

The State of South Carolina
In the Court of Appeals

Appeal from York County **RECEIVED**
Court of Common Pleas
Jean H. Toal, Circuit Court Judge FEB 25 2020

SC Court of Appeals
Appellate Case No. 2019-000649
Case No. 2013-CP-46-00368

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

v.

Scapa Waycross, Inc., ...Appellant.

**RECORD ON APPEAL
VOLUME ONE**

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INDEX

VOLUME ONE

Orders

1. Order Granting Second Amended Complaint entered November 18, 2013 p. 0001
2. Order on Post-Trial Motions entered March 25, 2019 p. 0006

Judgments

3. Verdict form, February 9, 2018 p. 0026

Pleadings

4. Summons and Complaint filed February 5, 2013 p. 0030
5. Amended Complaint filed May 31, 2013 p. 0057
6. Suggestion of Party Death filed October 23, 2013 p. 0072
7. Second Amended Complaint filed November 20, 2013 p. 0076
8. Answer to Second Amended Complaint filed December 18, 2013 p. 0093
9. Scapa Motion in Limine to Admit Bankruptcy Claim Forms as Admissions of a Party-Opponent filed December 18, 2017 p. 0103
10. Scapa's Motion in Limine to Exclude Expert Testimony on Causation p. 0119
11. Scapa's Motion for Setoff of Plaintiff's Settlement Proceeds p. 0141
12. Scapa Motion to Compel Complete Bankruptcy Forms filed December 18, 2017 p. 0146
13. Plaintiffs' Motion in Limine No. 2 Asbestos Bankruptcies: Trust and Plaintiff's Claims to Same filed December 18, 2017 p. 0154
14. Scapa Motion for Setoff filed December 18, 2017 p. 0158
15. Scapa Motion for Production of Plaintiff's Settlements and Payments with all Third Party Tortfeasors dated February 16, 2018 p. 0164
16. Scapa Motion for Judgment Notwithstanding the Verdict filed February 16, 2018 p. 0171
17. Plaintiffs' Motion to a New Trial Nisi Additur filed February 20, 2018 p. 0175
18. Scapa Memorandum in Support of Motion for JNOV filed March 22, 2018 p. 0184
19. Scapa Response to Plaintiff's Motion for a New Trial Nisi Additur filed April 6, 2018 p. 0194
20. Scapa Memorandum in Support of Motion to Reallocate Settlement Proceeds Filed July 23, 2018 p. 0199
21. Scapa Motion to Reallocate Settlement Proceeds filed July 24, 2018 p. 0203
22. Plaintiff's Response and Brief to Scapa's Motion to Reallocate Settlement Proceeds filed August 3, 2018 p. 0205
23. Notice of Appeal filed April 15, 2019 p. 0210

Transcripts

24. Pretrial Hearing Transcripts dated January 9, 2018 p. 0233

VOLUME TWO

25. Trial Transcript January 29 through February 7, 2018 p. 0408

VOLUME THREE

26. Trial Transcript January 29 through February 7, 2018 p. 0905
27. Trial Transcript February 7 through February 9, 2018 p. 1153

VOLUME FOUR

28. Trial Transcript February 7 through February 9, 2018 p. 1400
29. Post-Trial Motions Transcript July 11, 2018 p. 1647
30. Post-Trial Motions Transcript October 10, 2018 p. 1687

Exhibits

31. Court Exh 1 (chart) p. 1709
32. Defendant's Exhibit No. 1 (APG Trust Claim Form) (proffered) p. 1710
33. Defendant's Exhibit No. 2 (Leslie Trust Claim Form) (proffered) p. 1715
34. Defendant's Exhibit No. 5 (Incomplete Trust Claim Forms) (proffered) p. 1717

VOLUME FIVE

35. Defendant's Exhibit No. 5 (Incomplete Trust Claim Forms) (proffered) p. 1894
36. Defendant's Exhibit No. 12 (Marc Scarcella Report) (proffered) p. 2021
37. Plaintiffs Exhibit 1- Death Certificate (redacted) p. 2031
38. Plaintiffs Exhibit 3 - Mastercard 25A & B p. 2032
39. Plaintiffs Exhibit 4 - Mastercard 23A & B p. 2034
40. Plaintiffs Exhibit 6 - Report on Asbestos p. 2036
41. Plaintiffs Exhibit 7 -Document 71825 p. 2042
42. Plaintiffs Exhibit 9 - Scapa-Ponitt Memo p. 2046
43. Plaintiffs Exhibit 26 -Mastercard 10 A&B p. 2051
44. Plaintiffs Exhibit 27 - Mastercard 12 A&B p. 2053
45. Plaintiffs Exhibit 28 - Mastercard 14 A&B p. 2055
46. Plaintiffs Exhibit 31- photo p. 2057
47. Plaintiff's Exhibit 35 - photos (in color) p. 2058
48. Plaintiffs Exhibit 37 - Mastercard 8 A&B p. 2071
49. Plaintiffs Exhibit 38 - Mastercard 9 A&B p. 2073
50. Plaintiffs Exhibit 39 - Mastercard 26 A&B p. 2075
51. Plaintiffs Exhibit 40 - Mastercard 22 A&B p. 2077
52. Plaintiffs Exhibit 41 - Mastercard 19 A&B p. 2079
53. Plaintiffs Exhibit 42 - Mastercard 17 A&B p. 2081
54. Plaintiffs Exhibit 49- Mastercard 7 A&B p. 2083

55. Plaintiffs Exhibit 50 - Mastercard 11 A&B	p. 2085
56. Plaintiffs Exhibit 51- Mastercard 13 A&B	p. 2087
57. Plaintiffs Exhibit 52 -Mastercard 15 A&B	p. 2089
58. Plaintiffs Exhibit 53 - Mastercard 16 A&B	p. 2091
59. Plaintiffs Exhibit 54 - Mastercard 20 A&B	p. 2093
60. Plaintiffs Exhibit 56 - Mastercard 24 A&B	p. 2095
61. Plaintiffs Exhibit 57 - Mastercard 27 A&B	p. 2097

Other Materials

62. Deposition excerpts of Steven Stewart dated February 28, 2013	p. 2099
63. Deposition excerpts of Steven Stewart dated March 4, 2013	p. 2121
64. Day in the Live Video of Steven Stewart dated August 20, 2013	p. 2190
65. Deposition excerpts of George Hegler dated July 17, 2013	p. 2191
66. Deposition excerpts of Dr. Arthur Frank dated April 9, 2015	p. 2209
67. Deposition excerpts of Dr. Arthur Frank dated December 11, 2017	p. 2214
68. Deposition excerpts of Harry J. Merk, Jr. dated May 27, 1998	p. 2339

Certificate

69. Certificate of counsel	p. 2374

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4600368**

Steven Redfearn Stewart Stephen R Edwards		Albany International Corp	AstenJohnson Inc
		Daniel International Corporation	Fluor Enterprises Inc
		Fluor Daniel Inc	Daniel Construction Company Inc
		Fluor Daniel Services Corporation	Goulds Pumps Incorporated
		Ingersoll Rand Company	

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Daniel R Francis	Attorney for: ☒ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case. **ORDER SUBSTITUTING PERSONAL REPRESENTATIVE AS PLAINTIFF AND GRANTING LEAVE TO FILE THE SECOND AMENDED COMPLAINT.**

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
n/a	n/a	n/a

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge

may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/ Garrison Hill

2138

11/18/2013

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on **November 18, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on **November 18, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FILED-RECEIVED

2013 NOV 18 AM 10:55

DAVID HAMILTON
S.C.C.P. & G.S.
YORK COUNTY, SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) C/A No. 2013-CP-46-00368

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

Plaintiff,

vs.

Albany International Corp., et al;

Defendants.

Jury Trial Demanded

**ORDER SUBSTITUTING PERSONAL REPRESENTATIVE AS PLAINTIFF AND
GRANTING LEAVE TO FILE THE SECOND AMENDED COMPLAINT**

This cause being heard by the undersigned Judge on motion of Stephen R. Edwards, Personal Representative of the Estate of Steven Redfearn Stewart, deceased, to be substituted as plaintiff; and it appearing to the Court that the named plaintiff, Steven Redfearn Stewart, is deceased and that Stephen R. Edwards has been duly appointed and is qualified and acting as the Personal Representative of his estate; and it further appearing to the Court that the nature of this action is such that the cause of action survives the death of the named plaintiff. Additionally, the Plaintiff's motion for Leave to Amend the Complaint to add the wrongful death action is granted pursuant to Rule 15.

IT IS ORDERED that Stephen R. Edwards, Personal Representative of the Estate of Steven Redfearn Stewart, deceased, is hereby substituted as plaintiff and that the substitution shall be hereafter shown in the title to this action. It is further ordered that the Plaintiff is granted leave to file a Second Amended Complaint and for the defendants to answer per the rules of civil procedure.

This the 13th day of Nov., 2013.

Garrison

The Honorable Garrison Hill

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEASJUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4600368

Steven Redfearn Stewart

Stephen R Edwards

Scapa Waycross Inc

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.Additional Information for the Clerk: **Order re: Post-Trial Motions**

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Stephen R. Edwards, Individually	Scapa Waycross Inc.	\$100,000.00 (damages for wrongful death) \$792,800.00 ((damages for survival)
Stephen R. Edwards, as PR of Estate of Steven Redfearn Stewart	Scapa Waycross Inc.	\$100,000.00 (damages for wrongful death) \$792,800.00 ((damages for survival)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.**E-Filing Note:** In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/ Jean H. Toal

2758

3/25/2019

Jean H. Toal

Judge Code

Date

(Retired) Circuit Court Judge

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	FOR THE SIXTEENTH JUDICIAL CIRCUIT
	)	
STEPHEN R. EDWARDS, INDIVIDUALLY	)	C/A No.: 2013-CP-46-00368
AND AS PERSONAL REPRESENTATIVE	)	
OF THE ESTATE OF STEVEN REDFEARN	)	
STEWART,	)	
	)	
Plaintiff,	)	
v.	)	ORDER RE: POST-TRIAL MOTIONS
	)	
SCAPA WAYCROSS, INC.	)	
	)	
Defendant.	)	
	)	

The above-captioned case came before this Court pursuant to Plaintiff's Second Amended Complaint asserting causes of action for survival and wrongful death against Defendant Scapa Waycross, Inc. ("Scapa"), and requesting awards of damages against Scapa based on claims of its negligence, strict products liability, and breach of implied warranty. A jury trial commenced January 24, 2018. After receiving myriad testimony and evidence over several days, on February 9, 2018 the jury returned a verdict in favor of the Plaintiff on claims of negligence and breach of implied warranty. The jury's awarded Plaintiff \$600,000 in compensatory damages on the survival cause of action and \$100,000 in compensatory damages for wrongful death. Both parties sought certain relief from the jury's verdict, with the Plaintiff filing a Motion for New Trial *Nisi Additur*, and Scapa filing motions for Judgment Notwithstanding the Verdict, Discovery of Settlements, Setoff, and Reallocation of Plaintiff's Settlement Proceeds. For the reasons set forth below, Plaintiff's Motion for New Trial *Nisi Additur* is GRANTED in part and denied in part, Defendant's Motions for Judgment Notwithstanding the Verdict, Discovery of Settlements, and Reallocation of Plaintiff's Settlement Proceeds are each DENIED; and Defendant's Motion for Set-off under

S.C. Code § 15-38-50 is GRANTED.

I. Plaintiff's Motion for New Trial *Nisi Additur*

a. Legal Standard

The consideration of a motion for a new trial *nisi additur* requires the court to consider the adequacy of the verdict in light of the evidence presented. *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006); *Waring v. Johnson*, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000); *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). A trial court may grant a new trial *nisi additur* when it finds the amount of the verdict to be "merely inadequate". *Todd v. Joyner*, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2008), *aff'd*, 385 S.C. 421, 685 S.E.2d 595 (2009); *Green*, 356 S.C. at 570, 590 S.E.2d at 41; *Vinson* 324 S.C. at 406, 477 S.E.2d at 723. A trial court may grant *additur* upon finding inadequate that the portion of the award reasonably attributable to non-economic damages. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 188, 777 S.E.2d 824, 826 (2015)(upholding trial court's granting of *nisi additur* in the (additional) amount of \$600,000 in product liability action with \$228,000 in economic damages); *Graham v. Whitaker*, 282 S.C. 393, 405, 321 S.E.2d 40, 45 (1984) (upholding new trial *nisi additur* of several times the jury verdict, increasing actual damages from \$10,000 to \$67,500). Our Supreme Court has clarified that *additur* may be appropriate even when the jury has awarded some amount for noneconomic damages. *Riley*, 414 S.C. at 194, 777 S.E.2d at 829-30.

When considering a new trial *nisi* or *nisi additur*, it is proper to compare the jury's verdict to damages awards in comparable cases. *See Lucht v. Youngblood*, 266 S.C. 127, 136, 221 S.E.2d 854, 858 (1976); see also *Kapuschinsky v. US.*, 259 F. Supp. 1, 8 (D.S.C. 1966) ("Admittedly not controlling, but worthy of note are treatments of verdicts from all over this country").

The decision to grant a new trial *nisi additur* will not be disturbed on appeal unless the trial judge's findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Proctor*, 368 S.C. at 320, 628 S.E.2d at 518; *Waring*, 341 S.C. at 256, 533 S.E.2d at 910. Great deference is given to the trial judge because "the trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than [the appellate court]." *Rush v. Blanchard*, 310 S.C. 375, 381, 426 S.E.2d 802, 806 (1993).

b. Evidence and Analysis

The primary issues of dispute at trial were the extent of Decedent Steven R. Stewart's exposure to asbestos from dryer felts manufactured by Defendant Scapa Waycross, Inc. ("Scapa"), and the causation of his malignant mesothelioma from that exposure. The jury resolved those issues in Plaintiff's favor, finding that Scapa was negligent, and that Scapa's wrongful conduct was a substantial factor in causing Mr. Stewart's mesothelioma. While liability was fiercely contested, the evidence of the Mr. Stewart's economic damages was not disputed in any way. Plaintiff and Scapa stipulated as to economic damages by way of Mr. Stewart's medical expenses. Scapa did not offer any evidence tending to contradict economic damages, nor did Scapa contradict Plaintiff's evidence of non-economic damages consisting of Mr. Stewart's pain and suffering, loss of enjoyment of life, and mental anguish.

Economic damages were unequivocally established at \$241,000 (the stipulated amount of Mr. Stewart's medical expenses). 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, thoracenteses, a major invasive surgery, and ultimately died a very painful death from

mesothelioma.

The undisputed evidence shows the rapid deterioration and ultimate death of a 69-year-old previously active man. Mr. Stewart's life was torn apart by mesothelioma. Mr. Stewart was diagnosed with mesothelioma on October 24, 2012. 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. He even had to give up his beloved dog "Buddy" because he was no longer able to adequately care for his canine companion.

When asked about the effect of mesothelioma on his life and interaction with his family, Mr. Stewart described how he was just too exhausted to do things like drive to meet his family; he became emotional and could only say: "I never imagined that my life would come to what it is." Trial Depo. 67:9-24. In the midst of such terrible anguish, Mr. Stewart was determined to delay his impending death. He suffered greatly through multiple rounds of chemotherapy. He opted to undergo a pleurectomy, which his surgeon, Dr. David Harpole, described as a "maximally invasive" procedure which involved removing his rib and scraping out the tumor.

Unfortunately, Mr. Stewart was not able to get that extra time he hoped for; despite undergoing the pleurectomy he ultimately succumbed to mesothelioma within one year of diagnosis.

After the close of evidence, the jury was charged and instructed to consider Plaintiff's claims of negligence, strict products liability, and breach of implied warranty. The jury was instructed that "[a]ctual damages are designed to compensate a party for their loss and to make that party as whole as near as money can do and to put him or her in the same position they were in before the incident or accident occurred. Actual damages would be the actual losses and

expenses the plaintiffs have incurred.” The jury was instructed on four categories of actual damages—medical expenses, pain and suffering, loss of enjoyment of life, and mental anguish. The evidence supported damages in each of these categories, and accounting for over a decade of life Mr. Stewart never got to experience. Despite returning a verdict for the Plaintiff on the negligence and breach of implied warranty claims, the jury only awarded \$600,000 in compensatory damages for the survival cause of action and \$100,000 in compensatory damages for the wrongful death cause of action.

Damages awards for pain and suffering in comparable mesothelioma cases range from \$1.5 million to more than \$20 million. See, e.g., *Keene v. CNA Holdings, LLC*, No. 2013-CP-42-03915 (S.C. Ct. Comm. Pleas Jan. 8, 2016) (upholding award of \$2 million in survival damages, \$5 million in loss of consortium damages, and \$5 million in wrongful death damages); *Garvin v. Agco Corp.*, No. 2012-CP-40-6675 (S.C. Ct Comm. Pleas Nov. 14, 2014) (remitting the jury verdict to award \$1.5 million for the plaintiff's pain and suffering and upholding the loss of consortium award of \$1 million); see also *Bobo v. Tennessee Valley Authority*, 855 F.3d 1294 (11th Cir. 2017) (affirming in relevant part the district court's award of \$3 million in pain and suffering damages for woman with asbestos-related mesothelioma); *Romano v. Metropolitan Life Ins. Co.*, 221 So.3d 176 (La. Ct. App. 2017) (increasing pain and suffering award from \$500,000 to \$1.5 million in mesothelioma case where plaintiff had endured invasive surgery and was expected to die from his disease); *John Crane, Inc. v. Linkus*, 190 Md. App. 217, 988 A.2d 511 (Md. Ct. App. 2010) (upholding \$15,335,274 verdict for living shipyard worker diagnosed with mesothelioma at the age of 70, of which \$335,000 was medical expenses and \$15 million was noneconomic loss); *In re New York City Asbestos Litigation* (Re D'Ulisse), 16 Misc.3d 945, 842 N.Y.S.2d 333 (N.Y. Sup. Ct. 2007) (denying motion to reduce award of \$20 million in past and future pain and suffering to

mesothelioma victim and \$5 million to his wife of 51 years); *Williams v. CSX Transp., Inc.*, 176 N.C.App. 330, 626 S.E.2d 716 (N.C. Ct. App. 2006) (affirming verdict in which railroad worker with mesothelioma was awarded \$7.5 million in pain and suffering damages); *Goede v. Aerojet Gen. Corp.*, 143 S.W.3d 14, 17, 27-28 (Mo. Ct. App. 2004) (upholding award of \$2 million for pre-death pain, suffering and emotional distress where 43-year-old had survived one year with mesothelioma).

The South Carolina Supreme Court has held that the goal of compensatory damages is "to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred." *Clark v. Cantrell*, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000). In the court's opinion, the jury's award of damages was insufficient for this purpose.

It is fair to 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. The jury heard substantial, compelling evidence that Mr. Stewart's pain and suffering was severe and extensive. \$359,000 is an inadequate award of damages for just pain and suffering. Regardless of how the jury may have arrived at such a sum, their total survival damages award of \$600,000 fails to accord with the evidence and falls inexplicably short of providing fitting compensation for the magnitude of Mr. Stewart's losses.

What additional amount is required to make the award adequate? As Plaintiff points out, damages awards in similar cases have involved a 10-times multiplier to medical damages. See, e.g. *Jolly v. General Electric, et al.*, No. 2016-CP-42-1592 (S.C. Ct. Comm. Pleas) a mesothelioma case tried in Spartanburg County, the court determined it appropriate to multiply medical damages by a factor of 10 to arrive at a fair non-economic damages award. Order Denying Defendant's

Post-Trial Motions and Granting Plaintiff's Motion for New Trial *Nisi Additur*, at p. 9, *Jolly v. General Electric, et al.*, No. 2016-CP-42-1592 (S.C. Ct. Comm. Pleas). Employing a 10-times multiplier here would yield a total survival damages award of \$2,410,000. The court declines to adopt such a multiplier in this case. Instead, the court finds it necessary and appropriate to increase non-economic damages by \$400,000 so as to reach a total survival damages award of \$1,000,000.

The jury awarded \$100,000 for wrongful death, which Plaintiff submits is inadequate to compensate Mr. Stewart's family for their loss. The general elements of damages recoverable for wrongful death are: (1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing of the affairs of himself and of his beneficiaries. *Self v. Goodrich*, 300 S.C. 349, at 251, 387 S.E. 2d 713, at 714, (Ct App. 1993). The court instructed the jury as to damages for loss of companionship and the jury heard evidence as to how Mr. Stewart's mesothelioma prevented him from spending time with his children and grandchildren before he passed away at the age of 69. The jury heard how Mr. Stewart was collecting retirement, actively involved in his children and grandchildren's lives, including both his time and financial support, and was absolved of any contributory negligence regarding his untimely and painful death. The record shows that Mr. Stewart's children suffered substantial losses. Indeed, the evidence in the record would reasonably support a significantly greater compensatory damages award for wrongful death. However, while the award is certainly conservative, this trial judge does not see sufficient reason to disturb it.

c. Ruling

For the reasons discussed above, the court GRANTS Plaintiff's Motion for New Trial *Nisi Additur* in part, increasing the survival damages award from \$600,000 to \$1,000,000 but leaving

the jury's \$100,000 wrongful death damages award undisturbed.

II. Defendant's Motion for Judgment Notwithstanding the Verdict

a. Issues Raised

As grounds for its motion for judgment notwithstanding the verdict, Scapa alleges that Plaintiff failed to show actionable exposure to asbestos and that Plaintiff's expert testimony regarding cumulative exposure is not reliable. The Court denies Scapa's motion on both grounds.

b. Legal Standard

In ruling on a JNOV motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Swicegood v. Lott*, 379 S.C. 346, 351, 665 S.E.2d 211, 213 (Ct. App. 2008); *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 287, 356 S.E.2d 123, 127 (Ct. App. 1987). The court must deny the motion for JNOV when the evidence yields more than one inference, or its inference is in doubt. *Id.*; *Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). The jury's verdict may not be overturned if *any* evidence sustains the factual findings implicit in its decision. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.W.2d 408, 419 (Ct. App. 2000); *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000).

c. Evidence and Analysis

The primary issues disputed at trial were the extent of Decedent Steven R. Stewart's exposure to asbestos from dryer felts manufactured by Scapa Waycross, Inc. ("Scapa"), and the

causation of his malignant mesothelioma from that exposure. The jury resolved those issues in Plaintiff's favor, finding that Scapa was negligent, and that Scapa's wrongful conduct was a substantial factor in causing Mr. Stewart's mesothelioma.

A plaintiff in an asbestos case may defeat summary judgment with evidence of "actionable exposure" to a defendant's asbestos product. *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). To determine whether exposure is actionable, South Carolina courts apply the "frequency, regularity and proximity" factors set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). *Id.* Therefore, "[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Id.* (quoting *Lohrmann*, 782 F.2d at 1162). The Court finds that the *Henderson* causation standard is satisfied by the evidence presented at trial.

Both circumstantial and direct evidence was introduced tending to show asbestos-containing dryer felts manufactured by Scapa were regularly and frequently used on the machines which Mr. Stewart worked on and around during the time he worked on said machines. Mr. Stewart identified Scapa products via their shipping boxes. Mr. Steele identified Scapa as well. Scapa admitted that there were at least 23 asbestos-containing Scapa felts. Scapa corporate representative Harry Merk testified that he could not verify all sales were recorded due to document destruction that occurred in 1974.

Mr. Stewart and his co-workers explained how each of the various job on Paper Machine Number 1 would regularly expose the workers to asbestos. Mr. Stewart testified that he worked each of the jobs that involved relatively more frequent, closer proximity and/or regular exposure to activities releasing respirable asbestos, which Mr. Steele and other coworkers confirmed.

Messrs. Stewart, Steele, Ward and Hegler all testified with particularity that when a worker occupied the position of utility—which all of them did as an entry-level position—that they were in the basement receiving the felts at the end of the paper-manufacturing process. The testimony indicated that at this point the felts were in the dry part of the process, by which time the felts were dry and contained about five percent moisture content, much like the paper itself did at that dry part of the process. They testified that they had to manhandle these felts, that they did not do that while the machines were running, but rather, they shut off the machines and the felts would sometimes be frayed off of the cans and the various loops and configurations they went through at the dry end of the process and push them down an opening into the basement. And when they were in the basement, they were folded up and manhandled to get them in a manageable position, then placed on pallets and stacked in a corner. Often, in order to get them out to disposal, they were quite often cut up with a knife and that cutting threw a lot of dust into the atmosphere, quite apart from the dust that was in the atmosphere from blowing dust with an air hose on the floor, but just the process of handling these felts threw a lot of dust in the air. All of the workers also testified as to the process for blowing on these felts when they were still running on the machines. They also testified as how they would shut the machine off and use the air hoses to blow directly on the felts to try to dislodge debris and paper and so forth and that all kinds of dust would go into the atmosphere from the felts and from the material that was being blown off of the felts. The record included extensive expert testimony from Drs. Millette and DePasquale which, in part, stated that the process of handling the felts and blowing off the felts put respirable asbestos into the air.

Scapa offered a lot of testimony about the use of resin coatings on many of their asbestos yarns. Regardless of how effectively the resin may have encapsulated the asbestos, common sense

would certainly dictate that the resin would wear off over time with the felts constantly spinning around. Indeed, Scapa acknowledged that their dryer felts deteriorate over time.

The evidence was certainly sufficient for the jury to conclude that Mr. Stewart had frequent, regular, and proximate exposure to asbestos from Scapa dryer felts and to support the jury's determination that Mr. Stewart's mesothelioma was caused by his exposure to Scapa's asbestos products for which they are responsible.

The parties each presented voluminous conflicting expert testimony on the element of causation. Defendant's experts contended that chrysotile asbestos cannot cause mesothelioma in general, and more particularly questioned whether it was possible for asbestos from their products to have contributed to Mr. Stewart's contracting mesothelioma. Notwithstanding, Plaintiff offered convincing evidence that chrysotile asbestos can cause mesothelioma, that Mr. Stewart had a vast amount of plaques in his lungs, and that that plaque by his respiration of asbestos fibers.

The parties also offered conflicting expert testimony concerning whether and what other sources of asbestos Mr. Stewart may have been exposed to, with a good deal of testimony concerning the extent thermal pipe insulation may have been used at Bowater, what such insulation may have been made of, whether and how it may have been a contributing factor to Mr. Stewart's mesothelioma relative to Scapa's asbestos-containing dryer felts.

Scapa contests the admissibility of certain expert testimony regarding causation. The admissibility of expert testimony is governed by South Carolina Rule of Evidence 702. That rule provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." S.C. R. Evid. 702. Courts evaluating the admissibility of scientific expert evidence

"must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *State v. Council*, 335 S.C. 1, 20,515 S.E.2d 508 (S.C. 1999). The reliability of scientific evidence is evaluated based on several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. White*, 382 S.C. 265,274,676 S.E.2d 684 (S.C. 2009) (citing *Council*, 335 S.C. at 19).

"[C]ross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" are the ordinary means to attack an opposing expert. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993). Courts should not exercise their gatekeeping responsibility by excluding expert testimony that falls within the range of matters on which reasonable experts can disagree. See *Milward v. Acuity Specialty Prods. Group, Inc.*, 639 F.3d 11, 22 (1st Cir. 2011). While the trial court may look at the reliability of the expert's methodology, it is for the jury to determine the soundness of the facts underlying the expert's opinion and the correctness of the expert's conclusions. See *Id.* 22.

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 in. That does not mean that they concluded that "each and every exposure" that Mr. Stewart had was a substantial factor in causing his disease. This distinction was recently explained by the Pennsylvania Supreme Court in an opinion upholding the admissibility of Dr. Frank's causation opinions. See *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1045-46 (Pa. 2016). The court found his testimony to be entirely compatible with the substantial factor causation standard. *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1045-46 (Pa. 2016). The Eleventh Circuit has held the same. In *Bobo*

v. Tennessee Valley Auth., 855 F.3d 1294 (11th Cir. Apr. 26, 2017), the court noted that expert testimony that "there is no evidence that there is a threshold level of exposure below which there is zero risk of mesothelioma," and that "all 'significant' exposures to asbestos 'contribute to cause mesothelioma,'" is not the same thing as saying that each and every exposure is causative. *Id.* The expert's causation opinion was admissible because it was based on the exposure facts in the case and was supported by scientific literature, including the Helsinki Criteria. *Id.*

Judge Robreno of the federal asbestos MDL has similarly found that a "cumulative exposure" opinion is not the same as the "each and every exposure" opinion. The court agreed with the plaintiff that the "cumulative exposure" opinion is different "in substance and by definition" from the "any exposure" opinion. *Mortimer v. A.O. Smith Corp.*, 2015 WL 12533103, at *8 (E.D. Pa. Oct. 23, 2015). The court therefore rejected the defendant's argument that the experts' opinions were inadmissible on grounds that they are the same as the "any exposure" opinion. *Id.*

As recognized by these other distinguished courts, which have all admitted the causation testimony of Dr. Frank and/or Dr. Brody, it is not proper to evaluate the experts' medical opinions with reference to only one narrow part of the basis for the opinion. In reaching their opinions, Drs. Frank and Brody both relied on their many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including epidemiology and other scientific literature, the dose-response relationship, the science regarding the low levels of exposure that can cause mesothelioma, the exposure levels documented from working with dryer felts, and the facts surrounding Mr. Stewart's exposure to visible dust from Scapa's felts.

The specific causation opinions of Drs. Frank and Brody were firmly grounded in the exposure evidence presented at trial. Dr. Frank testified that he had reviewed Mr. Stewart's medical records, the deposition transcripts of Mr. Stewart and his co-workers and other case-

specific materials. Dr. Millette and DePasquale explained how Mr. Stewart's exposures were many orders of magnitude above background levels. In stating his causation opinion, Dr. Frank relied on a summary of the exposure facts proven to the jury.

The trial testimony of Plaintiff's experts demonstrates that their causation opinions are based on the record of Mr. Stewart's repeated exposures to asbestos from Scapa asbestos-containing dryer felts for during the majority of his career at Bowater, as well as the scientific literature. The methodology and approach used is exactly the same as that approved by Judge Hill in *Garvin* and by Judge Toal in *Jolly*.

The Court finds that the causation testimony of Plaintiff's experts is admissible. It is supported by the scientific literature as well as the facts of this case and was relevant and helpful to the jury.

d. Ruling

For the reasons discussed above, Defendant Scapa's Motion for Judgment Notwithstanding the Verdict is DENIED.

III. Defendant's Motion for Production of Plaintiff's Settlements and Payments with all Third-Party Tortfeasors

Defendants argue that they are entitled to disclosure of Plaintiffs' confidential settlement documents because they are "relevant" to set-off. The Court does not find a compelling reason to require disclosure of the confidential releases. The only matter of relevance is the amount of the settlements, and that information has been disclosed. The Court reviewed the releases *in camera* and verified that Plaintiff's pre-trial settlements are in the amount of \$1,036,000.

Defendant's motion for production of settlement documents is DENIED.

IV. Defendant's Motion for Setoff

In general, defendants are entitled to a set-off in the amount of Plaintiffs' settlements with other defendants in this case. S.C. Code Ann. § 15-38-50 provides that, "[w]hen a release ... is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) ... it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater " S.C. Code Ann. § 15-38-50.

Scapa correctly asserts that Plaintiff has received settlement money from other defendants in this case and that they are entitled to setoff for such funds. Plaintiff does not argue Scapa should be precluded from setoff; Plaintiff merely argues that while subject to setoff, the settlement allocation between the two causes of action should not be disturbed (see below).

Trial defendants are only entitled to "credit for the amount paid by another defendant who settles for the same cause of action." *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (emphasis added). Survival and wrongful death causes of action are different claims for different injuries. *Smith v. Widener*, 397 S.C. 468, 481 n.1, 724 S.E.2d 188, 195 n.1 (Ct. App. 2012).

As discussed above, the court examined the Plaintiff's settlement agreements *in camera* and verified that the Plaintiff reached pre-trial settlements totaling \$1,036,000.00. The court further confirmed that Plaintiff internally allocated 20% of each settlement to the survival cause of action and 80% to the wrongful death cause of action. For purposes of calculating setoff amounts, the corresponding settlement totals equal \$207,200 and \$828,800 for survival and wrongful death, respectively.

Pursuant to § 15-38-50, the \$1,000,000 survival award is reduced by \$207,200 to a balance of \$792,800; in turn, the wrongful death award is negated by application of the setoff rules, as the

applicable setoff amount, \$828,800, is greater than the wrongful death damage award amount. Accordingly, after setoff, the balance of the damages awards due to Plaintiff from Scapa equals \$792,800.

V. Defendant's Motion to Reallocate Settlement Proceeds

Scapa now requests the Court issue "an Order reallocating all settlement proceeds received by Plaintiff to date" so that 90% would be allocated to the survival claim and 10% to the wrongful death claim.

In support of their request, Scapa correctly points out that Plaintiff's counsel have consistently proposed award amounts weighted in favor of survival damages over wrongful death. Scapa essentially argues that because both the jury and the trial judge saw fit to award damages in similar proportions weighted in favor of survival, that such proportionality is inherently reasonable. Indeed, the resulting proportions of both were certainly reasonable given the manner and substance of Plaintiff's case as presented to the jury. Perhaps if Plaintiff had presented their case differently Plaintiff may have received damages awards resulting in different relative proportions but, of course, it is impossible to determine whether one resulting proportion is any more or less reasonable than the other based solely on their relative proportionality.

The Supreme Court has noted that "[s]ettling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify... reapportionment for the sole purpose of benefitting [non-settling defendants]." *Riley*, 414 S.C. at 196-97, 777 S.E.2d at 830-31 (2015). As discussed above, should the court deny Scapa's request to reallocate for purposes of setoff, Scapa owes a balance of \$792,800. However, if the court grants Scapa's request and reallocate 90% to survival and 10% to wrongful death, would only owe a balance \$67,600 (a substantial savings). Scapa does not contend—or is there any

evidence--that Plaintiff acted in bad faith concerning the allocations. Plaintiff has not obtained a double recovery by virtue of additur nor will it as a consequence of denying reallocation. The Court finds and concludes that the internal allocation of settlement proceeds received by Plaintiff is reasonable.

VI. Conclusion

The Court GRANTS Plaintiff's Motion for New Trial *Nisi Additur* in part and raises the verdict to \$1,000,000 for survival damages while leaving the \$100,000 wrongful death damages undisturbed. The Court

The Court DENIES Defendant's Motions for Judgment Notwithstanding the Verdict, Discovery of Settlements, and Reallocation of Plaintiff's Settlement Proceeds.

The Court GRANTS Defendant's Motion for Set-off under S.C. Code § 15-38-50, and reduces the \$1,000,000 additted survival damages award by \$207,200 (i.e. ten percent of Plaintiff's pre-trial settlements), resulting in Scapa owing the balance of \$792,800. The wrongful death damages award is likewise reduced by \$828,000, which exceeds the jury's wrongful death damages award. Judgment will therefore be entered against Defendant Scapa Waycross, Inc. in the amount of \$792,800.00. Scapa may, of course, reject the additur, and a new trial will be scheduled.

Defendant's remaining post-trial motions are DENIED.

IT IS SO ORDERED.

JEAN H. TOAL, Chief Justice of the Supreme Court of
South Carolina (Retired), acting as Circuit Court Judge

January ____, 2019

Columbia, South Carolina



York Common Pleas

Case Caption: Steven Redfearn Stewart , plaintiff, et al VS Albany International Corp , defendant, et al
Case Number: 2013CP4600368
Type: Order/Other

IT IS SO ORDERED.

s/ Jean H. Toal #2758

Electronically signed on 2019-03-22 10:51:46 page 18 of 18

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4600368**

Steven Redfearn Stewart

Stephen R Edwards

Scapa Waycross Inc

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: SEE ATTACHED VERDICT FORM

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Jean H. Toal
Circuit Court Judge

2758

Judge Code

Date

2-9-18

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

William M Graham Wallace & Graham Pa 525 N Main
Street Salisbury, NC 28144
Gregory L. Hyland PO Box 130 Summerville, SC
29484-0130
Frederick John Jekel Jekel Law, LLC PO Box 2597
Columbia, SC 29201

William Peele Early PO Box 22437 253 Indigo Bay Circle
Charleston, SC 29413
S Christopher Collier Hawkins Parnell Thackston & Young
Llp 303 Peachtree St NE Suite 4000 Atlanta, GA 30308
H Lane Young II

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter: Michael Watkins/Shirley Broom

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

IN THE COURT OF COMMON PLEAS

C/A No. 2013-CP-46-00368

Plaintiff,

Defendant.

IMPLIED WARRANTY

3. We the Jury find the Defendant Scapa Waycross, Inc breached the Implied Warranty in selling its products and its breach was proximate cause of Steven R. Stewart's injury and damages.

_____ Yes

☒ No

4. If you answered YES to any of Questions 1, 2, or 3, please state the amount of actual damages that have been proven by the greater weight of the evidence.

\$ 600,000 Damages for Survival

\$ 100,000 Damages for Wrongful Death

5. If you answered YES to Question 1, please answer Question 5. We, the Jury, by unanimous vote, find by clear and convincing evidence that the conduct of the following Defendant were willful, wanton, or reckless:

- a. Scapa Waycross, Inc.

_____ Yes ☒ No

Walter J.
Juror Foreperson

2/9/2018
Date

STATE OF SOUTH CAROLINA
COUNTY OF YORK

) IN THE COURT OF COMMON PLEAS

) C/A No. 2013-CP-46-00368

Steven Redfearn Stewart,

Plaintiff,

vs.

Albany International Corp. as successor in
interest to Mount Vernon Group d/b/a Mount
Vernon Dryer Fabrics and to Geschmay
Corporation; Appleton Papers, Inc.;
AstenJohnson, Inc.; Daniel International ✓
Corporation; Fluor Enterprises, Inc., f/k/a
Fluor Daniel, Inc., f/k/a Daniel
Construction Company, Inc.; Fluor Daniel
Services Corporation; Goulds Pumps ✓
Incorporated; Ingersoll-Rand Company; ✓
Metropolitan Life Insurance Company; ✓
Rapid American Corporation; Scapa
Waycross, Inc.; Uniroyal Inc.; Weavexx, LLC
as successor in interest to Huyck Felt Company
and to Lockport Felts; and CGR Products, Inc.,
f/k/a Carolina Gasket and Rubber Company, Inc.

Defendants.

Jury Demand on all Issues

FILED
2013 FEB -5 PM 2:00
CLERK OF COURT
YORK COUNTY, SC

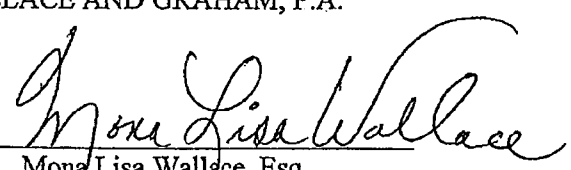
SUMMONS

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Respectfully submitted, this the 5th day of February, 2013.

WALLACE AND GRAHAM, P.A.

By: 

Mona Lisa Wallace, Esq.

SC Bar No. 15844

525 North Main Street

Salisbury, NC 28144

(704) 633-5244

Attorneys for the Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF YORK

) IN THE COURT OF COMMON PLEAS

) C/A No. 2013-CP-46-00368

Steven Redfearn Stewart,

Plaintiff,

vs.

Albany International Corp. as successor in
interest to Mount Vernon Group d/b/a Mount
Vernon Dryer Fabrics and to Geschmay
Corporation; Appleton Papers, Inc.;
AstenJohnson, Inc.; Daniel International
Corporation; Fluor Enterprises, Inc., f/k/a
Fluor Daniel, Inc., f/k/a Daniel
Construction Company, Inc.; Fluor Daniel
Services Corporation; Goulds Pumps,
Incorporated; Ingersoll-Rand Company;
Metropolitan Life Insurance Company;
Rapid American Corporation; Scapa
Waycross, Inc.; Uniroyal, Inc.; Weavexx, LLC
as successor in interest to Huyck Felt Company
and to Lockport Felts; and CGR Products, Inc.,
f/k/a Carolina Gasket and Rubber Company, Inc.

Defendants.

Jury Demand on all Issues

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2013 FEB -5 PM 2:00
CLERK
COURT OF COMMON PLEAS
YORK COUNTY, SC

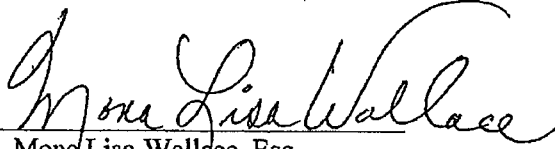
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Respectfully submitted, this the 5th day of February, 2013.

WALLACE AND GRAHAM, P.A.

By: 

Mona Lisa Wallace, Esq.
SC Bar No. 15844
525 North Main Street
Salisbury, NC 28144
(704) 633-5244

Attorneys for the Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF YORK

) IN THE COURT OF COMMON PLEAS
)
) C/A No. 2013-CF-46-00368

Steven Redfearn Stewart,

Plaintiff,

vs.

Albany International Corp. as successor in
interest to Mount Vernon Group d/b/a Mount
Vernon Dryer Fabrics and to Geschmay
Corporation; Appleton Papers, Inc.;
AstenJohnson, Inc.; Daniel International
Corporation; Fluor Enterprises, Inc., f/k/a
Fluor Daniel, Inc., f/k/a Daniel
Construction Company, Inc.; Fluor Daniel
Services Corporation; Goulds Pumps,
Incorporated; Ingersoll-Rand Company;
Metropolitan Life Insurance Company;
Rapid American Corporation; Scapa
Waycross, Inc.; Uniroyal, Inc.; Weavexx, LLC
as successor in interest to Huyck Felt Company
and to Lockport Felts; and CGR Products, Inc.,
f/k/a Carolina Gasket and Rubber Company, Inc.

Defendants.

Jury Demand on all Issues

FILED
2013 FEB - 5 PM 2:00
CLERK OF COURT
YORK COUNTY, SC

COMPLAINT

NOW COMES the Plaintiff STEVEN REDFEARN STEWART, citizen and resident of the State of South Carolina, through his counsel and sues the Defendants and alleges as follows:

BACKGROUND FACTS

1. Plaintiff is citizen and resident of the State of South Carolina.
2. Upon information and belief, Defendant **Albany International Corp.** is the successor in interest to Mount Vernon Group d/b/a Mount Vernon Dryer Fabrics and the successor in interest to Geschmay Corporation. Upon information and belief, Albany International Corp. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located in Rochester, New Hampshire, and can be served with process at its office at 975 Old Norcross Road, Suite A, Lawrenceville, Georgia 30045, or through its South Carolina registered agent, CT

Corporation System, 2 Office Park Court, Columbia SC 29223, or at its office at 216 Airport Drive, Rochester, NH 03867.

3. Upon information and belief, Defendant **Appleton Papers Inc.** is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Appleton, Wisconsin, and can be served with process at its office at 2500 West Wisconsin Street, Portage, WI 53901, or at its office at 825 East Wisconsin Avenue, Appleton, WI 54912.

4. Upon information and belief, Defendant **AstenJohnson, Inc.** is a corporation organized and existing under the laws of the State of Delaware with a principal place of business in Charleston, South Carolina and can be served with process at its office at 4399 Corporate Road, Charleston, SC 29405 or through its office located at 400 Asten Road, Clinton, SC 29325.

5. Upon information and belief, Defendant **Daniel International Corporation** is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in South Carolina, and can be served with process at its office at 100 Flour Daniel Drive, Greenville SC 29607, or through its South Carolina registered agent, John R. Reynolds, 100 Flour Daniel Drive, Greenville SC 29607.

6. Upon information and belief, Defendant **Fluor Enterprises, Inc., f/k/a Fluor Daniel, Inc., f/k/a Daniel Construction Company, Inc.** is a corporation organized and existing under the laws of the State of California, and can be served with process at its office at 3 Polaris Way, Aliso Viejo, CA 92698, or through its South Carolina registered agent, Corporation Service Company, 1703 Laurel Street, Columbia SC 29201.

7. Upon information and belief, Defendant **Fluor Daniel Services Corporation** is a corporation organized and existing under the laws of the State of Delaware and can be served with process at its office at 100 Flour Daniel Drive, Greenville SC 29607, or through its South Carolina registered agent, Corporation Service Company, 1703 Laurel Street, Columbia SC 29201.

8. Upon information and belief, Defendant **Goulds Pumps, Incorporated**, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Seneca Falls NY, and can be served with process at its office at 2881 E. Bayard Street, Seneca Falls NY 13148, or through its South Carolina registered agent, CT Corporation System, 2 Office Park Court, Columbia SC 29223.

9. Upon information and belief, Defendant **Ingersoll-Rand Company** is a corporation organized and existing under the laws of the State of New Jersey with its principal place of business in New Jersey, and can be served with process at its office at 800-E Beaty Street, Davidson, NC 28036, or through its South Carolina registered agent, CT Corporation System, 2 Office Park Court, Columbia SC 29223, or at its office at 200 Chestnut Ridge Rd, Woodcliff Lake, NJ 07677.

10. Upon information and belief, Defendant **Metropolitan Life Insurance Company** is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York, and can be served with process at its office at 200 Park Ave., New York, NY 10166, or at its office at One Madison Avenue, New York NY 10010.

11. Upon information and belief, Defendant **Rapid American Corporation** is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, and can be served with process at its office at 2711 Centerville Road, Wilmington, Delaware 19801; and is a successor in interest to Philip Carey Manufacturing Co.

12. Upon information and belief, Defendant **Scapa Waycross, Inc.** is a Georgia corporation which may be served at its office at 111 Great Pond Drive, Windsor, CT 06095; and has also done business under the names Scapa North America, Inc., Scapa Dryer Fabrics, Inc. and Scapa Dryers Waycross, Inc.

13. Upon information and belief, Defendant **Uniroyal, Inc.** is a corporation organized and existing under the laws of the State of New Jersey with its principal place of business in Connecticut, and can be served with process at its office at c/o Uniroyal Holding, Inc., 70 Great Hill Road, Naugatuck CT 06770, or at P.O. Box 19001, Greenville, SC 29602-9001.

14. Upon information and belief, Defendant **Weavexx, LLC** is a limited liability company organized and existing under the laws of the State of Delaware with a corporate office located at 51 Flex Way, Youngsville, North Carolina 27596 and may be served with process at that address or at its office address at 8537 Six Forks Road Suite 300, Raleigh NC 27615; and is the successor in interest to Huyck Felt Company and to Lockport Felts.

15. Upon information and belief, Defendant **CGR Products, Inc.**, f/k/a Carolina Gasket and Rubber Company, Inc., is a corporation organized and existing under the laws of the State of North Carolina with its principal place of business at 4655 US 29 North, Greensboro, NC 27405-9446, and can be served with process at its office address.

16. Defendants are foreign corporations who are amenable to jurisdiction in the Courts of South Carolina by virtue of their respective contacts with the State of South Carolina and/or their respective conduct of substantial or systematic business in South Carolina which subjects them to the jurisdiction of the South Carolina Courts pursuant to the South Carolina Long-Arm Statute.

17. Each Defendant listed in the caption (or its applicable predecessors in interest) mined, manufactured, processed, imported, converted, compounded, used, installed and/or retailed substantial amounts of asbestos and asbestos-containing materials which were sold, distributed and/or used in South Carolina; and/or are otherwise liable in connection with asbestos and asbestos-containing products as alleged herein below.

18. Venue is proper in this County in that the material facts occurred, in whole or part, in this County and one or more parties reside in this County.

19. This case is not subject to federal court jurisdiction. Federal diversity jurisdiction is lacking in that one or more of the Defendants is a corporation incorporated or with its principal place of business in South Carolina. Plaintiff is a citizen and resident of South Carolina. Plaintiff does not allege any federal claims and accordingly federal jurisdiction is lacking under 28 U.S.C. §§ 1131 and 1332.

20. The plaintiff was exposed to various asbestos-containing products while working in the vicinity of Rock Hill, South Carolina, including without limitation during work at the former Bowater plant in York County.

21. Plaintiff was a machine tender who for a long period of time, worked with and was exposed to the asbestos and asbestos-containing materials mined, manufactured, processed, imported, converted, compounded and/or sold by the Defendants, and/or for which Defendants are otherwise liable, some or all of which exposure occurred within the State of South Carolina.

22. Plaintiff has been diagnosed with the disease of mesothelioma.

23. Mesothelioma is a progressive, insidious disease and Plaintiff's asbestos exposure in South Carolina to the products of the Defendants or for which Defendants are otherwise liable contributed to the Plaintiff's contraction of his disease caused by breathing asbestos-containing products.

24. Plaintiff has obtained and submits herewith as Exhibit A hereto, a report by a physician who is appropriately board-certified, in compliance with S.C. Code §§ 44-135-50(A)(1), 44-135-70 and 44-135-80.

FIRST CAUSE OF ACTION
(Negligence)

25. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

26. Defendants (or their predecessors in interest or parties with whom they acted in concert), and each of them, are or at times relevant hereto, were miners, manufacturers, processors, importers, converters, compounders and/or retailers of asbestos and asbestos-containing materials.

27. Defendants, acting through their agents, servants, and/or employees have caused certain asbestos and asbestos-containing materials to be placed in the stream of interstate commerce with the result that said asbestos and asbestos-containing materials came into use by or in the vicinity of the Plaintiff.

28. During the course and scope of his employment, Plaintiff was exposed to Defendants' asbestos and asbestos-containing materials, which exposure directly and

proximately caused him to develop an illness known and designated as mesothelioma and/or other industrial dust diseases caused by breathing Defendants' asbestos-containing products.

29. The illness and disability of the Plaintiff are the direct and proximate result of the negligence, recklessness and willfulness of the Defendants, jointly and severally, in that they produced, sold and otherwise put into the stream of interstate commerce, asbestos and asbestos-containing materials which the Defendants, and each of them, knew were deleterious, poisonous and highly harmful to Plaintiff's body, lungs, respiratory system, skin and health.

30. Defendants owed a duty of care toward the Plaintiff. Defendants breached that duty by their negligent acts and omission.

31. Defendants knew, or, in the exercise of ordinary care, should have known, that the asbestos and asbestos-containing materials were deleterious, poisonous and highly harmful to plaintiff's body, lungs, respiratory system, skin and health. Defendants acted negligently, recklessly and willfully in that the Defendants:

- (a) Failed to advise Plaintiff of the dangerous characteristics of their asbestos and asbestos-containing products;
- (b) Failed or omitted to provide the Plaintiff with the knowledge as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliance, if, in truth, they were in any way able to protect him from being poisoned and disabled as he was by exposure to such deleterious and harmful asbestos-containing materials;
- (c) Failed and omitted to place any warnings or sufficient warnings on their containers of said asbestos and asbestos materials to warn the handlers thereof of the dangers to their health in coming in contact with said asbestos and asbestos materials;
- (d) Failed and omitted to take reasonable precautions or to exercise reasonable care to publish, adopt and enforce a safety plan and a safe method of handling and installing said asbestos and asbestos materials;
- (e) Inadequately warned, if, in fact, they warned at all, persons such as Plaintiff of the dangers to their health in coming in contact with and breathing said asbestos and asbestos-containing materials, even after they knew of the dangers and cancer-causing effects, and up until the present time;
- (f) Did not recommend methods to improve the work environment;
- (g) Did not develop alternative products; and

(h) Continued to use a known cancer-causing product, to wit: asbestos.

32. At all times relevant, it was feasible for Defendants to have warned plaintiffs, tested their asbestos products, designed safer asbestos products and/or substituted asbestos-free products.

33. In the alternative, subsequent to the time the Defendants caused the asbestos products to be sold and distributed, the Defendants knew, or in the exercise of ordinary care, should have known, that asbestos is deleterious, carcinogenic, and harmful to persons using buildings or on jobsites, but nevertheless, the Defendants negligently and recklessly failed and refused to warn and advise the Plaintiff of the dangerous characteristics thereof, and the dangers to the health and welfare of persons coming in contact with and breathing products. Despite possessed with information uniquely available to them relating to the dangerous effects of continued asbestos exposure, the Defendants did not provide that information to the Plaintiff.

34. The Defendants had a post-sale duty to warn, which duty was breached and, as a result, Plaintiff suffered injury and damages as hereinafter described.

35. Plaintiff has suffered continuing and lingering injury to himself due to the Defendants' asbestos fibers previously inhaled. Said fibers, once inhaled, caused repeated and continuing injury to Plaintiff.

36. As a proximate result of the aforesaid acts of the Defendants, the Plaintiff has been damaged as herein set forth.

SECOND CAUSE OF ACTION
(Implied Warranty of Merchantability)

37. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

38. The Defendants, and each of them, impliedly warranted that their relevant products, equipment and asbestos materials were of good and merchantable quality and fit for their intended use.

39. The implied warranty made by the Defendants, and each of them, that the asbestos and asbestos-containing materials were of good and merchantable quality and for the particular intended use was breached and that certain harmful, poisonous and deleterious matter was given off into the atmosphere wherein the Plaintiff carried out his duties working with asbestos and asbestos-containing materials.

40. As a direct and proximate result of the breach of the implied warranty of good and merchantable quality, Plaintiff developed mesothelioma and/or other industrial dust diseases caused by breathing Defendants' asbestos-containing products.

THIRD CAUSE OF ACTION
(Strict Liability)

41. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

42. During the pertinent times, Plaintiff was injured by his exposure to asbestos fibers associated with the products and equipment manufactured and sold by the Defendants.

43. Defendants' relevant products and equipment was at the time of the harmful asbestos exposure in materially the same condition as when it left the hands of the Defendants.

44. Plaintiff's injury herein occurred because the products and the equipment of the Defendants were in a defective condition unreasonably dangerous to the user.

45. At the time the Defendants, and each of them sold and/or delivered the aforesaid asbestos and asbestos-containing products and at the time said products were used by Plaintiff or by others in his vicinity in the manner and environment intended, they were in a defective condition and were unreasonably dangerous and unfit for their intended use in that they were deleterious, poisonous and highly harmful to Plaintiff. The above was the proximate cause of the severe damages sustained by the Plaintiff as herein set forth.

FOURTH CAUSE OF ACTION
(Punitive Damages)

46. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

47. During the pertinent times, Defendants had actual knowledge of the dangers to individuals similarly situated to the Plaintiff of asbestos exposure, nevertheless, Defendants deliberately, intentionally and purposefully withheld such information from Plaintiff, thus denying Plaintiff of the knowledge with which to take necessary safety precautions such as periodic x-rays and medical examinations and avoiding further dust exposure, the specifics of Defendants' intentional acts upon information and belief being as follows:

- (a) Failing to warn users of the need for monitoring due to asbestos exposure;
- (b) Never issuing recall-type letters or notices to users;
- (c) Rejecting advice of corporate officials and others to warn of the hazards of their products; such rejection being motivated by the possibility of adverse effects on profits;

- (d) Delaying the use of asbestos warnings and diluting the content of such warnings for asbestos-related products;
- (f) Failed to advise Plaintiff of medical findings known to Defendants concerning the dangers of asbestos exposure; and
- (g) Suppressed the dissemination of information to Plaintiff concerning the hazards of asbestos exposure.

48. The foregoing deliberate, intentional and purposeful acts of the Defendants were the direct and proximate cause of Plaintiff's injuries and damages hereinafter described, and the Plaintiff is therefore, entitled to compensation and punitive damages.

FIFTH CAUSE OF ACTION

(Conspiracy, Concert of Action – Defendant Metropolitan Life Insurance Company)

49. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

50. Beginning in the late 1920's, conspirators including Defendant Metropolitan Life Insurance Company ("Met Life"), as well as Johns-Manville, Raybestos-Manhattan and others, undertook a duty to conduct research on asbestos-related health problems and to inform the public about any health risks that could be associated therewith. In or about 1929, Met Life, through its agents and employees acting within the scope of their agency and employment, including but not limited to Dr. Anthony J. Lanza ("Lanza"), began an investigation of asbestos-related health hazards. In 1935, this study was altered by Lanza, with the full knowledge of Met Life, at the request of and in concert with the asbestos industry in order to wrongly influence the United States Public Health Service, the United States medical community and various state legislatures.

51. Thereafter, Defendant Met Life through the acts and omissions of its employees, most notably Lanza, undertook a series of activities with various members of the asbestos industry including but not limited to Johns-Manville, Raybestos-Manhattan/Raymark Industries, Inc., United States Gypsum, American Brake Blok/Abex, and others to suppress and misrepresent the dangers of exposure to asbestos dust to employees of Met Life's insureds and the general public and the medical community.

52. The conspirators through their agent, Lanza of Met Life, made a concerted effort to discredit and to terminate the studies and experiments of certain scientists who were developing data of profound importance for the area of public health in relation to the cancer hazard which existed for workers and bystanders in the asbestos industry.

53. As a direct and proximate result of Met Life's intentional publication of deceptive and misleading medical data and information, and other conspiratorial acts and

omissions, Defendant caused asbestos to be used in the occupational settings from which Plaintiff breathed asbestos dust which resulted in Plaintiff's injuries. Defendant Met Life, through its agents and employees and officers, aided and abetted and gave substantial assistance to Johns-Manville and Raybestos-Manhattan in their tortious selling of asbestos products and voluntarily undertook a duty to warn the United States Public Health Service, the medical community, and others about the danger of asbestos and consciously and negligently misrepresented the dangers of asbestos to the United States Public Health Service, the medical community, and others, all to the ultimate harm of Plaintiff herein.

54. Defendant Met Life rendered substantial aid and assistance to the manufacturers of asbestos-containing products to which Plaintiff was exposed, and such assistance by Met Life aided and abetted the negligence and the marketing of unreasonably dangerous asbestos-containing products by such manufacturers which proximately caused Plaintiff's illness.

55. In both conducting tests and in publishing their alleged results, Met Life failed to exercise reasonable care to conduct or publish complete, adequate and accurate tests of the health effects of asbestos. Met Life also caused to be published intentionally false, misleading, inaccurate and deceptive information about the health effects of asbestos exposure.

56. Plaintiff unwittingly and justifiably relied upon the thoroughness of Met Life's tests and information dissemination, the results of which Met Life published in leading medical journals.

57. As a direct and proximate contributing result of Met Life's failures to conduct or accurately publish adequate tests or disseminate accurate and truthful information, after undertaking to do so; (i) the risk of harm to Plaintiff from asbestos exposure was increased, and (ii) Plaintiff suffered the injuries described herein.

58. In failing to test fully and adequately for the adverse health effects from exposure to asbestos; in delaying the publication of such results; and in falsely editing such results as were obtained; in suppressing relevant medical inquiry and knowledge about those hazards to promote the sale and distribution of asbestos as a harmless product; and in collaborating with the other Defendants materially to understate the hazards of asbestos exposure, all for its own profit and gain, Met Life acted recklessly, wantonly, and in calculated disregard for the welfare of the general public, including Plaintiff.

59. Additionally and alternatively, as a direct and proximate result of Met Life's actions and omissions, Plaintiff was caused to remain ignorant of all the dangers of asbestos resulting in Plaintiff, his employers and the general public to be unaware of the true and full dangers of asbestos, depriving Plaintiff of the opportunity to decide for himself whether he wanted to take the risk of being exposed to asbestos, denied Plaintiff the opportunity to take precautions against the dangers of asbestos and proximately caused Plaintiff's damages herein.

60. During the relevant time period the Plaintiff was exposed to and did inhale and/or ingest asbestos dust, fibers, and particles, which dust, fibers, and particles came from the asbestos or asbestos-containing products which were mined, milled, manufactured, fabricated, supplied, and/or sold by the Johns Manville and/or Raybestos/Raymark.

61. Defendant, Met Life, together with Manville, Raymark and other persons and entities, known and unknown at times relevant hereto, engages in a conspiracy or concert of action to inflict injury on the Plaintiff, and to withhold, alter, suppress and misrepresent information about the health effects of asbestos exposure. One or more of said conspirators did cause tortious injury to the Plaintiff in the course of or as a consequence of the conspiracy or concert of action. At least the following enumerated acts were undertaken by the conspirators in the course of and in furtherance of the conspiracy or concert of action.

- (a) In 1932, Met Life, through Lanza and others, assisted Manville with medical examinations of over 1,000 employees of Manville's factory in Manville, New Jersey. The report of this study shows that a large percentage of the employees suffered from asbestosis including employees not directly involved in the manufacturing process. This 1932 medical survey was not published in the medical literature and, therefore, was unavailable to scientists studying the issue of asbestos-related disease. Further collaboration between Manville and Met Life continued the cover-up.
- (b) Beginning in approximately 1934, Manville, through its agents, Vandiver Brown and Attorney J.C. Hobart, suggested to Lanza, Associate Director of Met Life, which was then insurer of Manville and Raymark, that Lanza publish a study on asbestosis in which Lanza would affirmatively misrepresent material facts about the health consequences of asbestos exposure. This was accomplished through intentional deletion of Lanza's description of asbestosis as 'fatal' and through other selective editing that affirmatively misrepresent asbestosis as a disease process less serious than it actually is and was known to be. As a result, Lanza's study was published in the medical literature in this misleading fashion in 1935. The conspirators were motivated, in part, to effectuate this fraudulent misrepresentation and fraudulent nondisclosure by the desire to influence proposed legislation to regulate asbestos exposure and to provide a defense in lawsuits involving Manville, Raymark, and Met Life as insurer. Furthermore, upon information and belief, it is alleged that Met Life, at all times relevant hereto, had substantial monetary investments in Manville and Raymark, among other asbestos product manufacturers and distributors.
- (c) In 1936, the conspirators or some of them entered into an agreement with the Saranac Laboratories. Under this agreement, these conspirators acquired the power to decide what information Saranac could publish about asbestos disease and to control in what form such publications would occur. This agreement gave these conspirators power to affirmatively misrepresent the results of the work at Saranac, and also gave these conspirators power to material facts included in any

study. On numerous occasions thereafter, the conspirators exercised their power to prevent Saranac scientists from disclosing material scientific data, resulting in numerous misstatements of fact being made at scientific meetings.

- (d) By November 1948, or earlier, Manville, Met Life (acting through Lanza), Raymark, and others decided to exert their influence to materially alter and misrepresent material facts about the substance of research started by Dr. Leroy Gardner at the Saranac Laboratories beginning in 1936. Dr. Gardner's research involved carcinogenicity of asbestos in mice and also included an evaluation of the health effects of asbestos on humans with a critical review of the then-existing standards of dust exposure for asbestos and asbestos products.
- (e) At a meeting on November 11, 1948, these conspirators and others intentionally and affirmatively determined that Dr. Gardner's work should be edited to specifically delete material facts about the cancer-causing propensities of asbestos and the health effects of asbestos on humans and they determined that only an edited version would be published. These conspirators thereby fraudulently misrepresented the risks of asbestos exposure to the public, in general, and to the class of persons exposed to asbestos, including the Plaintiff.
- (f) As a direct result of influence exerted by the above described conspirators, Dr. Arthur Vorwald published Dr. Gardner's edited work in the Journal of Industrial Hygiene, AMA Archives of Industrial Hygiene and Occupational Health in 1951 in a form that stressed those portions of Dr. Gardner's work that the conspirators wished stressed, but which omitted references to human asbestosis and cancer, thereby fraudulently and affirmatively misrepresenting the extent of the risks. The conspirators affirmatively and deliberately disseminated this misleading Vorwald publication to universities, libraries, government officials, agencies and others.
- (g) Such action constituted a material affirmative misrepresentation of the material facts involved in Dr. Gardner's work and resulted in creating an appearance that inhalation of asbestos was a less serious health concern than Dr. Gardner's unedited work indicated.
- (h) for many decades, Met Life, individually, jointly and in conspiracy with Manville and Raymark, have been in possession of medical and scientific data, literature, and test reports which clearly indicated that the inhalation of asbestos dust and fibers resulting from the ordinary foreseeable use of said asbestos-containing products and/or machinery requiring or calling for the use of asbestos or asbestos-containing products were unreasonably dangerous, hazardous, deleterious to human health, carcinogenic, and potentially deadly.
- (i) Despite the medical and scientific data, literature and test reports possessed by and available to Met Life, individually and in conspiracy with Manville and Raymark, Fraudulently, willfully and maliciously withheld, concealed and suppressed said medical and scientific data, literature and test reports regarding

the risks of asbestosis, cancer, mesothelioma, and other illnesses and diseases from Plaintiff who using and being exposed to Manville or Raymark asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products; caused to be released, published and disseminated medical and scientific data, literature and test reports containing information and statements regarding the risks of asbestosis, cancer, mesothelioma and other illnesses and diseases, which Metropolitan, Manville and Raymark knew were either incorrect, incomplete, outdated and misleading; distorted the results of medical examinations conducted upon workers who were using asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products and being exposed to the inhalation of asbestos dust and fibers by falsely stating and/or concealing the nature and extent of the harm which workers suffered; and failed to adequately warn the Plaintiff of the dangers to which he was exposed when they knew of the dangers.

- (a) by the false and fraudulent representations, omissions, failures, and concealments set forth above, Met Life, Manville and Raymark, individually, jointly, and in conspiracy with each other, intended to induce the Plaintiff to rely upon said false and fraudulent representations, omissions, failures, and concealments, to continue to expose themselves to the dangers inherent in the use of and exposure to their asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products. Said misrepresentations were false, incomplete, and misleading and constitute negligent misrepresentations as defined by Sections 311 and 522 of the Restatement (Second) of Torts.

62. Plaintiff reasonably and in good faith relied upon the false and fraudulent representations, omissions, failures, and concealments made by Met Life, Manville, and Raymark regarding the nature of their asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products.

63. As a direct and proximate result of the conspiracy and concert of action between Met Life, Manville and Raymark, the Plaintiff has been deprived of the opportunity of informed free choice and connection with the use of and exposure to Manville and Raymark's asbestos and asbestos-containing products, and therefore continued to work with and be exposed to the co-conspirator corporation's asbestos and asbestos-containing products and as a result contracted asbestos-related diseases and other conditions, and/or aggravated pre-existing conditions, as a result of which the Plaintiff has been damaged.

DAMAGES

64. As a result of the development of mesothelioma and other industrial dust diseases caused by breathing defendants' asbestos-containing products, Plaintiff has suffered and sustained very serious injuries to his person requiring medical treatment.

65. Plaintiff has further suffered great pain and mental anguish as a direct result of the aforesaid injuries.

66. Plaintiff believes that his injuries and illnesses are permanent in nature and that he will be forced to suffer same for the remainder of his life, that his enjoyment of life has been greatly impaired and, further, that his expected life span has been greatly shortened.

67. Plaintiff alleges that as a result of the aforesaid illnesses, he has been forced to incur large amounts of medical expenses by way of doctor and drug bills and verily believes that he will be forced to incur additional expenses in an effort to treat his illnesses as aforesaid, all to Plaintiff's damage, compensatory and punitive in amounts to be determined by the trier of fact.

68. As a direct and proximate result of the Defendants' conduct as alleged above, the Plaintiff has suffered a dramatic reduction of his life expectancy, incurred great mental and physical pain and suffering, sustained lost wages and lost earning capacity, incurred medical expenses, and his enjoyment of life has been greatly impaired, which damages are continuing in nature.

PETITION FOR EXPEDITED TRIAL

69. Pursuant to S.C. Code § 44-135-80(B), Plaintiff hereby petitions the Court requesting that a trial date be set on an expedited basis. Plaintiff shows that there is good cause for such an expedited trial setting in that the Plaintiff while grievously ill, is living and wishes to have his claims promptly adjudicated. Further, Defendants will not be prejudiced by such an expedited trial setting.

PETITION FOR EXPEDITED DEPOSITION

70. Pursuant to S.C. R. Civ. P. 30(a)(1), Plaintiff hereby petitions the Court requesting that his deposition be conducted on an expedited basis.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays to ask that this Court:

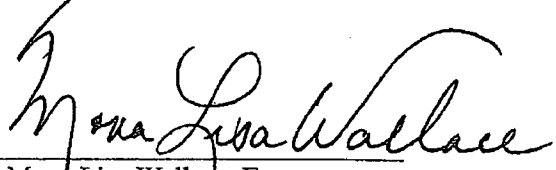
- A. Award the Plaintiff actual and compensatory damages, in an amount to be determined at trial, for the wrongful, negligent, reckless and willful acts of the Defendants;
- B. Award the Plaintiff pre-judgment and post-judgment interest to the extent allowable by law;
- C. Award the Plaintiff punitive damages to the extent allowable by law; and
- D. Award the Plaintiffs' attorney fees and costs to the extent allowable by law; and

E. For such other and further relief as may be just and proper.

A JURY IS RESPECTFULLY DEMANDED TO TRY THESE ISSUES.

Respectfully submitted, this the 5th day of February, 2013.

WALLACE AND GRAHAM, P.A.

By: 

Mona Lisa Wallace, Esq.
SC Bar No. 15844
525 North Main Street
Salisbury, NC 28144
(704) 633-5244

Attorneys for the Plaintiff

EXHIBIT A



School of Public Health

Arthur L. Frank, M.D., Ph.D.

Professor of Public Health

Chair, Department of Environmental and Occupational Health

February 1, 2013

Mona L. Wallace, Esq.
Wallace and Graham, P.A.
Attorneys at Law
525 North Main St.
Salisbury, NC 28144

Re: Steve R. Stewart -- DOB:

Dear Mrs. Wallace:

I am in receipt of medical records in the case of Mr. Steven R. Stewart and have been asked by you to review them and render my judgment regarding any evidence of an asbestos-related disease.

I am currently employed as Professor of Public Health at the Drexel University School of Public Health in Philadelphia. I received my medical degree from the Mount Sinai School of Medicine in 1972. During this time and thereafter, I worked with Dr. Irving Selikoff regarding health concerns associated with exposure to asbestos. From 1973 to 1975, I served two years at the Lung Cancer Branch at the National Cancer Institute at the National Institutes of Health in Bethesda, Maryland as a Commissioned Officer in the United States Public Health Service. I then returned to Mount Sinai and completed two residencies: one in internal medicine and the other in occupational medicine. I became board-certified in internal medicine in 1978 and in occupational medicine in 1979. I also have a Ph.D. degree in biomedical sciences. From 1977 to 1983, I served on the faculty at Mt. Sinai.

In 1983, I accepted the position of Chairman and Professor of Preventive Medicine and Environmental Health at the University of Kentucky, College of Medicine and remained in that position until 1994, when I became Vice President for Medical Education at the University of Texas Health Science Center at Tyler. In 2002, I became the Chairman and Professor for the Department of Environmental and Occupational Health at the Drexel School of Public Health in Philadelphia, Pennsylvania. I am also Professor of Medicine in the Division of Pulmonary Medicine.

Re: Steve R. Stewart
February 1, 2013
Page 2

I have held a number of positions with the United States government. I was on the Board of Scientific Counselors and Chair of the Grant Review Panel for the National Institute for Occupational Safety and Health (NIOSH). I do consulting work for federal agencies including NIOSH, OSHA and the EPA on issues involving general occupational and environmental exposures. In addition, I was appointed to the Air Pollution Control Board in the City of Philadelphia. In addition to the United States government, I have been a consultant to the governments of China, Thailand, India, Brazil, and Israel, among others, regarding asbestos-related issues. In the 1980s, I was elected to the Collegium Ramazzini, which is an international organization of health care professionals. Admission in this group is by election only and limited to 180 members. I have been part of this organization for 25 years and held a position on the executive board. Currently, my time is divided between research, teaching, administration and service. My department research activities focus on occupational toxins. I also teach introductory courses in environmental and occupational health, occupational cancers, and occupational toxicology.

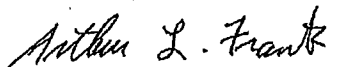
The medical records provided note that Mr. Stewart is a 69-year-old white male with a history of heavy asbestos exposure having worked in a paper factory for 40 years. He started to develop dyspnea and pleuritic-type chest pain in September 2012. A CT scan demonstrated pleural thickening with an associated effusion. He underwent thoracentesis which demonstrated atypical mesothelial cells and he was referred to Dr. Harpole for consideration for surgical staging and possible surgical resection. This was performed on October 24, 2012 at Duke University Hospital with a preoperative and postoperative diagnosis of mesothelioma. The surgical pathology report dated October 24, 2012 confirmed malignant pleural mesothelioma, epithelial variance. The tumor was invasive into the subpleural adipose tissue. The positive antikeratin immunostaining with additional calretinin WT-1, D2-40 and CK 5/6 immunoreactivity and negative staining for BerEp4 and TTF-1 supported the diagnosis of malignant mesothelioma.

It is my opinion and diagnosis, to a reasonable degree of medical certainty that Steven R. Stewart, based upon his work history of 40 years at a paper mill and the information in the medical records has been exposed to asbestos and has an asbestos-related mesothelioma. It is my further opinion, to a reasonable degree of medical certainty, that Mr. Stewart's exposure to asbestos was a proximate cause of the diagnosed mesothelioma, and that Mr. Stewart's illness is not more probably the result of other causes. This is clearly shown by the Mr. Stewart's 40-year employment at a paper mill that contained asbestos and his recorded medical history. Specifically, the records indicate that he had a 40-year career as a paper mill worker which, in the time period he worked, was a known industry in which exposure to asbestos in dryer felts and other asbestos products was common and routine. The cumulative exposure he had to asbestos, from any and all products during his work history, containing any and all asbestos fiber types contributed to his developing mesothelioma. The hazards of asbestos have been known for many years as is reflected by medical articles and studies and industry materials.

Re: Steve R. Stewart
February 1, 2013
Page 3

Should you have any questions about this matter please feel free to contact me.

Sincerely yours,

A handwritten signature in cursive script that reads "Arthur L. Frank".

Arthur L Frank, M.D, Ph.D.
ALF/tmc

STATE OF SOUTH CAROLINA

COUNTY OF YORK

) IN THE COURT OF COMMON PLEAS

) C/A No.

2013-CP-46-00368

Steven Redfearn Stewart,

Plaintiff,

vs.

Albany International Corp. as successor in
interest to Mount Vernon Group d/b/a Mount
Vernon Dryer Fabrics and to Geschmay
Corporation; Appleton Papers, Inc.;
AstenJohnson, Inc.; Daniel International
Corporation; Fluor Enterprises, Inc., f/k/a
Fluor Daniel, Inc., f/k/a Daniel
Construction Company, Inc.; Fluor Daniel
Services Corporation; Goulds Pumps,
Incorporated; Ingersoll-Rand Company;
Metropolitan Life Insurance Company;
Rapid American Corporation; Scapa
Waycross, Inc.; Uniroyal, Inc.; Weavexx, LLC
as successor in interest to Huyck Felt Company
and to Lockport Felts; and CGR Products, Inc.,
f/k/a Carolina Gasket and Rubber Company, Inc.

Defendants.

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YORK COUNTY, SC

PLAINTIFF'S MOTION FOR EXPEDITED DEPOSITION

Plaintiff, Steven Redfearn Stewart, through counsel, hereby respectfully moves the Court to allow an expedited deposition of the Plaintiff, Mr. Stewart, pursuant to South Carolina Rule of Civil Procedure 30(a)(1). Plaintiff shows as follows:

1. Pursuant to Rule 30(a)(1), after the commencement of an action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of the Court is required, granted with or without notice, if the Plaintiff seeks to take a deposition

prior to the expiration of 30 days after the service of the summons and complaint upon any Defendant.

2. The Plaintiff herein, Mr. Stewart, is grievously ill with the disease of mesothelioma, as is reflected by the medical physician's letter attached to the Complaint as Exhibit A and incorporated herein by reference.

3. It would serve the interests of justice for the deposition of Mr. Stewart to be taken promptly for the purposes of preserving his testimony in this matter.

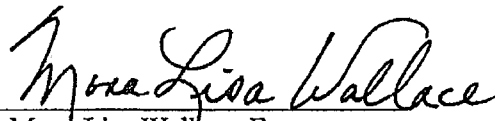
4. Under South Carolina Rule of Civil Procedure 30(a)(1), it is appropriate and good cause exists to allow the deposition of the Plaintiff in order to advance the cause of justice and preserve important testimony in light of the fact that he is very seriously ill.

Wherefore, the Plaintiff respectfully requests that the Court order that his deposition may be taken as soon as is reasonably possible.

Respectfully submitted, this the 5th day of February, 2013.

WALLACE AND GRAHAM, P.A.

By:



Mona Lisa Wallace, Esq.
SC Bar No. 18844
525 North Main Street
Salisbury, NC 28144
(704) 633-5244

Attorneys for the Plaintiff

13-00368

CERTIFICATE OF SERVICE

The undersigned states that on January 5, 2013, she caused a true and correct copy of the PLAINTIFF'S MOTION FOR EXPEDITED DEPOSITION to be served upon the parties identified below by certified or registered mail, return receipt requested, along with the summons and the complaint herein, addressed to the following addresses:

Albany International Corp., c/o officer, managing or general agent, 975 Old Norcross Road, Suite A, Lawrenceville, Georgia 30045.

Albany International Corp., c/o registered agent, CT Corporation System, 2 Office Park Court, Columbia SC 29223.

Albany International Corp., c/o officer, managing or general agent, 216 Airport Drive, Rochester, NH 03867.

Appleton Papers Inc., c/o officer, managing or general agent, 2500 West Wisconsin Street, Portage, WI 53901.

Appleton Papers Inc., c/o officer, managing or general agent, 825 East Wisconsin Avenue, Appleton, WI 54912.

AstenJohnson, Inc., c/o officer, managing or general agent, 4399 Corporate Road, Charleston, SC 29405.

AstenJohnson, Inc., c/o officer, managing or general agent, 400 Asten Road, Clinton, SC 29325.

Daniel International Corporation, c/o officer, managing or general agent, 100 Flour Daniel Drive, Greenville SC 29607.

Daniel International Corporation, c/o registered agent, John R. Reynolds, 100 Flour Daniel Drive, Greenville SC 29607.

Fluor Enterprises, Inc., c/o officer, managing or general agent, 3 Polaris Way, Aliso Viejo, CA 92698.

Fluor Enterprises, Inc., c/o registered agent, Corporation Service Company, 1703 Laurel Street, Columbia SC 29201.

Fluor Daniel Services Corporation, c/o officer, managing or general agent, 100 Flour Daniel Drive, Greenville SC 29607.

Fluor Daniel Services Corporation, c/o registered agent, Corporation Service Company, 1703 Laurel Street, Columbia SC 29201.

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SOUTH CAROLINA
COUNTY, SC

Goulds Pumps, Incorporated, c/o officer, managing or general agent, 2881 E. Bayard Street, Seneca Falls NY 13148,

Goulds Pumps, Incorporated, c/o registered agent, CT Corporation System, 2 Office Park Court, Columbia SC 29223.

Ingersoll-Rand Company, c/o officer, managing or general agent, 800-E Beaty Street, Davidson, NC 28036.

Ingersoll-Rand Company, c/o registered agent, CT Corporation System, 2 Office Park Court, Columbia SC 29223,

Ingersoll-Rand Company, c/o officer, managing or general agent, 200 Chestnut Ridge Rd, Woodcliff Lake, NJ 07677.

Metropolitan Life Insurance Company, c/o officer, managing or general agent, 200 Park Ave., New York, NY 10166

Metropolitan Life Insurance Company, c/o officer, managing or general agent, One Madison Avenue, New York NY 10010.

Rapid American Corporation, c/o officer, managing or general agent, 2711 Centerville Road, Wilmington, Delaware 19801

Scapa Waycross, Inc., c/o officer, managing or general agent, 111 Great Pond Drive, Windsor, CT 06095.

Uniroyal, Inc., c/o Uniroyal Holding, Inc., 70 Great Hill Road, Naugatuck CT 06770.

Uniroyal, Inc., c/o officer, managing or general agent, P.O. Box 19001, Greenville, SC 29602-9001.

Weavexx, LLC, c/o officer, managing or general agent, 51 Flex Way, Youngsville, North Carolina 27596

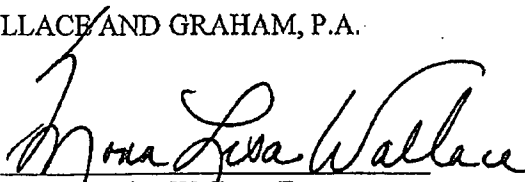
Weavexx, LLC, c/o officer, managing or general agent, 8537 Six Forks Road Suite 300, Raleigh NC 27615.

CGR Products, Inc., c/o officer, managing or general agent, 4655 US 29 North, Greensboro, NC 27405-9446,

Respectfully submitted, this the 5th day of February, 2013.

WALLACE AND GRAHAM, P.A.

By:

A handwritten signature in cursive script, reading "Mona Lisa Wallace", written over a horizontal line.

Mona Lisa Wallace, Esq.
SC Bar No. 15844
525 North Main Street
Salisbury, NC 28144
(704) 633-5244

Attorneys for the Plaintiff

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Steven Redfearn Stewart)

Plaintiff,)

vs.)

Industrial Holdings Corporation f/k/a)

The Carborundum Company)

Defendant.)

IN THE COURT OF COMMONPLEAS

SUMMONS

FILE NO. 2013-CP-46-00368

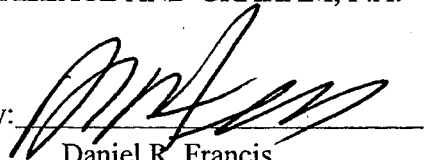
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DAVID HAMILTON
CC-C.P. & G.S.
YORK COUNTY, SC

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusion of the day of such service, and if you fail to answer the complaint, judgement by default will be rendered against you for the relief demanded in the complaint.

Respectfully submitted, this the 30th day of May, 2013.

WALLACE AND GRAHAM, P.A.

By: 

Daniel R. Francis

NC Bar No. 44131

525 North Main Street

Salisbury, NC 28144

704.633.5244

Attorneys for the Plaintiff

Delaware with its principal place of business located in Rochester, New Hampshire, and can be served with process at its office at 975 Old Norcross Road, Suite A, Lawrenceville, Georgia 30045, or through its South Carolina registered agent, CT Corporation System, 2 Office Park Court, Columbia SC 29223, or at its office at 216 Airport Drive, Rochester, NH 03867.

3. Upon information and belief, Defendant **AstenJohnson, Inc.** is a corporation organized and existing under the laws of the State of Delaware with a principal place of business in Charleston, South Carolina and can be served with process at its office at 4399 Corporate Road, Charleston, SC 29405 or through its office located at 400 Asten Road, Clinton, SC 29325.

4. Upon information and belief, Defendant **Daniel International Corporation** is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in South Carolina, and can be served with process at its office at 100 Flour Daniel Drive, Greenville SC 29607, or through its South Carolina registered agent, John R. Reynolds, 100 Flour Daniel Drive, Greenville SC 29607.

5. Upon information and belief, Defendant **Fluor Enterprises, Inc., f/k/a Fluor Daniel, Inc., f/k/a Daniel Construction Company, Inc.** is a corporation organized and existing under the laws of the State of California, and can be served with process at its office at 3 Polaris Way, Aliso Viejo, CA 92698, or through its South Carolina registered agent, Corporation Service Company, 1703 Laurel Street, Columbia SC 29201.

6. Upon information and belief, Defendant **Fluor Daniel Services Corporation** is a corporation organized and existing under the laws of the State of Delaware and can be served with process at its office at 100 Flour Daniel Drive, Greenville SC 29607, or through its South Carolina registered agent, Corporation Service Company, 1703 Laurel Street, Columbia SC 29201.

7. Upon information and belief, Defendant **Goulds Pumps, Incorporated**, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Seneca Falls NY, and can be served with process at its office at 2881 E. Bayard Street, Seneca Falls NY 13148, or through its South Carolina registered agent, CT Corporation System, 2 Office Park Court, Columbia SC 29223.

8. Upon information and belief, Defendant **Ingersoll-Rand Company** is a corporation organized and existing under the laws of the State of New Jersey with its principal place of business in New Jersey, and can be served with process at its office at 800-E Beaty Street, Davidson, NC 28036, or through its South Carolina registered agent, CT Corporation System, 2 Office Park Court, Columbia SC 29223, or at its office at 200 Chestnut Ridge Rd, Woodcliff Lake, NJ 07677.

9. Upon information and belief, Defendant **Industrial Holdings Corporation f/k/a The Carborundum Company** is a corporation organized and

existing under the laws of the State of New York with its principal place of business in New York, and can be served with process at its office at 1271 Sixth Ave., New York, NY 10020, or it can be served with process at The Prentice-Hall Corporation System Inc., 80 State Street, Albany, NY 12207. Upon information and belief this defendant acquired at some point in time following plaintiff's exposure the liabilities of Lockport Felt Division and is the proper party for certain liability periods.

10. Upon information and belief, Defendant **Metropolitan Life Insurance Company** is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York, and can be served with process at its office at 200 Park Ave., New York, NY 10166, or at its office at One Madison Avenue, New York NY 10010.

11. Upon information and belief, Defendant **Mount Vernon Mills, Inc.** is a corporation organized and existing under the laws of the State of Maryland with its principal place of business in Columbia, Couth Carolina, and can be served with process through its registered agent, National Corporate Research, LTD, 2 Office Park Court, Suite 103, Columbia, SC 29223.

12. Upon information and belief, Defendant **Rapid American Corporation** is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, and can be served with process at its office at 2711 Centerville Road, Wilmington, Delaware 19801; and is a successor in interest to Philip Carey Manufacturing Co.

13. Upon information and belief, Defendant **Scapa Waycross, Inc.** is a Georgia corporation which may be served at its office at 111 Great Pond Drive, Windsor, CT 06095; and has also done business under the names Scapa North America, Inc., Scapa Dryer Fabrics, Inc. and Scapa Dryers Waycross, Inc.

14. Upon information and belief, Defendant **Uniroyal, Inc.** is a corporation organized and existing under the laws of the State of New Jersey with its principal place of business in Connecticut, and can be served with process at its office at c/o Uniroyal Holding, Inc., 70 Great Hill Road, Naugatuck CT 06770, or at P.O. Box 19001, Greenville, SC 29602-9001.

15. Upon information and belief, Defendant **Weavexx, LLC** is a limited liability company organized and existing under the laws of the State of Delaware with a corporate office located at 51 Flex Way, Youngsville, North Carolina 27596 and may be served with process at that address or at its office address at 8537 Six Forks Road Suite 300, Raleigh NC 27615; and is the successor in interest to Huyck Felt Company.

16. Upon information and belief, Defendant **CGR Products, Inc., f/k/a Carolina Gasket and Rubber Company, Inc.**, is a corporation organized and existing under the laws of the State of North Carolina with its principal place of business at 4655 US 29 North, Greensboro, NC 27405-9446, and can be served with process at its office address.

17. Defendants are foreign corporations who are amenable to jurisdiction in the Courts of South Carolina by virtue of their respective contacts with the State of South Carolina and/or their respective conduct of substantial or systematic business in South Carolina which subjects them to the jurisdiction of the South Carolina Courts pursuant to the South Carolina Long-Arm Statute.

18. Each Defendant listed in the caption (or its applicable predecessors in interest) mined, manufactured, processed, imported, converted, compounded, used, installed and/or retailed substantial amounts of asbestos and asbestos-containing materials which were sold, distributed and/or used in South Carolina; and/or are otherwise liable in connection with asbestos and asbestos-containing products as alleged herein below.

19. Venue is proper in this County in that the material facts occurred, in whole or part, in this County and one or more parties reside in this County.

20. The plaintiff was exposed to various asbestos-containing products while working in the vicinity of Rock Hill, South Carolina, including without limitation during work at the former Bowater plant in York County.

21. Plaintiff was a machine tender who for a long period of time, worked with and was exposed to the asbestos and asbestos-containing materials mined, manufactured, processed, imported, converted, compounded and/or sold by the Defendants, and/or for which Defendants are otherwise liable, some or all of which exposure occurred within the State of South Carolina.

22. Plaintiff has been diagnosed with the disease of mesothelioma.

23. Mesothelioma is a progressive, insidious disease and Plaintiff's asbestos exposure in South Carolina to the products of the Defendants or for which Defendants are otherwise liable contributed to the Plaintiff's contraction of his disease caused by breathing asbestos-containing products.

24. Plaintiff has obtained and submits herewith as **Exhibit A** hereto, a report by a physician who is appropriately board-certified, in compliance with S.C. Code §§ 44-135-50(A)(1), 44-135-70 and 44-135-80.

FIRST CAUSE OF ACTION
(Negligence)

25. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

26. Defendants (or their predecessors in interest or parties with whom they acted in concert), and each of them, are or at times relevant hereto, were miners, manufacturers, processors, importers, converters, compounders and/or retailers of asbestos and asbestos-containing materials.

27. Defendants, acting through their agents, servants, and/or employees have caused certain asbestos and asbestos-containing materials to be placed in the stream of interstate commerce with the result that said asbestos and asbestos-containing materials came into use by or in the vicinity of the Plaintiff.

28. During the course and scope of his employment, Plaintiff was exposed to Defendants' asbestos and asbestos-containing materials, which exposure directly and proximately caused him to develop an illness known and designated as mesothelioma and/or other industrial dust diseases caused by breathing Defendants' asbestos-containing products.

29. The illness and disability of the Plaintiff are the direct and proximate result of the negligence, recklessness and willfulness of the Defendants, jointly and severally, in that they produced, sold and otherwise put into the stream of interstate commerce, asbestos and asbestos-containing materials which the Defendants, and each of them, knew were deleterious, poisonous and highly harmful to Plaintiff's body, lungs, respiratory system, skin and health.

30. Defendants owed a duty of care toward the Plaintiff. Defendants breached that duty by their negligent acts and omission.

31. Defendants knew, or, in the exercise of ordinary care, should have known, that the asbestos and asbestos-containing materials were deleterious, poisonous and highly harmful to plaintiff's body, lungs, respiratory system, skin and health. Defendants acted negligently, recklessly and willfully in that the Defendants:

- (a) Failed to advise Plaintiff of the dangerous characteristics of their asbestos and asbestos-containing products;
- (b) Failed or omitted to provide the Plaintiff with the knowledge as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliance, if, in truth, they were in any way able to protect him from being poisoned and disabled as he was by exposure to such deleterious and harmful asbestos-containing materials;
- (c) Failed and omitted to place any warnings or sufficient warnings on their containers of said asbestos and asbestos materials to warn the handlers thereof of the dangers to their health in coming in contact with said asbestos and asbestos materials;
- (d) Failed and omitted to take reasonable precautions or to exercise reasonable care to publish, adopt and enforce a safety plan and a safe method of handling and installing said asbestos and asbestos materials;
- (e) Inadequately warned, if, in fact, they warned at all, persons such as Plaintiff of the dangers to their health in coming in contact with and breathing said asbestos and asbestos-containing materials, even after they

knew of the dangers and cancer-causing effects, and up until the present time;

- (f) Did not recommend methods to improve the work environment;
- (g) Did not develop alternative products; and
- (h) Continued to use a known cancer-causing product, to wit: asbestos.

32. At all times relevant, it was feasible for Defendants to have warned plaintiffs, tested their asbestos products, designed safer asbestos products and/or substituted asbestos-free products.

33. In the alternative, subsequent to the time the Defendants caused the asbestos products to be sold and distributed, the Defendants knew, or in the exercise of ordinary care, should have known, that asbestos is deleterious, carcinogenic, and harmful to persons using buildings or on jobsites, but nevertheless, the Defendants negligently and recklessly failed and refused to warn and advise the Plaintiff of the dangerous characteristics thereof, and the dangers to the health and welfare of persons coming in contact with and breathing products. Despite possessed with information uniquely available to them relating to the dangerous effects of continued asbestos exposure, the Defendants did not provide that information to the Plaintiff.

34. The Defendants had a post-sale duty to warn, which duty was breached and, as a result, Plaintiff suffered injury and damages as hereinafter described.

35. Plaintiff has suffered continuing and lingering injury to himself due to the Defendants' asbestos fibers previously inhaled. Said fibers, once inhaled, caused repeated and continuing injury to Plaintiff.

36. As a proximate result of the aforesaid acts of the Defendants, the Plaintiff has been damaged as herein set forth.

SECOND CAUSE OF ACTION
(Implied Warranty of Merchantability)

37. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

38. The Defendants, and each of them, impliedly warranted that their relevant products, equipment and asbestos materials were of good and merchantable quality and fit for their intended use.

39. The implied warranty made by the Defendants, and each of them, that the asbestos and asbestos-containing materials were of good and merchantable quality and for the particular intended use was breached and that certain harmful, poisonous and

deleterious matter was given off into the atmosphere wherein the Plaintiff carried out his duties working with asbestos and asbestos-containing materials.

40. As a direct and proximate result of the breach of the implied warranty of good and merchantable quality, Plaintiff developed mesothelioma and/or other industrial dust diseases caused by breathing Defendants' asbestos-containing products.

THIRD CAUSE OF ACTION **(Strict Liability)**

41. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

42. During the pertinent times, Plaintiff was injured by his exposure to asbestos fibers associated with the products and equipment manufactured and sold by the Defendants.

43. Defendants' relevant products and equipment was at the time of the harmful asbestos exposure in materially the same condition as when it left the hands of the Defendants.

44. Plaintiff's injury herein occurred because the products and the equipment of the Defendants were in a defective condition unreasonably dangerous to the user.

45. At the time the Defendants, and each of them sold and/or delivered the aforesaid asbestos and asbestos-containing products and at the time said products were used by Plaintiff or by others in his vicinity in the manner and environment intended, they were in a defective condition and were unreasonably dangerous and unfit for their intended use in that they were deleterious, poisonous and highly harmful to Plaintiff. The above was the proximate cause of the severe damages sustained by the Plaintiff as herein set forth.

FOURTH CAUSE OF ACTION **(Punitive Damages)**

46. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

47. During the pertinent times, Defendants had actual knowledge of the dangers to individuals similarly situated to the Plaintiff of asbestos exposure, nevertheless, Defendants deliberately, intentionally and purposefully withheld such information from Plaintiff, thus denying Plaintiff of the knowledge with which to take necessary safety precautions such as periodic x-rays and medical examinations and avoiding further dust exposure, the specifics of Defendants' intentional acts upon information and belief being as follows:

- (a) Failing to warn users of the need for monitoring due to asbestos exposure;

- (b) Never issuing recall-type letters or notices to users;
- (c) Rejecting advice of corporate officials and others to warn of the hazards of their products; such rejection being motivated by the possibility of adverse effects on profits;
- (d) Delaying the use of asbestos warnings and diluting the content of such warnings for asbestos-related products;
- (f) Failed to advise Plaintiff of medical findings known to Defendants concerning the dangers of asbestos exposure; and
- (g) Suppressed the dissemination of information to Plaintiff concerning the hazards of asbestos exposure.

48. The foregoing deliberate, intentional and purposeful acts of the Defendants were the direct and proximate cause of Plaintiff's injuries and damages hereinafter described, and the Plaintiff is therefore, entitled to compensation and punitive damages.

FIFTH CAUSE OF ACTION

(Conspiracy, Concert of Action – Defendant Metropolitan Life Insurance Company)

49. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

50. Beginning in the late 1920's, conspirators including Defendant Metropolitan Life Insurance Company ("Met Life"), as well as Johns-Manville, Raybestos-Manhattan and others, undertook a duty to conduct research on asbestos-related health problems and to inform the public about any health risks that could be associated therewith. In or about 1929, Met Life, through its agents and employees acting within the scope of their agency and employment, including but not limited to Dr. Anthony J. Lanza ("Lanza"), began an investigation of asbestos-related health hazards. In 1935, this study was altered by Lanza, with the full knowledge of Met Life, at the request of and in concert with the asbestos industry in order to wrongly influence the United States Public Health Service, the United States medical community and various state legislatures.

51. Thereafter, Defendant Met Life through the acts and omissions of its employees, most notably Lanza, undertook a series of activities with various members of the asbestos industry including but not limited to Johns-Manville, Raybestos-Manhattan/Raymark Industries, Inc., United States Gypsum, American Brake Blok/Abex, and others to suppress and misrepresent the dangers of exposure to asbestos dust to employees of Met Life's insureds and the general public and the medical community.

52. The conspirators through their agent, Lanza of Met Life, made a concerted effort to discredit and to terminate the studies and experiments of certain scientists who were developing data of profound importance for the area of public health in relation to the cancer hazard which existed for workers and bystanders in the asbestos industry.

53. As a direct and proximate result of Met Life's intentional publication of deceptive and misleading medical data and information, and other conspiratorial acts and omissions, Defendant caused asbestos to be used in the occupational settings from which Plaintiff breathed asbestos dust which resulted in Plaintiff's injuries. Defendant Met Life, through its agents and employees and officers, aided and abetted and gave substantial assistance to Johns-Manville and Raybestos-Manhattan in their tortious selling of asbestos products and voluntarily undertook a duty to warn the United States Public Health Service, the medical community, and others about the danger of asbestos and consciously and negligently misrepresented the dangers of asbestos to the United States Public Health Service, the medical community, and others, all to the ultimate harm of Plaintiff herein.

54. Defendant Met Life rendered substantial aid and assistance to the manufacturers of asbestos-containing products to which Plaintiff was exposed, and such assistance by Met Life aided and abetted the negligence and the marketing of unreasonably dangerous asbestos-containing products by such manufacturers which proximately caused Plaintiff's illness.

55. In both conducting tests and in publishing their alleged results, Met Life failed to exercise reasonable care to conduct or publish complete, adequate and accurate tests of the health effects of asbestos. Met Life also caused to be published intentionally false, misleading, inaccurate and deceptive information about the health effects of asbestos exposure.

56. Plaintiff unwittingly and justifiably relied upon the thoroughness of Met Life's tests and information dissemination, the results of which Met Life published in leading medical journals.

57. As a direct and proximate contributing result of Met Life's failures to conduct or accurately publish adequate tests or disseminate accurate and truthful information, after undertaking to do so; (i) the risk of harm to Plaintiff from asbestos exposure was increased, and (ii) Plaintiff suffered the injuries described herein.

58. In failing to test fully and adequately for the adverse health effects from exposure to asbestos; in delaying the publication of such results; and in falsely editing such results as were obtained; in suppressing relevant medical inquiry and knowledge about those hazards to promote the sale and distribution of asbestos as a harmless product; and in collaborating with the other Defendants materially to understate the hazards of asbestos exposure, all for its own profit and gain, Met Life acted recklessly, wantonly, and in calculated disregard for the welfare of the general public, including Plaintiff.

59. Additionally and alternatively, as a direct and proximate result of Met Life's actions and omissions, Plaintiff was caused to remain ignorant of all the dangers of asbestos resulting in Plaintiff, his employers and the general public to be unaware of the true and full dangers of asbestos, depriving Plaintiff of the opportunity to decide for himself whether he wanted to take the risk of being exposed to asbestos, denied Plaintiff the opportunity to take precautions against the dangers of asbestos and proximately caused Plaintiff's damages herein.

60. During the relevant time period the Plaintiff was exposed to and did inhale and/or ingest asbestos dust, fibers, and particles, which dust, fibers, and particles came from the asbestos or asbestos-containing products which were mined, milled, manufactured, fabricated, supplied, and/or sold by the Johns Manville and/or Raybestos/Raymark.

61. Defendant, Met Life, together with Manville, Raymark and other persons and entities, known and unknown at times relevant hereto, engages in a conspiracy or concert of action to inflict injury on the Plaintiff, and to withhold, alter, suppress and misrepresent information about the health effects of asbestos exposure. One or more of said conspirators did cause tortious injury to the Plaintiff in the course of or as a consequence of the conspiracy or concert of action. At least the following enumerated acts were undertaken by the conspirators in the course of and in furtherance of the conspiracy or concert of action.

- (a) In 1932, Met Life, through Lanza and others, assisted Manville with medical examinations of over 1,000 employees of Manville's factory in Manville, New Jersey. The report of this study shows that a large percentage of the employees suffered from asbestosis including employees not directly involved in the manufacturing process. This 1932 medical survey was not published in the medical literature and, therefore, was unavailable to scientists studying the issue of asbestos-related disease. Further collaboration between Manville and Met Life continued the cover-up.
- (b) Beginning in approximately 1934, Manville, through its agents, Vandiver Brown and Attorney J.C. Hobart, suggested to Lanza, Associate Director of Met Life, which was then insurer of Manville and Raymark, that Lanza publish a study on asbestosis in which Lanza would affirmatively misrepresent material facts about the health consequences of asbestos exposure. This was accomplished through intentional deletion of Lanza's description of asbestosis as 'fatal' and through other selective editing that affirmatively misrepresent asbestosis as a disease process less serious than it actually is and was known to be. As a result, Lanza's study was published in the medical literature in this misleading fashion in 1935. The conspirators were motivated, in part, to effectuate this fraudulent misrepresentation and fraudulent nondisclosure by the desire to influence proposed legislation to regulate asbestos exposure and to provide a defense in lawsuits involving Manville, Raymark, and Met Life as insurer. Furthermore, upon information and belief, it is alleged that Met Life, at all times relevant

hereto, had substantial monetary investments in Manville and Raymark, among other asbestos product manufacturers and distributors.

- (c) In 1936, the conspirators or some of them entered into an agreement with the Saranac Laboratories. Under this agreement, these conspirators acquired the power to decide what information Saranac could publish about asbestos disease and to control in what form such publications would occur. This agreement gave these conspirators power to affirmatively misrepresent the results of the work at Saranac, and also gave these conspirators power to material facts included in any study. On numerous occasions thereafter, the conspirators exercised their power to prevent Saranac scientists from disclosing material scientific data, resulting in numerous misstatements of fact being made at scientific meetings.
- (d) By November 1948, or earlier, Manville, Met Life (acting through Lanza), Raymark, and others decided to exert their influence to materially alter and misrepresent material facts about the substance of research started by Dr. Leroy Gardner at the Saranac Laboratories beginning in 1936. Dr. Gardner's research involved carcinogenicity of asbestos in mice and also included an evaluation of the health effects of asbestos on humans with a critical review of the then-existing standards of dust exposure for asbestos and asbestos products.
- (e) At a meeting on November 11, 1948, these conspirators and others intentionally and affirmatively determined that Dr. Gardner's work should be edited to specifically delete material facts about the cancer-causing propensities of asbestos and the health effects of asbestos on humans and they determined that only an edited version would be published. These conspirators thereby fraudulently misrepresented the risks of asbestos exposure to the public, in general, and to the class of persons exposed to asbestos, including the Plaintiff.
- (f) As a direct result of influence exerted by the above described conspirators, Dr. Arthur Vorwald published Dr. Gardner's edited work in the Journal of Industrial Hygiene, AMA Archives of Industrial Hygiene and Occupational Health in 1951 in a form that stressed those portions of Dr. Gardner's work that the conspirators wished stressed, but which omitted references to human asbestosis and cancer, thereby fraudulently and affirmatively misrepresenting the extent of the risks. The conspirators affirmatively and deliberately disseminated this misleading Vorwald publication to universities, libraries, government officials, agencies and others.
- (g) Such action constituted a material affirmative misrepresentation of the material facts involved in Dr. Gardner's work and resulted in creating an appearance that inhalation of asbestos was a less serious health concern than Dr. Gardner's unedited work indicated.
- (h) for many decades, Met Life, individually, jointly and in conspiracy with Manville and Raymark, have been in possession of medical and scientific data, literature, and test reports which clearly indicated that the inhalation of asbestos dust and

fibers resulting from the ordinary foreseeable use of said asbestos-containing products and/or machinery requiring or calling for the use of asbestos or asbestos-containing products were unreasonably dangerous, hazardous, deleterious to human health, carcinogenic, and potentially deadly.

- (i) Despite the medical and scientific data, literature and test reports possessed by and available to Met Life, individually and in conspiracy with Manville and Raymark, Fraudulently, willfully and maliciously withheld, concealed and suppressed said medical and scientific data, literature and test reports regarding the risks of asbestosis, cancer, mesothelioma, and other illnesses and diseases from Plaintiff who using and being exposed to Manville or Raymark asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products; caused to be released, published and disseminated medical and scientific data, literature and test reports containing information and statements regarding the risks of asbestosis, cancer, mesothelioma and other illnesses and diseases, which Metropolitan, Manville and Raymark knew were either incorrect, incomplete, outdated and misleading; distorted the results of medical examinations conducted upon workers who were using asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products and being exposed to the inhalation of asbestos dust and fibers by falsely stating and/or concealing the nature and extent of the harm which workers suffered; and failed to adequately warn the Plaintiff of the dangers to which he was exposed when they knew of the dangers.
- (a) by the false and fraudulent representations, omissions, failures, and concealments set forth above, Met Life, Manville and Raymark, individually, jointly, and in conspiracy with each other, intended to induce the Plaintiff to rely upon said false and fraudulent representations, omissions, failures, and concealments, to continue to expose themselves to the dangers inherent in the use of and exposure to their asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products. Said misrepresentations were false, incomplete, and misleading and constitute negligent misrepresentations as defined by Sections 311 and 522 of the Restatement (Second) of Torts.

62. Plaintiff reasonably and in good faith relied upon the false and fraudulent representations, omissions, failures, and concealments made by Met Life, Manville, and Raymark regarding the nature of their asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products.

63. As a direct and proximate result of the conspiracy and concert of action between Met Life, Manville and Raymark, the Plaintiff has been deprived of the opportunity of informed free choice and connection with the use of and exposure to Manville and Raymark's asbestos and asbestos-containing products, and therefore continued to work with and be exposed to the co-conspirator corporation's asbestos and asbestos-containing products and as a result contracted asbestos-related diseases and

other conditions, and/or aggravated pre-existing conditions, as a result of which the Plaintiff has been damaged.

DAMAGES

64. As a result of the development of mesothelioma and other industrial dust diseases caused by breathing defendants' asbestos-containing products, Plaintiff has suffered and sustained very serious injuries to his person requiring medical treatment.

65. Plaintiff has further suffered great pain and mental anguish as a direct result of the aforesaid injuries.

66. Plaintiff believes that his injuries and illnesses are permanent in nature and that he will be forced to suffer same for the remainder of his life, that his enjoyment of life has been greatly impaired and, further, that his expected life span has been greatly shortened.

67. Plaintiff alleges that as a result of the aforesaid illnesses, he has been forced to incur large amounts of medical expenses by way of doctor and drug bills and verily believes that he will be forced to incur additional expenses in an effort to treat his illnesses as aforesaid, all to Plaintiff's damage, compensatory and punitive in amounts to be determined by the trier of fact.

68. As a direct and proximate result of the Defendants' conduct as alleged above, the Plaintiff has suffered a dramatic reduction of his life expectancy, incurred great mental and physical pain and suffering, sustained lost wages and lost earning capacity, incurred medical expenses, and his enjoyment of life has been greatly impaired, which damages are continuing in nature.

PETITION FOR EXPEDITED TRIAL

69. Pursuant to S.C. Code § 44-135-80(B), Plaintiff hereby petitions the Court requesting that a trial date be set on an expedited basis. Plaintiff shows that there is good cause for such an expedited trial setting in that the Plaintiff while grievously ill, is living and wishes to have his claims promptly adjudicated. Further, Defendants will not be prejudiced by such an expedited trial setting.

PETITION FOR EXPEDITED DEPOSITION

70. Pursuant to S.C. R. Civ. P. 30(a)(1), Plaintiff hereby petitions the Court requesting that his deposition be conducted on an expedited basis.

PRAYER FOR RELIEF

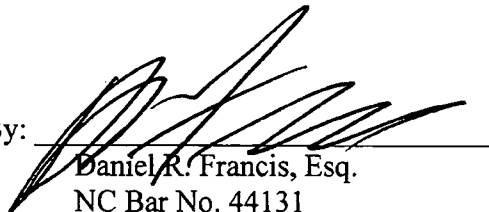
WHEREFORE, the Plaintiff prays to ask that this Court:

- A. Award the Plaintiff actual and compensatory damages, in an amount to be determined at trial, for the wrongful, negligent, reckless and willful acts of the Defendants;
- B. Award the Plaintiff pre-judgment and post-judgment interest to the extent allowable by law;
- C. Award the Plaintiff punitive damages to the extent allowable by law; and
- D. Award the Plaintiffs' attorney fees and costs to the extent allowable by law; and
- E. For such other and further relief as may be just and proper.

A JURY IS RESPECTFULLY DEMANDED TO TRY THESE ISSUES.

Respectfully submitted, this the 30 day of May 2013.

WALLACE AND GRAHAM, P.A.

By: 

Daniel R. Francis, Esq.
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Attorneys for the Plaintiff

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) C/A No. 2013-CP-46-00368

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

Plaintiff,

vs.

Albany International Corp., et al;

Defendants.

Jury Trial Demanded

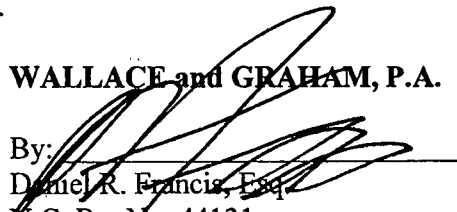
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YORK COUNTY, SC

SUGGESTION OF PARTY'S DEATH

In accordance with Rule 25(a)(1) of the South Carolina Rules of Civil Procedure, Plaintiff Stephen R. Edwards, who is a plaintiff to this action and the representative of the deceased party, notes the death during the pendency of this action of Steven Redfearn Stewart, one of the parties to this action. Steven Redfearn Stewart died on August 23, 2013. A Motion to Substitute Party is being filed contemporaneously with this Statement.

Dated this 23rd day of October, 2013.

WALLACE and GRAHAM, P.A.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served via Electronic Mail and US Mail to the York County Clerk of Court and the following parties on October 23, 2013:

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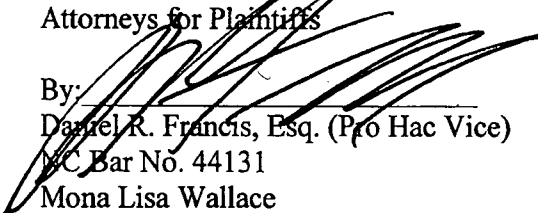
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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) C/A No. 2013-CP-46-00368

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

Plaintiff,

vs.

Albany International Corp. as successor in
interest to Mount Vernon Group d/b/a Mount
Vernon Dryer Fabrics and to Geschmay
Corporation; AstenJohnson, Inc.;
Daniel International Corporation;
Fluor Enterprises, Inc., f/k/a
Fluor Daniel, Inc., f/k/a Daniel
Construction Company, Inc.; Fluor Daniel
Services Corporation; Goulds Pumps,
Incorporated; Industrial Holdings Corporation
f/k/a The Carborundum Company
Ingersoll-Rand Company;
Metropolitan Life Insurance Company;
Mount Vernon Mills, Inc.;
Scapa Waycross, Inc.;
Uniroyal, Inc.; Weavexx, LLC as successor in
interest to Huyck Felt Company; and
CGR Products, Inc., f/k/a Carolina
Gasket and Rubber Company, Inc.

Defendants.

Asbestos Lawsuit
Wrongful Death and Survival Action

SECOND AMENDED COMPLAINT

PLAINTIFF, Stephen R. Edwards, Individually and as Personal Representative of the Estate of Steven Redfearn Stewart (deceased) sues the above-named defendants for compensatory and punitive damages and alleges:

1. This action is brought pursuant to the Wrongful Death Act, S.C. Gen. Stat. 15-51:10 *et seq.*, for the wrongful death of the decedent, Steven Redfearn Stewart, on behalf of all persons entitled to recover damages.

2. The decedent died on August 23, 2013, in York County, South Carolina. The cause of death was Malignant Mesothelioma. The decedent had been diagnosed with Mesothelioma on or about October 24, 2012.

BACKGROUND FACTS

1. Plaintiff Steven R. Stewart, deceased, was a citizen and resident of the State of South Carolina. Steven Edwards, Personal Representative, is the son of Steven R. Stewart.

2. Upon information and belief, Defendant **Albany International Corp.** is the successor in interest to Mount Vernon Group d/b/a Mount Vernon Dryer Fabrics and the successor in interest to Geschmay Corporation. Upon information and belief, Albany International Corp. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located in Rochester, New Hampshire, and can be served with process at its office at 975 Old Norcross Road, Suite A, Lawrenceville, Georgia 30045, or through its South Carolina registered agent, CT Corporation System, 2 Office Park Court, Columbia SC 29223, or at its office at 216 Airport Drive, Rochester, NH 03867.

3. Upon information and belief, Defendant **AstenJohnson, Inc.** is a corporation organized and existing under the laws of the State of Delaware with a principal place of business in Charleston, South Carolina and can be served with process at its office at 4399 Corporate Road, Charleston, SC 29405 or through its office located at 400 Asten Road, Clinton, SC 29325.

4. Upon information and belief, Defendant **Daniel International Corporation** is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in South Carolina, and can be served with process at its office at 100 Flour Daniel Drive, Greenville SC 29607, or through its South Carolina registered agent, John R. Reynolds, 100 Flour Daniel Drive, Greenville SC 29607.

5. Upon information and belief, Defendant **Fluor Enterprises, Inc., f/k/a Fluor Daniel, Inc., f/k/a Daniel Construction Company, Inc.** is a corporation organized and existing under the laws of the State of California, and can be served with process at its office at 3 Polaris Way, Aliso Viejo, CA 92698, or through its South Carolina registered agent, Corporation Service Company, 1703 Laurel Street, Columbia SC 29201.

6. Upon information and belief, Defendant **Fluor Daniel Services Corporation** is a corporation organized and existing under the laws of the State of Delaware and can be served with process at its office at 100 Flour Daniel Drive, Greenville SC 29607, or through its South Carolina registered agent, Corporation Service Company, 1703 Laurel Street, Columbia SC 29201.

7. Upon information and belief, Defendant **Goulds Pumps, Incorporated**, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Seneca Falls NY, and can be served with process at its office at 2881 E. Bayard Street, Seneca Falls NY 13148, or through its South Carolina registered agent, CT Corporation System, 2 Office Park Court, Columbia SC 29223.

8. Upon information and belief, Defendant **Ingersoll-Rand Company** is a corporation organized and existing under the laws of the State of New Jersey with its principal place of business in New Jersey, and can be served with process at its office at 800-E Beaty Street, Davidson, NC 28036, or through its South Carolina registered agent, CT Corporation System, 2 Office Park Court, Columbia SC 29223, or at its office at 200 Chestnut Ridge Rd, Woodcliff Lake, NJ 07677.

9. Upon information and belief, Defendant **Industrial Holdings Corporation f/k/a The Carborundum Company** is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York, and can be served with process at its office at 1271 Sixth Ave., New York, NY 10020, or it can be served with process at The Prentice-Hall Corporation System Inc., 80 State Street, Albany, NY 12207. Upon information and belief this defendant acquired at some point in time following plaintiff's exposure the liabilities of Lockport Felt Division and is the proper party for certain liability periods.

10. Upon information and belief, Defendant **Metropolitan Life Insurance Company** is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York, and can be served with process at its office at 200 Park Ave., New York, NY 10166, or at its office at One Madison Avenue, New York NY 10010.

11. Upon information and belief, Defendant **Mount Vernon Mills, Inc.** is a corporation organized and existing under the laws of the State of Maryland with its principal place of business in Columbia, South Carolina, and can be served with process through its registered agent, National Corporate Research, LTD, 2 Office Park Court, Suite 103, Columbia, SC 29223.

12. Upon information and belief, Defendant **Scapa Waycross, Inc.** is a Georgia corporation which may be served at its office at 111 Great Pond Drive, Windsor, CT 06095; and has also done business under the names Scapa North America, Inc., Scapa Dryer Fabrics, Inc. and Scapa Dryers Waycross, Inc.

13. Upon information and belief, Defendant **Uniroyal, Inc.** is a corporation organized and existing under the laws of the State of New Jersey with its principal place of business in Connecticut, and can be served with process at its office at c/o Uniroyal Holding, Inc., 70 Great Hill Road, Naugatuck CT 06770, or at P.O. Box 19001, Greenville, SC 29602-9001.

14. Upon information and belief, Defendant **Weavexx, LLC** is a limited liability company organized and existing under the laws of the State of Delaware with a corporate office located at 51 Flex Way, Youngsville, North Carolina 27596 and may be served with process at that address or at its office address at 8537 Six Forks Road Suite 300, Raleigh NC 27615; and is the successor in interest to Huyck Felt Company.

15. Upon information and belief, Defendant **CGR Products, Inc., f/k/a Carolina Gasket and Rubber Company, Inc.**, is a corporation organized and existing under the laws of

the State of North Carolina with its principal place of business at 4655 US 29 North, Greensboro, NC 27405-9446, and can be served with process at its office address.

16. Defendants are foreign corporations who are amenable to jurisdiction in the Courts of South Carolina by virtue of their respective contacts with the State of South Carolina and/or their respective conduct of substantial or systematic business in South Carolina which subjects them to the jurisdiction of the South Carolina Courts pursuant to the South Carolina Long-Arm Statute.

17. Each Defendant listed in the caption (or its applicable predecessors in interest) mined, manufactured, processed, imported, converted, compounded, used, installed and/or retailed substantial amounts of asbestos and asbestos-containing materials which were sold, distributed and/or used in South Carolina; and/or are otherwise liable in connection with asbestos and asbestos-containing products as alleged herein below.

18. Venue is proper in this County in that the material facts occurred, in whole or part, in this County and one or more parties reside in this County.

19. The plaintiff, decedent Steven R. Stewart, was exposed to various asbestos-containing products while working in the vicinity of Rock Hill, South Carolina, including without limitation during work at the former Bowater plant in York County.

20. Plaintiff, decedent Steven R. Stewart, was a machine tender who for a long period of time, worked with and was exposed to the asbestos and asbestos-containing materials mined, manufactured, processed, imported, converted, compounded and/or sold by the Defendants, and/or for which Defendants are otherwise liable, some or all of which exposure occurred within the State of South Carolina.

21. Plaintiff has been diagnosed with the disease of mesothelioma and on August 23, 2013 died with his official cause of death as mesothelioma.

22. Mesothelioma is a progressive, insidious disease and Plaintiff's asbestos exposure in South Carolina to the products of the Defendants or for which Defendants are otherwise liable contributed to the Plaintiff's contraction of his disease caused by breathing asbestos-containing products.

23. Plaintiff has obtained and submitted in his original complaint, a report by a physician who is appropriately board-certified, in compliance with S.C. Code §§ 44-135-50(A)(1), 44-135-70 and 44-135-80.

FIRST CAUSE OF ACTION
(Negligence)

24. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

25. Defendants (or their predecessors in interest or parties with whom they acted in concert), and each of them, are or at times relevant hereto, were miners, manufacturers, processors, importers, converters, compounders and/or retailers of asbestos and asbestos-containing materials.

26. Defendants, acting through their agents, servants, and/or employees have caused certain asbestos and asbestos-containing materials to be placed in the stream of interstate commerce with the result that said asbestos and asbestos-containing materials came into use by or in the vicinity of the Plaintiff.

27. During the course and scope of his employment, Plaintiff was exposed to Defendants' asbestos and asbestos-containing materials, which exposure directly and proximately caused him to develop an illness known and designated as mesothelioma and/or other industrial dust diseases caused by breathing Defendants' asbestos-containing products.

28. The illness and disability and death of the Plaintiff are the direct and proximate result of the negligence, recklessness and willfulness of the Defendants, jointly and severally, in that they produced, sold and otherwise put into the stream of interstate commerce, asbestos and asbestos-containing materials which the Defendants, and each of them, knew were deleterious, poisonous and highly harmful to Plaintiff's body, lungs, respiratory system, skin and health.

29. Defendants owed a duty of care toward the Plaintiff. Defendants breached that duty by their negligent acts and omission.

30. Defendants knew, or, in the exercise of ordinary care, should have known, that the asbestos and asbestos-containing materials were deleterious, poisonous and highly harmful to plaintiffs body, lungs, respiratory system, skin and health. Defendants acted negligently, recklessly and willfully in that the Defendants:

- (a) Failed to advise Plaintiff of the dangerous characteristics of their asbestos and asbestos-containing products;
- (b) Failed or omitted to provide the Plaintiff with the knowledge as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliance, if, in truth, they were in any way able to protect him from being poisoned and disabled as he was by exposure to such deleterious and harmful asbestos-containing materials;
- (c) Failed and omitted to place any warnings or sufficient warnings on their containers of said asbestos and asbestos materials to warn the handlers thereof of the dangers to their health in coming in contact with said asbestos and asbestos materials;

- (d) Failed and omitted to take reasonable precautions or to exercise reasonable care to publish, adopt and enforce a safety plan and a safe method of handling and installing said asbestos and asbestos materials;
- (e) Inadequately warned, if, in fact, they warned at all, persons such as Plaintiff of the dangers to their health in coming in contact with and breathing said asbestos and asbestos-containing materials, even after they knew of the dangers and cancer-causing effects, and up until the present time;
- (f) Did not recommend methods to improve the work environment;
- (g) Did not develop alternative products; and
- (h) Continued to use a known cancer-causing product, to wit: asbestos.

31. At all times relevant, it was feasible for Defendants to have warned plaintiff, tested their asbestos products, designed safer asbestos products and/or substituted asbestos-free products.

32. In the alternative, subsequent to the time the Defendants caused the asbestos products to be sold and distributed, the Defendants knew, or in the exercise of ordinary care, should have known, that asbestos is deleterious, carcinogenic, and harmful to persons using buildings or on jobsites, but nevertheless, the Defendants negligently and recklessly failed and refused to warn and advise the Plaintiff of the dangerous characteristics thereof, and the dangers to the health and welfare of persons coming in contact with and breathing products. Despite possessed with information uniquely available to them relating to the dangerous effects of continued asbestos exposure, the Defendants did not provide that information to the Plaintiff.

33. The Defendants had a post-sale duty to warn, which duty was breached and, as a result, Plaintiff suffered injury and damages as hereinafter described.

34. Plaintiff has suffered continuing and lingering injury to himself due to the Defendants' asbestos fibers previously inhaled. Said fibers, once inhaled, caused repeated and continuing injury to Plaintiff.

35. As a proximate result of the aforesaid acts of the Defendants, the Plaintiff has been damaged as herein set forth.

SECOND CAUSE OF ACTION
(Implied Warranty of Merchantability)

36. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

37. The Defendants, and each of them, impliedly warranted that their relevant products, equipment and asbestos materials were of good and merchantable quality and fit for their intended use.

38. The implied warranty made by the Defendants, and each of them, that the asbestos and asbestos-containing materials were of good and merchantable quality and for the particular intended use was breached and that certain harmful, poisonous and deleterious matter was given off into the atmosphere wherein the Plaintiff carried out his duties working with asbestos and asbestos-containing materials.

39. As a direct and proximate result of the breach of the implied warranty of good and merchantable quality, Plaintiff developed mesothelioma and/or other industrial dust diseases caused by breathing Defendants' asbestos-containing products.

THIRD CAUSE OF ACTION **(Strict Liability)**

40. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

41. During the pertinent times, Plaintiff was injured by his exposure to asbestos fibers associated with the products and equipment manufactured and sold by the Defendants.

42. Defendants' relevant products and equipment was at the time of the harmful asbestos exposure in materially the same condition as when it left the hands of the Defendants.

43. Plaintiff's injury herein occurred because the products and the equipment of the Defendants were in a defective condition unreasonably dangerous to the user.

44. At the time the Defendants, and each of them sold and/or delivered the aforesaid asbestos and asbestos-containing products and at the time said products were used by Plaintiff or by others in his vicinity in the manner and environment intended, they were in a defective condition and were unreasonably dangerous and unfit for their intended use in that they were deleterious, poisonous and highly harmful to Plaintiff. The above was the proximate cause of the severe damages sustained by the Plaintiff as herein set forth.

FOURTH CAUSE OF ACTION **(Punitive Damages)**

45. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

46. During the pertinent times, Defendants had actual knowledge of the dangers to individuals similarly situated to the Plaintiff of asbestos exposure, nevertheless, Defendants deliberately, intentionally and purposefully withheld such

information from Plaintiff, thus denying Plaintiff of the knowledge with which to take necessary safety precautions such as periodic x-rays and medical examinations and avoiding further dust exposure, the specifics of Defendants' intentional acts upon information and belief being as follows:

- (a) Failing to warn users of the need for monitoring due to asbestos exposure;
- (b) Never issuing recall-type letters or notices to users;
- (c) Rejecting advice of corporate officials and others to warn of the hazards of their products; such rejection being motivated by the possibility of adverse effects on profits;
- (d) Delaying the use of asbestos warnings and diluting the content of such warnings for asbestos-related products;
- (f) Failed to advise Plaintiff of medical findings known to Defendants concerning the dangers of asbestos exposure; and
- (g) Suppressed the dissemination of information to Plaintiff concerning the hazards of asbestos exposure.

47. The foregoing deliberate, intentional and purposeful acts of the Defendants were the direct and proximate cause of Plaintiff's injuries and damages hereinafter described, and the Plaintiff is therefore, entitled to compensation and punitive damages.

FIFTH CAUSE OF ACTION

(Conspiracy, Concert of Action – Defendant Metropolitan Life Insurance Company)

48. Plaintiff incorporates by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

49. Beginning in the late 1920's, conspirators including Defendant Metropolitan Life Insurance Company ("Met Life"), as well as Johns-Manville, Raybestos-Manhattan and others, undertook a duty to conduct research on asbestos-related health problems and to inform the public about any health risks that could be associated therewith. In or about 1929, Met Life, through its agents and employees acting within the scope of their agency and employment, including but not limited to Dr. Anthony J. Lanza ("Lanza"), began an investigation of asbestos-related health hazards. In 1935, this study was altered by Lanza, with the full knowledge of Met Life, at the request of and in concert with the asbestos industry in order to wrongly influence the United States Public Health Service, the United States medical community and various state legislatures.

50. Thereafter, Defendant Met Life through the acts and omissions of its employees, most notably Lanza, undertook a series of activities with various members of the asbestos industry including but not limited to Johns-Manville, Raybestos-Manhattan/Raymark Industries, Inc., United States Gypsum, American Brake Blok/Abex, and others to suppress and misrepresent the dangers of exposure to asbestos dust to employees of Met Life's insureds and the general public and the medical community.

51. The conspirators through their agent, Lanza of Met Life, made a concerted effort to discredit and to terminate the studies and experiments of certain scientists who were developing data of profound importance for the area of public health in relation to the cancer hazard which existed for workers and bystanders in the asbestos industry.

52. As a direct and proximate result of Met Life's intentional publication of deceptive and misleading medical data and information, and other conspiratorial acts and omissions, Defendant caused asbestos to be used in the occupational settings from which Plaintiff breathed asbestos dust which resulted in Plaintiff's injuries. Defendant Met Life, through its agents and employees and officers, aided and abetted and gave substantial assistance to Johns-Manville and Raybestos-Manhattan in their tortious selling of asbestos products and voluntarily undertook a duty to warn the United States Public Health Service, the medical community, and others about the danger of asbestos and consciously and negligently misrepresented the dangers of asbestos to the United States Public Health Service, the medical community, and others, all to the ultimate harm of Plaintiff herein.

53. Defendant Met Life rendered substantial aid and assistance to the manufacturers of asbestos-containing products to which Plaintiff was exposed, and such assistance by Met Life aided and abetted the negligence and the marketing of unreasonably dangerous asbestos-containing products by such manufacturers which proximately caused Plaintiff's illness.

54. In both conducting tests and in publishing their alleged results, Met Life failed to exercise reasonable care to conduct or publish complete, adequate and accurate tests of the health effects of asbestos. Met Life also caused to be published intentionally false, misleading, inaccurate and deceptive information about the health effects of asbestos exposure.

55. Plaintiff unwittingly and justifiably relied upon the thoroughness of Met Life's tests and information dissemination, the results of which Met Life published in leading medical journals.

56. As a direct and proximate contributing result of Met Life's failures to conduct or accurately publish adequate tests or disseminate accurate and truthful information, after undertaking to do so; (i) the risk of harm to Plaintiff from asbestos exposure was increased, and (ii) Plaintiff suffered the injuries described herein.

57. In failing to test fully and adequately for the adverse health effects from exposure to asbestos; in delaying the publication of such results; and in falsely editing

such results as were obtained; in suppressing relevant medical inquiry and knowledge about those hazards to promote the sale and distribution of asbestos as a harmless product; and in collaborating with the other Defendants materially to understate the hazards of asbestos exposure, all for its own profit and gain, Met Life acted recklessly, wantonly, and in calculated disregard for the welfare of the general public, including Plaintiff.

58. Additionally and alternatively, as a direct and proximate result of Met Life's actions and omissions, Plaintiff was caused to remain ignorant of all the dangers of asbestos resulting in Plaintiff, his employers and the general public to be unaware of the true and full dangers of asbestos, depriving Plaintiff of the opportunity to decide for himself whether he wanted to take the risk of being exposed to asbestos, denied Plaintiff the opportunity to take precautions against the dangers of asbestos and proximately caused Plaintiff's damages herein.

59. During the relevant time period the Plaintiff was exposed to and did inhale and/or ingest asbestos dust, fibers, and particles, which dust, fibers, and particles came from the asbestos or asbestos-containing products which were mined, milled, manufactured, fabricated, supplied, and/or sold by the Johns Manville and/or Raybestos/Raymark.

60. Defendant, Met Life, together with Manville, Raymark and other persons and entities, known and unknown at times relevant hereto, engages in a conspiracy or concert of action to inflict injury on the Plaintiff, and to withhold, alter, suppress and misrepresent information about the health effects of asbestos exposure. One or more of said conspirators did cause tortious injury to the Plaintiff in the course of or as a consequence of the conspiracy or concert of action. At least the following enumerated acts were undertaken by the conspirators in the course of and in furtherance of the conspiracy or concert of action.

- (a) In 1932, Met Life, through Lanza and others, assisted Manville with medical examinations of over 1,000 employees of Manville's factory in Manville, New Jersey. The report of this study shows that a large percentage of the employees suffered from asbestosis including employees not directly involved in the manufacturing process. This 1932 medical survey was not published in the medical literature and, therefore, was unavailable to scientists studying the issue of asbestos-related disease. Further collaboration between Manville and Met Life continued the cover-up.
- (b) Beginning in approximately 1934, Manville, through its agents, Vandiver Brown and Attorney J.C. Hobart, suggested to Lanza, Associate Director of Met Life, which was then insurer of Manville and Raymark, that Lanza publish a study on asbestosis in which Lanza would affirmatively misrepresent material facts about the health consequences of asbestos exposure. This was accomplished through intentional deletion of Lanza's description of asbestosis as 'fatal' and through other selective editing that affirmatively misrepresent asbestosis as a disease process less serious than it actually is and was known to be. As a result, Lanza's

study was published in the medical literature in this misleading fashion in 1935. The conspirators were motivated, in part, to effectuate this fraudulent misrepresentation and fraudulent nondisclosure by the desire to influence proposed legislation to regulate asbestos exposure and to provide a defense in lawsuits involving Manville, Raymark, and Met Life as insurer. Furthermore, upon information and belief, it is alleged that Met Life, at all times relevant hereto, had substantial monetary investments in Manville and Raymark, among other asbestos product manufacturers and distributors.

- (c) In 1936, the conspirators or some of them entered into an agreement with the Saranac Laboratories. Under this agreement, these conspirators acquired the power to decide what information Saranac could publish about asbestos disease and to control in what form such publications would occur. This agreement gave these conspirators power to affirmatively misrepresent the results of the work at Saranac, and also gave these conspirators power to material facts included in any study. On numerous occasions thereafter, the conspirators exercised their power to prevent Saranac scientists from disclosing material scientific data, resulting in numerous misstatements of fact being made at scientific meetings.
- (d) By November 1948, or earlier, Manville, Met Life (acting through Lanza), Raymark, and others decided to exert their influence to materially alter and misrepresent material facts about the substance of research started by Dr. Leroy Gardner at the Saranac Laboratories beginning in 1936. Dr. Gardner's research involved carcinogenicity of asbestos in mice and also included an evaluation of the health effects of asbestos on humans with a critical review of the then-existing standards of dust exposure for asbestos and asbestos products.
- (e) At a meeting on November 11, 1948, these conspirators and others intentionally and affirmatively determined that Dr. Gardner's work should be edited to specifically delete material facts about the cancer-causing propensities of asbestos and the health effects of asbestos on humans and they determined that only an edited version would be published. These conspirators thereby fraudulently misrepresented the risks of asbestos exposure to the public, in general, and to the class of persons exposed to asbestos, including the Plaintiff.
- (f) As a direct result of influence exerted by the above described conspirators, Dr. Arthur Vorwald published Dr. Gardner's edited work in the Journal of Industrial Hygiene, AMA Archives of Industrial Hygiene and Occupational Health in 1951 in a form that stressed those portions of Dr. Gardner's work that the conspirators wished stressed, but which omitted references to human asbestosis and cancer, thereby fraudulently and affirmatively misrepresenting the extent of the risks. The conspirators affirmatively and deliberately disseminated this misleading Vorwald publication to universities, libraries, government officials, agencies and others.
- (g) Such action constituted a material affirmative misrepresentation of the material facts involved in Dr. Gardner's work and resulted in creating an appearance that

inhalation of asbestos was a less serious health concern than Dr. Gardner's unedited work indicated.

- (h) for many decades, Met Life, individually, jointly and in conspiracy with Manville and Raymark, have been in possession of medical and scientific data, literature, and test reports which clearly indicated that the inhalation of asbestos dust and fibers resulting from the ordinary foreseeable use of said asbestos-containing products and/or machinery requiring or calling for the use of asbestos or asbestos-containing products were unreasonably dangerous, hazardous, deleterious to human health, carcinogenic, and potentially deadly.
- (i) Despite the medical and scientific data, literature and test reports possessed by and available to Met Life, individually and in conspiracy with Manville and Raymark, Fraudulently, willfully and maliciously withheld, concealed and suppressed said medical and scientific data, literature and test reports regarding the risks of asbestosis, cancer, mesothelioma, and other illnesses and diseases from Plaintiff who using and being exposed to Manville or Raymark asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products; caused to be released, published and disseminated medical and scientific data, literature and test reports containing information and statements regarding the risks of asbestosis, cancer, mesothelioma and other illnesses and diseases, which Metropolitan, Manville and Raymark knew were either incorrect, incomplete, outdated and misleading; distorted the results of medical examinations conducted upon workers who were using asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products and being exposed to the inhalation of asbestos dust and fibers by falsely stating and/or concealing the nature and extent of the harm which workers suffered; and failed to adequately warn the Plaintiff of the dangers to which he was exposed when they knew of the dangers.
- (a) by the false and fraudulent representations, omissions, failures, and concealments set forth above, Met Life, Manville and Raymark, individually, jointly, and in conspiracy with each other, intended to induce the Plaintiff to rely upon said false and fraudulent representations, omissions, failures, and concealments, to continue to expose themselves to the dangers inherent in the use of and exposure to their asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products. Said misrepresentations were false, incomplete, and misleading and constitute negligent misrepresentations as defined by Sections 311 and 522 of the Restatement (Second) of Torts.

61. Plaintiff reasonably and in good faith relied upon the false and fraudulent representations, omissions, failures, and concealments made by Met Life, Manville, and Raymark regarding the nature of their asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products.

62. As a direct and proximate result of the conspiracy and concert of action between Met Life, Manville and Raymark, the Plaintiff has been deprived of the opportunity of informed free choice and connection with the use of and exposure to Manville and Raymark's asbestos and asbestos-containing products, and therefore continued to work with and be exposed to the co-conspirator corporation's asbestos and asbestos-containing products and as a result contracted asbestos-related diseases and other conditions, and/or aggravated pre-existing conditions, as a result of which the Plaintiff has been damaged.

DAMAGES

63. As a result of the development of mesothelioma caused by breathing dust from defendants' asbestos-containing products, Plaintiff has suffered and sustained very serious injuries to his person requiring medical treatment.

64. Plaintiff has further suffered great pain and mental anguish as a direct result of the aforesaid injuries.

65. Plaintiff believes that his injuries and illnesses are permanent in nature and that he will be forced to suffer same for the remainder of his life, that his enjoyment of life has been greatly impaired and, further, that his expected life span has been greatly shortened. Plaintiff died on August 23, 2013 due to mesothelioma.

66. Plaintiff alleges that as a result of the aforesaid illnesses, he was forced to incur large amounts of medical expenses by way of doctor and drug bills and verily believes prior to death he incurred additional expenses in an effort to treat his illnesses as aforesaid, all to Plaintiff's damage, compensatory and punitive in amounts to be determined by the trier of fact.

67. As a direct and proximate result of the Defendants' conduct as alleged above, the Plaintiff has suffered a dramatic reduction of his life expectancy, died early and incurred great mental and physical pain and suffering, sustained lost wages and lost earning capacity, incurred medical expenses, and his enjoyment of life was greatly impaired, which damages are continuing in nature.

68. As a result of the development of mesothelioma and other industrial dust disease caused by breathing defendants' asbestos-containing products, plaintiff suffered and sustained very serious injuries to his person requiring medical treatment and ultimately death.

69. Plaintiff alleges that as a result of the aforesaid illnesses, decedent suffered conscious pain and suffering, medical and hospital expenses, personal injuries, and trauma, suffered by decedent prior to his death, and funeral expenses and other compensatory damages, and is entitled to punitive damages in an amount to be determined by the trier of fact. Plaintiff alleges entitlement to all damages allowed under the Survival Act, §15-5-90, S.C. Code of Laws.

70. Plaintiff further alleges that as a result of the aforesaid death of decedent, decedent's beneficiaries have and will suffer pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, deprivation of use and comfort of decedent's society, all both past and future; and funeral expenses, all to the beneficiaries' actual damages, and further are entitled to punitive damages in an amount to be determined by the trier of fact. Plaintiff alleges entitlement to all damages allowed under the Wrongful Death Act, §15-51-10, S.C. Code of Laws.

WHEREFORE, Plaintiff prays judgment, joint and several, against the Defendants for compensatory and punitive damages in amounts to be determined by the trier of fact, and costs of this action.

PRAYER FOR RELIEF

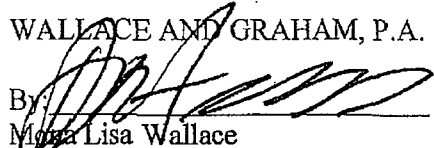
WHEREFORE, the Plaintiff prays to ask that this Court:

- A. Award the Plaintiff actual and compensatory damages, in an amount to be determined at trial, for the wrongful, negligent, reckless and willful acts of the Defendants;
- B. Award the Plaintiff pre-judgment and post-judgment interest to the extent allowable by law;
- C. Award the Plaintiff punitive damages to the extent allowable by law; and
- D. Award the Plaintiffs' attorney fees and costs to the extent allowable by law; and
- E. All damages allowed pursuant to the Survival and Wrongful Death Act;
- F. For such other and further relief as may be just and proper.

A JURY IS RESPECTFULLY DEMANDED TO TRY THESE ISSUES.

Respectfully submitted, this the 20th day of November, 2013.

WALLACE AND GRAHAM, P.A.

By: 

Mona Lisa Wallace

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Attorneys for the Plaintiff

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Plaintiffs' Second Amended Complaint was served via Electronic Mail and US Mail to the following parties on November 20, 2013:

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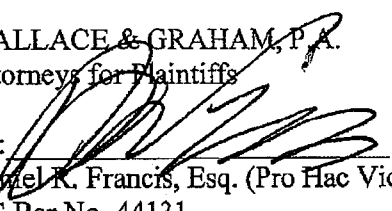
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STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

C/A NO: 13-CP-46-00368

Steven R. Edwards, Individually)
And as Personal Representative of)
the Estate of Steven Redfearn)
Stewart,)

Plaintiff)

vs.)

Albany International Corp., as)
successor in interest to Mount)
Vernon Group d/b/a Mount Vernon)
Dryer Fabrics and to Geschmay)
Corporation, et al.,)

Defendants)

**AMENDED ANSWER AND AFFIRMATIVE
DEFENSES OF DEFENDANTS SCAPA
WAYCROSS, INC., TO PLAINTIFF'S
SECOND AMENDED COMPLAINT**

FILED-RECEIVED
2013 DEC 18 PM 2:56
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

COMES NOW Defendant, SCAPA Waycross, Inc. (hereinafter referred to as SCAPA) answering the Plaintiff's Second Amended Complaint alleges and says as follows:

1. This Defendant denies each and every allegation of the Second Amended Complaint which is not hereinafter specifically admitted.

BACKGROUND FACTS

2. Answering Paragraph 1 of the Second Amended Complaint, this Defendant denies the preface to the Second Amended Complaint with regard to the Plaintiff's citizenship and residency for lack of sufficient information.

3. Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the Second Amended Complaint pertain to a Defendant other than this Defendant and this Defendant is not required to respond to those allegations. To the extent that a response is required, those allegations are denied.

4. Defendant admits only that it is a foreign corporation and denies the remaining

allegations contained in Paragraph 12.

5. Paragraphs 13, 14, and 15 of the Second Amended Complaint pertain to a Defendant other than this Defendant and this Defendant is not required to respond to those allegations. To the extent that a response is required, those allegations are denied.

6. This Defendant denies the allegations contained in Paragraphs 16, 17, 18, 19, 20, 21 thereof, 22 and 23 as they relate to this Defendant and demands strict proof thereof.

AS TO THE FIRST CAUSE OF ACTION
(Negligence)

7. In response to the allegations of Paragraph 24, this Defendant repeats, realleges and incorporates herein by reference its responses to the preceding paragraphs as if fully set forth herein.

8. This Defendant denies the allegations of Paragraphs 25, 26, 27, 28, 29, 30, including all subparagraphs thereof, 31, 32, 33, 34 and 35, of the Second Amended Complaint.

AS TO THE SECOND CAUSE OF ACTION
(Implied Warranty of Merchantability)

9. In response to the allegations of Paragraph 36, this Defendant repeats, realleges and incorporates herein by reference its responses to the preceding paragraphs as if fully set forth herein.

10. This Defendant denies the allegations of Paragraphs 37, 38 and 39.

AS TO THE THIRD CAUSE OF ACTION
(Strict Liability)

11. In response to the allegations of Paragraph 40, this Defendant repeats, realleges and incorporates herein by reference its responses to the preceding paragraphs as if fully set forth herein.

12. This Defendant denies the allegations of Paragraphs 41, 42, 43 and 44 of the Second Amended Complaint.

AS TO THE FOURTH CAUSE OF ACTION
(Punitive Damages)

13. In response to the allegations of Paragraph 45, this Defendant repeats, realleges and incorporates herein by reference its responses to the preceding paragraphs as if fully set forth herein.

14. This Defendant denies the allegations of Paragraph 46, including all subparagraphs thereof, and Paragraph 47 of the Second Amended Complaint.

AS TO THE FIFTH CAUSE OF ACTION
(Conspiracy, Concert of Action – Defendant Metropolitan Life Insurance Company)

15. In response to the allegations of Paragraph 48 of the Second Amended Complaint, this Defendant repeats, realleges and incorporates herein by reference its responses to the preceding paragraphs as if fully set forth herein.

16. Paragraphs 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, including all subparagraphs, 61 and 62 of the Second Amended Complaint pertain to a Defendant other than this Defendant and this Defendant is not required to respond to those allegations. To the extent that a response is required, those allegations are denied.

DAMAGES

17. This Defendant denies the allegations of Paragraphs 63, 64, 65, 66, 67, 68, 69 and 70 of the Second Amended Complaint related to damages and denies any claim for relief.

PRAYER FOR RELIEF

18. This Defendant denies the allegations of all Paragraphs related to damages and denies any claim for relief.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

19. This Defendant would show that the claims set forth in the Second Amended Complaint are barred by the applicable statutes of limitations and statutes of repose in this state, as well as in any other states where it may be claimed that the Plaintiff was exposed to any products allegedly manufactured or supplied by this Defendant's predecessor.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

20. That the Plaintiff was not in privity with this Defendant's predecessor and Plaintiff may not rely upon any warranties which may have been implied or imposed by law upon this Defendant; this Defendant affirmatively states that it breached no warranty.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

21. That if the Plaintiff sustained any injuries or illness as set forth in the Second Amended Complaint, the same were due to his own willful, wanton, reckless, careless and negligent acts and conduct which combined and concurred with any willful, wanton, reckless or negligent acts and conduct on the part of this Defendant's predecessor (which is specifically denied) to bring about the said illness or injuries, if any, as the proximate cause thereof and without which the same would not have occurred.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

22. That the Plaintiff had actual knowledge of and voluntarily assumed the risk incident to his employment in repeated use and exposure to asbestos or the products and processes involving

the use of asbestos or asbestos related insulation materials which were known to him to be dangerous and further voluntarily adopted a dangerous, willful, wanton, reckless, careless, and negligent and hazardous method or manner of performing the task assigned to him when safer methods of performing the tasks assigned were available, and he thereby assumed the risk of injury in so performing his undertaking in such a hazardous and dangerous manner and that he had actual knowledge of the same perils, if any, or the imminence of danger, if any, which were of such a nature that a prudent person would not have incurred the risk and the Plaintiff thereby assumed the risk of exposing himself in working in close proximity to asbestos or the products and processes involving asbestos or asbestos related insulation materials.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

23. That the Plaintiff failed to properly use the product or products in question and abused the product or products and subjected it to abnormal use at the time or times and places alleged in the Second Amended Complaint, thereby rendering his conduct or misconduct the sole proximate cause or an intervening or superseding cause of the his alleged damages.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

24. That if the Plaintiff used the product or products manufactured or supplied by this Defendant's predecessor (which is denied) the same was used for a purpose not intended by this Defendant's predecessor and contrary to any instructions or normal method of using the same in such a way as to constitute his conduct by omission and commission as the sole proximate cause or an intervening or superseding cause of the his alleged damages.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

25. That if the Plaintiff sustained any injuries or damages as set forth in the Second Amended Complaint, which is denied, the same were due to and caused solely by the acts and/or omissions of recklessness, willfulness and negligence of the Plaintiff's employer and that the acts and/or omission of recklessness, negligence, willfulness and wantonness upon the part of his employer were the sole and proximate cause of the Plaintiff's injuries and damage, if any.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

26. That if the Plaintiff sustained any injuries or damages as set forth in the Second Amended Complaint, which is denied, the same were due to and caused solely by the acts and/or omissions of recklessness, willfulness and negligence of the Plaintiff's labor union, and that the acts and/or omissions of recklessness, negligence, willfulness and wantonness upon the part of the labor union were the sole and proximate cause of the Plaintiff's injuries and damages, if any.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

27. That if the Plaintiff was injured by any products supplied or manufactured by this Defendant's predecessor, which is denied, the Plaintiff discovered any defect in the products and was aware of the dangers thereof but nevertheless proceeded unreasonably to make use of the same and is therefore barred from recovery by South Carolina Code of Laws Section 15-73-20 (1976).

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

28. That if the Plaintiff used any product or products manufactured or supplied by or installed by this Defendant's predecessor, it was while employed by the Defendant or a predecessor company. Therefore, the Plaintiff cannot maintain this tort action against this Defendant for the reason that the South Carolina Workmen's Compensation Act provides that it is the sole and exclusive remedy for injuries or death sustained by an employee when the employer and employee are governed under the terms of that Act, South Carolina Code Section 42-1-540. This Defendant also raises the same defense, workmen's compensation, if applicable, under the laws of any other state which may apply.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

29. That the alleged injuries to the Plaintiff occurred or were allegedly sustained prior to the enactment of Section 15-73-10 of the South Carolina Code of Laws (1976), and the Plaintiff therefore is prohibited by law from asserting a cause of action based on strict liability for either actual or punitive damages.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

30. That the Plaintiff did not notify this Defendant's predecessor within a reasonable period of time after he discovered or should have discovered the alleged defect in the products, and therefore is barred from recovery.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

31. This Defendant states that at all times alleged in the Second Amended Complaint the products alleged to have caused Plaintiff's injuries were manufactured, supplied and/or installed in compliance with reasonably precise government specifications and contracts and conform to those specifications and contracts. Said specification and contract requirements were for a specific intended use by the United States government and there were not known or perceived dangers in the use of said materials that were not equally known and perceived by the United States government.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

32. This Defendant alleges that by virtue of the doctrine of judicial estoppel the Plaintiff is precluded from taking a position inconsistent with one taken with respect to the same facts in earlier litigation and are, therefore, precluded from alleging the material facts necessary to state a cause of action against this Defendant.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

33. In the event it is determined that any product manufactured or sold, by this

Defendant's predecessor was dangerous, which danger is specifically denied, this Defendant's predecessor was unaware of such danger as it would apply in any conceivable use of the products by the Plaintiff; furthermore, the discovery of such danger was beyond the state of the art at the time such product or products were manufactured, distributed, sold, or installed. Further, such products were manufactured, distributed, sold, and installed in conformity with the state of the art and/or prevailing industry standards at the time.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

34. This Defendant states that if the Plaintiff was exposed to any asbestos containing products, said products at the time were manufactured in conformity with federal and state regulations, standards, specifications and laws. Consequently, recovery by the Plaintiff herein is barred.

**FURTHER ANSWERING AND FOR A FURTHER
AFFIRMATIVE DEFENSE, THIS
DEFENDANT ALLEGES:**

35. Plaintiff's employer was, and is sophisticated user, and knew independently or should have known of any danger or hazard associated with the use of a product containing asbestos and of exposure to asbestos dust or fibers. Furthermore, Plaintiff's employer was warned of the danger or hazard associated with the use of asbestos-containing products and that Plaintiff's employer failed to rely upon such warning resulting in alleged damages to Plaintiff due to Plaintiff's employer's acts and omissions and failure to act as a sophisticated user.

WHEREFORE, having fully answered the Plaintiff's Second Amended Complaint, this Defendant prays that it be dismissed.

PIERCE, HERNS, SLOAN & WILSON, LLC

The Blake House

321 East Bay Street

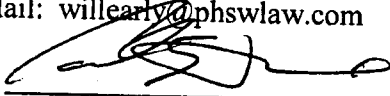
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BY: 

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Carl E. Pierce, II (7946)

Counsel for the Defendant Named Herein

12/16, 2013
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 16 day of December 2013

Brenda Casey

STATE OF SOUTH CAROLINA

COUNTY OF YORK

STEPHEN R. EDWARDS, Individually and as
Person Representative of the Estate of STEVEN
REDFEARN STEWART,

☐ Plaintiff

v.

Albany International Corp., Et Al.

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2013-CP-10-00368

MOTION INFORMATION FORM
AND COVER SHEET

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Address:
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525 North Main Street, Salisbury, NC 28144
phone: 704-633-5244 fax: 704-633-9434
e-mail: bgraham@wallacegraham.com other:

Defendant's Attorney:
William P. Early, Bar No. 15657
Address:
Pierce, Hems, Sloan & Wilson, LLC
321 East Bay Street Charleston, SC 29401
phone: 843 722-7733 fax: 843 722-7732
e-mail: willearly@phswlaw.com other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Mtn to Admit BK Trust Forms

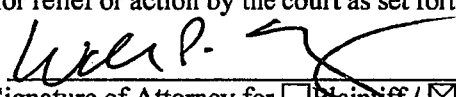
Estimated Time Needed: 30 Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion --

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

December 15, 2017

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached
order.

☐ Other:

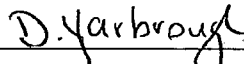
JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by:



Date Filed:

☒ MOTION FEE COLLECTED: \$25.00

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA

COUNTY OF YORK

STEPHEN R. EDWARDS, Individually and as
Personal Representative of the Estate of Steven
Redfearn Stewart,

Plaintiff,

v.

ALBANY INTERNATIONAL CORP., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A NO.: 13-CP-46-00368

FILED-RECEIVED
2017 DEC 18 AM 10:12
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

DEFENDANT SCAPA WAYCROSS, INC.'S,
MOTION IN LIMINE TO ADMIT BANKRUPTCY CLAIM FORMS AS
ADMISSIONS OF A PARTY-OPPONENT

Defendant Scapa Waycross, Inc. ("Scapa" or "Defendant"), by and through the undersigned counsel, files this Motion in Limine and shows this Court as follows:

RELEVANT FACTS

This lawsuit, originally filed on February 5, 2013, by Mr. Steven Redfearn Stewart ("Decedent"), is based upon allegations that Scapa, among other defendants, manufactured or supplied asbestos-containing products that were present at Decedent's jobsite, the Bowater paper mill in Rock Hill, South Carolina. Decedent alleged that he worked in various positions, from a utility worker through a machine tender, on the number one paper machine from 1963 until 2002. Decedent passed away on August 23, 2013, and the claim is now being pursued by his adult son, Stephen R. Edwards ("Plaintiff"). On or around June 22, 2015, Plaintiff's counsel (on behalf of Plaintiff) made various claims with bankruptcy trusts established by other parties who, but for their status as trusts for bankrupt entities, would

have also been defendants in this matter.¹ In the forms, Plaintiff claims that the products made by these now-bankrupt companies contributed to or caused Decedent's illness which ultimately led to his passing.

Plaintiff made claims against the following bankruptcy trusts:

1. Plaintiff claims that Leslie Controls Inc. is a party responsible for Decedent's death. (Ex. 1) Here, Plaintiff claims that Decedent was exposed to asbestos while performing or in the immediate vicinity of other worker(s) performing installation, maintenance or removal of Leslie Valves. This claim was filed on June 22, 2015.
2. Plaintiff has also made a claim with APG, the claims processor for the A.P. Green Trust. (Ex. 2). By way of this claim, Plaintiff asserts that Decedent was exposed to A.P. Green products at the Bowater facility in Rock Hill, South Carolina when he was a paper machine operator. In this claim, it is alleged that Plaintiff's Decedent was exposed to refractory and costable products. As such, Plaintiff claims that A.P. Green is a party responsible for Decedent's death. This claim was filed on June 22, 2015.

Defendant submits that these admissions contained within the bankruptcy forms are relevant admissions of a party-opponent and, as such, should be allowed into evidence during the trial of this case.

ARGUMENT AND CITATION TO AUTHORITY

The claim forms are admissions of a party-opponent. Under South Carolina's Rule of Evidence 803 (d)(2), a statement is not hearsay if:

¹ In addition, Plaintiff has provided Defendant with approximately 37 partially filled out bankruptcy trust claim forms that he had also filed. Plaintiff has indicated that the partially filled out bankruptcy trust claims were only made as "placeholder" claims to avoid a statute of limitations issue. Scapa has filed a Motion to Compel Complete Bankruptcy Forms so that evidence of additional exposures is available at trial and reserves the right to supplement this motion with newly discovered evidence.

The statement is offered **against a party** and is (A) **the party's own statement in either an individual or a representative capacity**, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

South Carolina's courts have held time and again that admissions of party-opponents that are relevant are admissible. See generally, State v. Beck, 536 S.E.2d 679, 682 (2000) (holding that the defendant's statement which provided financial motive for his crime was admissible against him at trial); State v. Tucker, 512 S.E.2d 99, 105 (1999) (holding that the defendant's testimony from a previous trial was admissible as an admission by party-opponent).

Furthermore, whether this Court considers Plaintiff to be the "party" in this case or merely the "representative" of Decedent's estate, his admissions on the bankruptcy claim forms must be admissible in this action. The courts of this state have specifically held that admissions of the representative of a party are admissible against that party at trial. Jackson v. Speed, 486 S.E.2d 750, 758 (1997). In Jackson, the plaintiffs sued the defendants for alleged misrepresentations the defendants made during negotiations for the sale of a 1969 Jaguar automobile. The defendants, William Broome and his son, employed Robert Speed as a salesperson during the sale of the car to the plaintiffs. While negotiating, Speed represented to the plaintiffs that the Jaguar was "in excellent condition" and "had never been wrecked." Id. at 753. Broome and Speed also told the plaintiffs that the car only had 87,000 actual miles on it. Id. The plaintiffs agreed to buy the vehicle for \$20,000 upon assurances that it would "be like a new vehicle" after the Broomes restored it. Id.

After the restoration of the car, it was delivered to the plaintiffs and they paid \$20,000 in cash for it. After receiving the car, the plaintiffs then had the car checked out and

discovered that it had, in fact, been wrecked, that it had more than 87,000 miles, and that the car had not been restored properly as promised. Id. at 754. At trial, the plaintiffs testified to the litany of assurances given to them by both the Broomes and Speed (who was a defendant but was never served with the lawsuit).

On appeal, the defendants claimed that the statements made by Speed should not have been admitted because they were hearsay. The Court rejected this argument and held that “as an agent for [defendants], Speed’s statements were admissible as admissions of a party-opponent....Speed was an agent authorized to speak for them about this vehicle. Thus, any statements made by him about the vehicle during the transaction were admissible.” Id. at 758.

Just as in Jackson, any statements made by Plaintiff must be admissible as an admission of a party-opponent. His statements on the bankruptcy claim forms are not hearsay and are relevant to the determinations in this case. Plaintiff has asked this Court to determine whether exposure to Scapa’s dryer felts contributed to Decedent’s illness. Thus, his admission (as the representative of Decedent’s estate) that *other* products actually caused Decedent’s illness is relevant as well to this court’s inquiry.² For the foregoing reasons, his admissions within the bankruptcy claim forms must be admitted.

WHEREFORE Defendant Scapa Waycross, Inc., prays that its motion be GRANTED and the claims forms be admitted into evidence.

This the 15th day of December, 2017.

² See Rule 402, SCRE stating “All relevant evidence is admissible...”

PIERCE, HERNS, SLOAN & WILSON, LLC

The Blake House

321 East Bay Street

Post Office Box 22437

Charleston, South Carolina 29413

PH: (843) 722-7733

Fax: (843) 722-7732

E-Mail: willearly@phswlaw.com

BY: 

William P. Early (15657)

Counsel for the Defendant Named Herein

12/15, 2017
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 15th day of December, 2017

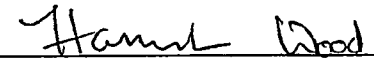


EXHIBIT 1

MFR

Print

Leslie Controls Inc. Asbestos Trust Claim Form

Injured Party ID	Claim Sequence/NBR	Claim Status	Claim Value	Input Date
38242	1	OPEN	\$100,000.00	8/22/2015

Injured Party

Part 1.4: Law Firm Plaintiff Attorney WILLIAM M. GRAHAM ☒		Part 2: Diagnosed Disease Disease Claimed MESOTHELIOMA ☒																					
Part 1.1 Claim Type ☒ Leslie Powerhouse and Below-Deck Naval ☐ Leslie Construction and Maintenance Leslie Powerhouse and Below-Deck Naval Station Claim: The Injured Party performed or was in the immediate vicinity of a worker who performed: ☒ Installation, maintenance or removal of Leslie valves ☐ Installation, maintenance or removal of other control equipment manufactured by Leslie identified as: ☐ regularly employed in a Leslie Powerhouse, identified as: ☐ In a US shipyard working on naval vessel, identify shipyard(s) and/or vessel(s): ☐ serving at an assigned Below-Deck Naval Station, identified as: ☐ other (please specify):		First Diagnosis 10/1/2012 ☐ Filed pre 07/12/10 - Physical Exam Report																					
Part 1.5 Review Type ☒ Expedited Review ☐ Individual Review Part 1.5(b) Review Sub-Type ☐ Secondary Exposure ☐ Extraordinary Claim ☐ Exigent Health Claim ☐ Exigent Hardship Claim ☐ Foreign Claim																							
Part 1.1: Injured Party <table border="1"> <tr> <td>First Name</td> <td>Middle</td> <td>Last Name</td> <td>Social</td> <td>Date of Birth</td> </tr> <tr> <td>STEVEN</td> <td>REDFEARN</td> <td>STEWART</td> <td></td> <td></td> </tr> <tr> <td colspan="5">Foreign ID:</td> </tr> </table>				First Name	Middle	Last Name	Social	Date of Birth	STEVEN	REDFEARN	STEWART			Foreign ID:									
First Name	Middle	Last Name	Social	Date of Birth																			
STEVEN	REDFEARN	STEWART																					
Foreign ID:																							
Gender: ☒ Male ☐ Female Is Injured Party Living? Yes ☐ No ☒ Date of Death: 8/20/2013																							
Part 1.2: Personal Rep; If Injured Party is Deceased <table border="1"> <tr> <td>First Name</td> <td>Middle</td> <td>Last Name</td> </tr> <tr> <td>STEPHEN</td> <td>IR</td> <td>EDWARDS</td> </tr> </table>				First Name	Middle	Last Name	STEPHEN	IR	EDWARDS														
First Name	Middle	Last Name																					
STEPHEN	IR	EDWARDS																					
Part 3: Statute of Limitations Current Residence/Lawsuit Filed <table border="1"> <tr> <td>State</td> <td>City</td> <td>County</td> <td>State</td> </tr> <tr> <td>SC ☒</td> <td>York</td> <td>York</td> <td>SC ☒</td> </tr> <tr> <td colspan="2">Name of Court</td> <td colspan="2">Date Filed</td> </tr> <tr> <td colspan="2">York County Common Pleas</td> <td colspan="2">2/6/2013</td> </tr> <tr> <td colspan="4">Docket Number</td> </tr> </table>				State	City	County	State	SC ☒	York	York	SC ☒	Name of Court		Date Filed		York County Common Pleas		2/6/2013		Docket Number			
State	City	County	State																				
SC ☒	York	York	SC ☒																				
Name of Court		Date Filed																					
York County Common Pleas		2/6/2013																					
Docket Number																							
Tolling Agreement/Final Judgement? ☐ Yes? ☒ No? ☐ Yes? ☒ No? Receive Money/Leslie Release? ☐ Yes? ☒ No? ☐ Yes? ☒ No?																							

Occupational Exposure

Job Sites

No jobsite can be found in the system.

Significant Occupational Exposure (Check all that apply)

W&G - Stewart 002481

☐ Handled raw asbestos fibers on a regular basis		
☐ Fabricated asbestos-containing products so that the Injured Party in the fabrication process was exposed on a regular basis to raw asbestos fibers		
☐ Altered, repaired or otherwise worked with an asbestos-containing products such that the Injured Party was exposed on a regular basis to asbestos fibers		
☒ Was employed in an industry and occupation such that the Injured Party worked on a regular basis in close proximity to workers engaged in the activity of handling, fabricating, altering, or repairing asbestos-containing products		
Injured Party's Exposure Through OEP		
Relationship	From	To
First Name	Middle	Last Name
Description of Exposure		
Part 1: Certification Completed		
☒ Yes? ☐ No?		
Part 7: Certification Completed		
This claim is certified by (check one and check capacity in which Certification is provided)		
☒ Yes? ☐ No?		
☐ Injured Party ☐ Official Representative ☒ Attorney		
☐ On personal knowledge		
☐ affidavit or sworn statement attached		
I have reviewed the information submitted on this claim form and all documents submitted in support of this claim. To the best of my knowledge, under penalty of perjury, the information submitted is accurate and complete in all material respects.		
Signature of the Injured Party, Attorney or Official Representative		
William M. Graham		
Attorney certifies that this claim is filed on behalf of the Claimant Representative acting for the Injured Party and that the Claimant Representative has official capacity to file this claim based on the operation of law.		
William M. Graham		

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W&O - Stewart 002482

EXHIBIT 2

MFR claims

APG Claim Form

Lankford, Susan

Claim Form	Review	Injured Party ID	Claim Seq No	Claim Status	Input Date	Value
		196993	1	OPEN	06/22/2015	\$131,040.00

Section 1: Review of Claim

Review Type: ☒ Expedited Review ☐ Individual Review ☐ Paid USG/A.P. Green ClaimReview Sub Type: ☐ Secondary Exposure ☐ Foreign ☐ Exigent ☐ Extraordinary

Section 2: Injured Party Information

Injured Party Name: Last Name First Name Middle Name Suffix
STEWART STEVEN REDFEARN

Social Security No:

Date of Birth:

Gender: ☒ Male ☐ Female

Date of Death:

Death Asbestos Related: ☒ Yes ☐ No

Address:

Mailing Address: City State Zip

Daytime Telephone:

Section 3: Law Firm / Attorney Information

Plaintiff Attorney:

W&G - Stewart 002331

Section 4: Personal Representative

Personal Rep. Name:	Last Name	First Name	Middle Name	Suffix
	EDWARDS	STEPHEN	R	

Social Security No:

Capacity:

Address:

Mailing Address:

City	State	Zip
	VA	

Daytime Telephone:

Official Representative Certification

Certificate of Official Capacity or other estate documentation must be enclosed if available.

If no Certificate of Official Capacity or other estate documentation is available per state law, attorney must provide official representative certification by signing below:

Attorney certifies that this claim is filed on behalf of the Official Representative acting for the Injured Party and that the Official Representative has official capacity to file this claim based on the operation of law.

Signature of Attorney:

Section 5: Asbestos Related Injury

Disease:

Date of Diagnosis:

Please check this box if the Injured party filed a claim against an APG Entity or any other defendant in the tort system prior to the Petition Date (February 12, 2002) and has available a report of a diagnosing physician engaged by the Injured party or his or her law firm who conducted a physical examination of the holder as described in Section 6.7(a)(1)(A) of the TDP, or if the Injured party has filed such medical evidence and/or diagnosis of the asbestos-related disease by a physician not engaged by the Injured party or his or her law firm who conducted a physical examination with another asbestos personal injury settlement trust that requires such evidence, without regard to whether the claimant or the law firm engaged the diagnosing physician.

Such medical evidence must be provided to the Trust (except for Paid USGA.P. Green Claims under Section 7).

Pre 2/12/2002 Physical Exam: ☐

W&G - Stewart 002332

Section 6: Asbestos Litigation and Claims History**1. Lawsuit Filed**Asbestos-related lawsuit filed: ☒ Yes ☐ No1a. APG Named as Defendant: ☐ Yes ☒ No

1b. Filing Date: 02/08/2013

1c. State: SC - SOU

1d. Court: YORK COUNTY COURT

1e. Case #: 2013-CP-48-00388

1f. Has the injured party ever received money from an APG Entity or its insurers regarding this suit?: ☐ Yes ☒ No Amount: \$1g. Did the injured party sign a release releasing an APG Entity regarding this suit?: ☐ Yes ☒ No**2. Final Judgment**Judgment Entered: ☐ Yes ☒ No Judgment Parties:**3. Jurisdiction**

Jurisdiction State: SC - SOU

- Jurisdiction:
- ☐ The state/jurisdiction in which the injured party was domiciled at the time of the diagnosis.
 - ☐ The state/jurisdiction in which the injured party was domiciled at the time of filing this claim form.
 - ☒ A state/jurisdiction in which the injured party was exposed to an asbestos-containing product for which an APG Entity has legal responsibility.

4. Settlement Claim

Has a claim on behalf of the injured party ever been submitted to APG pursuant to an administrative settlement agreement?

Settlement Claim Filed: ☐ Yes ☒ No Date of Submission:**5. Tolling Agreement**

Was the injured party or claimant a party to a tolling agreement with APG?

Tolling Agreement: ☐ Yes ☒ No Begin Date: End Date:**6. Pre-Petition Claim**

W&G - Stewart 002333

☐ Yes ☒ No

Section 8: Occupational Exposure to Asbestos Products**Part 1: Exposure****Exposure Records**Jobsite Type: Other APG Exposure ☐

Jobsite (Minimum 3 letters):

Bowater

City:

Rock Hill

State:

SC - SOUT

Country:

Industry:

Non-Asbestos Products Manufacturing

Occupation:

Operator

Date From:

11/05/1983

Date To:

12/31/2002

APG Post 12/5/80:

Exposure:

☒ Yes ☐ No

Products:

Refractory & Castable Products

Exposure Description:

Claimant was a paper machine operator

Description of Significant Occupation Exposure at this jobsite

- ☐ Injured party handled raw asbestos fibers on a regular basis.
- ☐ Injured party fabricated asbestos-containing products so that the injured party in the fabrication process was exposed on a regular basis to raw asbestos fibers.
- ☐ Injured party altered, repaired, or otherwise worked with an asbestos-containing product such that the injured party was exposed on a regular basis to asbestos fibers.
- ☒ Injured party was employed in an industry and occupation such that the injured party worked on a regular basis in close proximity to workers engaged in one or more of the above three activities.

W&G - Stewart 002334

Section 13: Certification

If signed by the claimant, I (the claimant) have reviewed the information submitted on this claim form and all documents submitted in support of this claim. To the best of my knowledge, under penalty of perjury, the information submitted is accurate and complete.

If signed by the claimant's counsel, I (counsel to the claimant) certify that the information and materials with respect to this claim are being submitted pursuant to and subject to the provisions of Rule 11 of the Federal Rules of Civil Procedure.

Signature:

Relationship:

STATE OF SOUTH CAROLINA

COUNTY OF YORK

STEPHEN R. EDWARDS, Individually and as
Person Representative of the Estate of STEVEN
REDFEARN STEWART,

☐ Plaintiff

v.

Albany International Corp., Et Al.

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2013-CP-10-00368

MOTION INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney:
William Graham, Bar No.
Address:
Wallace & Graham, PA
525 North Main Street, Salisbury, NC 28144
phone: 704-633-5244 fax: 704-633-9434
e-mail: bgraham@wallacegraham.com other:

Defendant's Attorney:
William P. Early, Bar No. 15657
Address:
Pierce, Hems, Sloan & Wilson, LLC
321 East Bay Street Charleston, SC 29401
phone: 843 722-7733 fax: 843 722-7732
e-mail: willearly@phswlaw.com other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

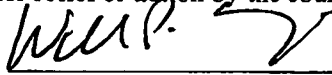
Nature of Motion: Scapa Waycross, Inc.'s Motion to Exclude Plaintiff's Expert Testimony on Specific Causation (Refile)

Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached
☐ Form Motion --

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

December 15, 2017
Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by:



Date Filed:

☒ MOTION FEE COLLECTED: <u>\$25⁰⁰</u>
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA

COUNTY OF YORK

STEPHEN R. EDWARDS, Individually and as
Personal Representative of the Estate of Steven
Redfeam Stewart,

Plaintiff,

v.

ALBANY INTERNATIONAL CORP., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A NO.: 13-CP-46-00368

FILED-RECEIVED
2017 DEC 18 AM 10:09
DAVID H. HAMILTON
C.C. CLERK
YORK COUNTY, SC

**Scapa Waycross, Inc.'s Motion to Exclude
Plaintiff's Expert Testimony on Specific Causation**

The Court should exclude Plaintiff's expert testimony on specific causation because they are relying on a theory that has been rejected by dozens of courts as junk science.

Plaintiff's Proposed Expert Testimony on Specific Causation

A plaintiff in a toxic tort case must prove both general causation and specific causation. *In re Bausch & Lomb Inc. Contacts Lens Solution Prod. Liab. Litig.*, 693 F. Supp. 2d 515, 518 (D.S.C. 2010). General causation is whether a substance is capable of causing a particular injury or condition in the general population. *Id.* Specific causation is whether a substance caused a particular individual's injury. *Id.* In a case like this one, specific causation addresses the question whether the plaintiff's disease was in fact caused by his claimed exposure to a particular asbestos-containing product.

To establish the specific-causation element of his claim, the Plaintiff intends to offer expert testimony that is based on the cumulative-exposure theory, also known as the any-exposure or every-exposure theory. Courts around the nation have rejected and even ridiculed this theory, including in cases where it was espoused by the experts in this case. *See Betz v. Pneumo Abex, LLC*,

44 A.3d 27 (Pa. 2012) (excluding Dr. Maddox's specific-causation testimony based on the cumulative-exposure theory); *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 847 (E.D.N.C. 2015) (excluding Dr. Brody's specific-causation testimony based on the cumulative-exposure theory); *Krik v. Crane Co.*, 76 F. Supp.3d 747 (N.D. Ill. 2014) (excluding Dr. Frank's specific-causation testimony based on the cumulative-exposure theory).

The gist of the cumulative-exposure theory is that every exposure to asbestos that is above the naturally occurring levels of asbestos in ambient air contributes to cause a person's mesothelioma. The expert need not know the characteristics of the exposure in terms of duration or frequency—as long as the exposures were anything above background levels, the expert regards them as causative. In other words, cumulative-exposure experts ignore the concept of dose, leading one court to say that the cumulative-exposure theory is akin to opining that pouring water into the ocean from a single bucket substantially increases ocean levels. *Moeller v. Garlock Sealing Techs.*, 660 F.3d 950, 955 (6th Cir. 2011).

The deposition testimony and reports provided by the Plaintiff's experts confirm that they are still clinging to the cumulative-exposure theory despite having their testimony excluded by courts on prior occasions. Here are the relevant excerpts:

Dr. Brody

From his deposition:

- Q. Does the jobs – do the jobs that Mr. Stewart held at that paper mill have any impact on your opinions in this case?
- A. No, because my opinions are – explain how asbestos causes disease. So if at whatever jobs he was employed at exposed him to asbestos, then that's what I need to know to render my opinions on how asbestos causes disease.
- Q. Tell me, for Mr. Stewart do you intend to do a qualitative risk assessment?

- A. Well, if I'm asked does the asbestos exposure produced in an environment over years where the levels are above background, and I'm asked, does that increase the risk – of producing a mesothelioma, I'd say, sure.
- Q. But you don't intend to quantify that risk?
- A. Exactly.
- Q. Have you been provided any dose reconstruction for Mr. Stewart?
- A. No.
- Q. Have you been provided any cumulative lifetime exposure calculation for him?
- A. No.
- Q. Have you been provided any quantitative exposure evaluations for Mr. Stewart for exposure from any product?
- A. No.
- Q. Have you been provided any quantitative exposure evaluations for Mr. Stewart for exposure from any specific product?
- A. No.
- Q. Would you agree that if a person were exposed to asbestos from a particular product in the range of .01 to .00001, there would be no basis to say work with that product causes or contributes to the development of a mesothelioma?
- A. Well, .01 is certainly above background. I've never seen a background of .01. So, I mean, .01 or two or three or any of those would be above background. And as far as I know, there no threshold that allows one to say there would be no disease.

(Exh. 1 at 25, 29-30, 40, 42)

Dr. Frank

From his report: "The cumulative exposure he had to asbestos, from any and all products during his work history, containing any and all asbestos fiber types contributed to his developing mesothelioma." (Exh. 2 at 2).

From his deposition:

Q. And you certainly didn't make any calculation as to -- or reach any opinion with respect to a specific dose of asbestos that Mr. Stewart might have inhaled solely from Scapa asbestos felts?

A. I made no such calculation.

Q. And again, I apologize if this was asked. But you have not made any efforts to quantify Mr. Stewart's asbestos exposure, have you?

A. That is correct.

Q. [I]s it your opinion that every exposure that contributes to a person's cumulative dose contributes to the development of a mesothelioma?

A. It is the cumulative dose which is clearly made up of all the exposures they've had over their lifetime. And yes, they all contribute. That doesn't mean that each exposure was the one that caused the mesothelioma, because we never know which fiber on which day from which product did it. But they all certainly increase the risk and ultimately have to be said to be contributory to that individual getting the disease.

Q. Does it matter to you if any particular exposure is above background or not?

A. Well, any exposure has to be at least at background level; and it doesn't matter how much above background that any additional exposures are. Some will clearly contribute more, some will contribute less. Scientifically that's how you look at it. Obviously there are jurisdictions where some exposures, for legal reasons, are said to be de minimis and are not part of lawsuits because of that. That said, scientifically, you can't leave out any specific exposure that can be documented, because they all contribute to someone's overall dose.

(Exh. 3 at 35-36, 52-53).

Dr. Maddox

From his report: "[B]ased on the exposure history, the patient's cumulative asbestos exposures caused this lethal malignant pleural mesothelioma." (Exh. 4 at 3).

From his deposition:

Q. So you can't say which of Mr. Stewart's work with or around asbestos-containing products caused his disease then, can you?

A. Oh, sure I can. It was his cumulative exposure to all of the products, not excluding any of them if they meet the six-point criteria that we discussed earlier.

Q. So it's cumulative exposures to asbestos that caused his disease?

A. Yes, sir.

Q. So do you assume that every workplace contact with asbestos is part of the cause?

A. Well, if it meets the criteria that we've already discussed.

Q. So is everything then that makes it past the six-factor test considered a substantial contributing fact to the development of mesothelioma?

A. Well, I would say yes. I mean, there are certainly modifiers of that. Like, for example, was it this type of fiber or the other type of fiber. Was it an early exposure or a late exposure. Was it a continuous versus an intermittent exposure.

(Exh. 5 at 129-30, 132).

Argument and Authorities

1. The standard for admission of expert testimony.

When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. *State v. Council*, 335 S.C. 1, 20 (1999). The trial judge should apply the *Jones* factors to determine reliability. *Id.* The *Jones* factors are: (i) the publications and peer review of the technique; (ii) prior application of the method to the type of evidence involved in the case; (iii) the quality control procedures used to ensure reliability; and (iv) the consistency of the method with recognized scientific laws and procedures. *Id.* at 19. Expert testimony is also subject to attack for relevancy. *Id.* Further, if the evidence is admissible under Rule 702, the trial judge should determine whether its probative value is outweighed by its prejudicial effect. *Id.* at 20. As demonstrated

next, the cumulative-exposure theory used by the Plaintiff's experts does not satisfy South Carolina's test for admissibility.

2. The expert testimony offered by Plaintiff to establish specific causation is inadmissible.

Dozens of courts around the nation have excluded or rejected the "cumulative" or "any" exposure theory of specific causation. William L. Anderson & Kieran Tuckley, *The Any Exposure Theory Round III: An Update on the State of the Case Law 2012-2016*, 83 Def. Counsel J. 264, 264 (July 2016). For example, this year the Georgia Supreme Court held—in a case against Scapa—that an expert's specific-causation testimony based on the cumulative-exposure theory was inadmissible and reversed a judgment rendered for the plaintiff following a jury trial. *Scapa Dryer Fabrics, Inc. v. Knight*, --- Ga. ---, 2016 WL 3658923 (July 5, 2016). The court held that the theory did not fit the pertinent causation inquiry under Georgia law because it would allow a finding of liability for *de minimus* exposure to asbestos from a defendant's product. As explained next, the cumulative-exposure theory has been rejected for a variety of other reasons.

A. Dose evidence plays a critical role in establishing specific causation in a toxic tort case.

The starting point for identifying the reasons why the cumulative-exposure theory does not belong in a courtroom is this fundamental legal requirement: the plaintiff in a toxic-tort case must demonstrate specific causation through evidence sufficient to establish a dose-response relationship. *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1240 (11th Cir. 2005). This relationship is the hallmark of toxic-tort science, and any expert who neglects this principle "casts suspicion on the reliability of his methodology." *Id.* at 1242. Thus, when analyzing an expert's methodology in toxic tort cases, "the court should pay careful attention to the expert's testimony about the dose-response relationship." *Id.* at 1241. Dose is "the single most important factor" in evaluating whether an exposure caused a disease or ailment. *Id.*; see also David L. Eaton,

Scientific Judgment & Toxic Torts—A Primer in Toxicology for Judges & Lawyers, 12 J.L. & Pol’y 5, 15, 18 (2003); Megan A. Ceder, *A Dose of Reality: The Struggle with Causation in Toxic Tort Litigation*, 51 Hous. L. Rev. 1147, 1174 (2014).

Dose evidence is particularly important in a case like this one, where the plaintiff has multiple other asbestos exposures that might have caused his disease. The Plaintiff’s experts, however, never offer anything resembling dose evidence. The only specific-causation “evidence” they present is the cumulative-exposure theory. Using that theory, they did not concern themselves with the absence of any evidence as to the amount of asbestos, if any, Plaintiff supposedly inhaled from a Scapa product. Instead, they treated every assumed exposure to asbestos above the naturally-occurring background level as a substantial contributing cause to the development of Plaintiff’s mesothelioma.

The overarching problem with the Plaintiff’s experts’ opinions in this case is what led another court to deem an expert’s cumulative-exposure inadmissible junk science: “he cannot rule any exposure out, but on the opposite: he rules all exposures ‘in,’ boldly stating that [the plaintiff’s] mesothelioma ‘was caused by his total and cumulative exposure to asbestos, *with all* exposures and all products playing a contributing role.’” *Smith v. Ford Motor Co.*, 2013 WL 214378 at *3 (D. Utah 2013); *see also Betz v. Pneumo Abex, LLC*, 44 A.3d 27, 55-58 (Pa. 2012) (holding that the cumulative-exposure theory is inadmissible to establish mesothelioma causation).

B. The cumulative-exposure theory is an unsound basis for asbestos causation and expert testimony.

Although there is substantial case law and commentary condemning the cumulative-exposure theory as junk science, in the interest of brevity this motion will limit detailed discussion to one article and two cases that expose the flaws in the cumulative-exposure theory.

(i) Legal scholars reject the cumulative-exposure theory.

An article published online by the ABA's Litigation Section provides a useful introduction to the flaws in the cumulative exposure theory. *See* Richard C. Beaulieu, *The Every-Exposure Theory Reviewed*.¹ To do so, the author begins with a look at the disease mesothelioma and some key tenets of the scientific disciplines used to uncover causation.

Mesothelioma: This disease is a cancer of the cells forming protective membranes around certain organs, usually the lungs. The specific mechanism by which mesothelioma is caused is not yet known, but it is known that exposure to certain types of asbestos can cause the disease. *Id.*

Dose: In toxicology—the discipline charged with studying the effects of potentially toxic substances—a central tenet is that that “the dose makes the poison.” That is, the *amount* of a toxic substance (i) to which a person was exposed, and (ii) that actually made its way into that person’s system, determines whether the exposure caused any particular adverse effect. To determine dose, several factors are examined: duration of exposure, intensity of exposure, physical circumstances of exposure, specific toxic chemical involved, and a host of others. *Id.*

Epidemiology: This science is the study of the frequency of disease in human populations and the way in which the frequency varies from one population to another. To determine whether exposure to a particular substance created a particular adverse effect, epidemiologists compare the rates of that effect in the exposed population with that of an unexposed population. If the rate of the adverse effect in the exposed group is (to a statistically significant degree) higher than that in the unexposed group, the differential suggests that the exposure caused the disease. *Id.*

The cumulative-exposure theory: Contrary to the scientific principles mentioned above, pro-

¹ <http://apps.americanbar.org/litigation/committees/masstorts/articles/summer2013-0813-every-exposure-theory-reviewed.html>

ponents of the every-exposure theory hold that every exposure to asbestos that is above the naturally-occurring background level in ambient air by a person later afflicted with mesothelioma contributed to the disease's formation. The expert need not know the characteristics of the exposure in terms of duration or frequency—as long as those exposures were anything above background, the expert regards them as causative. In other words, every-exposure experts ignore the concept of dose. *Id.*

Experts relying on the every-exposure theory also conflate risk and causation. Even assuming that each individual exposure to asbestos increased the risk of developing mesothelioma, every exposure would not necessarily have actually contributed to the injured party's mesothelioma. Yet every-exposure experts have no hesitation in declaring that very minor exposures are causative, even when an individual has alternative exposures, and even though every human is exposed to a certain background level of asbestos. *Id.*

Finally, the every-exposure theory is not based on accepted epidemiological studies. Instead, proponents rely on “case reports, animal studies, and regulatory standards,” along with tenuous downward extrapolation from established epidemiology, to support their hypothesis that every exposure to asbestos contributes to the risk (or, as they would say, the actual causation of) mesothelioma. *Id.*

(ii) A Pennsylvania trial judge exposes the flaws in the cumulative-exposure theory.

An opinion written by Judge Robert Colville of Pennsylvania's Court of Common Pleas is considered “the seminal and best evisceration of the grounds asserted by any exposure approach experts.” Mark A. Behrens & William L. Anderson, *The “Any Exposure” Theory: An Unsound Basis for Asbestos Causation & Expert Testimony*, 37 Sw. U. L. Rev. 479, 497 (2008). The opinion sets forth Judge Colville's reasons for granting a motion to exclude expert testimony based on the

cumulative-exposure theory. *In re: Toxic Substances Cases*, 2006 WL 2404008 (Pa. Ct. Com. Pl. Aug. 17, 2006), *aff'd sub nom. Betz v. Pneumo Abex LLC*, 44 A.3d 27 (Pa. 2012). A synopsis of Judge Colville's reasoning, adapted from the article by Messrs. Behrens and Anderson, follows.

First, Judge Colville addressed the serious discrepancy between the claim that any occupational exposure to asbestos causes disease, and the candid admission by the plaintiffs' experts that a lifetime of background exposures to asbestos fibers does not cause disease. 2006 WL 2404008, at *11-12. In our modern industrial society, urban and sometimes rural air has historically contained asbestos at low levels. Thus most people over 50 will have millions of "background" fibers in their lungs even without any known occupational or other direct exposure to asbestos. *Id.* at *3. These levels have never been known to cause disease, primarily because the human body is capable of ejecting, absorbing, or otherwise dealing with these low exposures. *Id.*

Plaintiffs' experts readily admit that background exposures do not cause disease and exclude those exposures from their cumulative-dose opinions. *Id.* The fibers involved in background and occupational exposures, however, are no different—only *the dose* distinguishes background from occupational exposures, and even then a low occupational exposure can easily overlap or not exceed a higher background exposure. *Id.* Thus, there is no logic that permits these experts to categorically exclude background exposure, yet, at the same time, categorically include all occupational exposures as causative. *Id.* at *12.

Given that plaintiffs' experts admit background exposures are not high enough to cause disease, Judge Colville recognized that it was incumbent on the experts to identify exactly what dose would be sufficient to cause disease:

For instance, experts suggest that the average ambient exposure in Pittsburgh is approximately .0001 fibers per milliliter of air No one, including the plaintiff's experts, proffers an opinion that this level of exposure creates an increased risk of the development of any asbestos-related disease The argument in this *Frye* challenge, in part, revolves around the question of how much greater quantity of exposure is necessary to permit the causal attribution of an asbestos-related disease to a particular asbestos-related exposure.

Id. at *3.

The plaintiffs' experts had made no attempt to measure or quantify the plaintiffs' occupational doses or show how they were sufficient to cause disease when background exposures clearly are not. *Id.* at *6-7. Judge Colville rejected the experts' failure to quantify or assess the plaintiffs' doses in any way because the lack of any measurement made it impossible for them to accurately distinguish low-level occupational exposures from background exposures. *Id.* at *6, 9, 11-13.

Second, Judge Colville rejected the experts' attempt to "extrapolate down" from high-dose asbestos studies to prove that occupational exposures at low doses, above background or not, also must cause disease. *Id.* at *6-7. The amphibole form of asbestos is widely recognized to cause disease at significant doses (*e.g.*, in the shipyard, insulator, and asbestos factory professions), but there are no low-dose response curves for asbestos exposure and no studies demonstrating an increase in actual disease at very low doses. *Id.* at *6, 8. The plaintiffs' experts used the "extrapolate down" methodology to assume, based on high-dose studies, that low-doses would also cause disease in a linear fashion. *Id.* at *7. Judge Colville rejected this approach:

The fallacy of the "extrapolation down" argument is plainly illustrated by common sense and common experience. Large amounts of alcohol can intoxicate, larger amounts can kill; a very small amount, however, can do neither. Large amounts of nitroglycerine or arsenic can injure, larger amounts can kill; small amounts, however, are medicinal. Great volumes of water may be harmful, . . . moderate amounts of water, however, are healthful. In short, the poison is in the dose

Id. at *7.

Judge Colville recognized that when experts attempt this kind of extrapolation downward, they are engaged in both a logical falsehood and scientific error:

[P]laintiffs have not proffered any generally accepted methodology to support the contention that a single exposure or an otherwise vanishingly small exposure has, in fact, in any case, ever caused or contributed to any specific individual's disease, or even less so, that in this case such a small exposure did, in fact, contribute to this specific plaintiff's disease.

Id. at *8.

Finally, Judge Colville rejected the experts' reliance on the "no safe threshold" position. *Id.* The court noted the significant difference between stating that the threshold is not known and claiming that there is no threshold at all. *Id.* at *8-9. The court believed that such testimony improperly shifted the burden of proof to defendants when it is the plaintiff's burden to establish the known toxic level of a substance and that the plaintiff experienced a dose consistent with that level.

Just as in the case before Judge Colville, the Plaintiff's experts did not attempt "to meaningfully quantify the actual or even approximate amount of [Plaintiff's] occupational, or other, asbestos exposure in this case." *Id.* at *13. Nor did they meaningfully attempt to quantify the exposure directly attributable to a Scapa product. Moreover, nowhere did they "attempt to delineate a threshold exposure, or even a potential range for a threshold exposure (*i.e.* over which [he] would attribute a specific exposure and under which [he] would not attribute a specific exposure as a cause of asbestos related disease), other than to simply indicate that if there was a single exposure to a defendant's asbestos containing product, then the plaintiff's disease can be causally attributed to that exposure." *Id.*

(iii) Courts continue to reject cumulative exposure testimony.

Like the Georgia Supreme Court in *Scapa v. Knight*, a New York Court recently rejected proffered expert testimony like that offered by the Plaintiff here. *See Juni v. A.O. Smith Water*

Prods., 11 N.Y.S.3d 416 (N.Y. Sup. Ct. 2015). In that case, the court considered the admissibility of the plaintiffs' experts' opinions—"specifically whether they provided a reliable causation opinion without using a dose-response relationship and without quantifying [the plaintiff's] exposure." *Id.* at 431.

The plaintiffs argued they should not have to establish a quantifiable level of exposure because, they asserted, there is no safe level of exposure to asbestos. *Id.* Applying New York precedent involving other toxins, the court concluded that quantification is required to establish specific causation. *Id.* at 432. Although exposure to asbestos can cause mesothelioma, that fact alone, said the court, does not dispose of the question whether a particular exposure caused the plaintiff's mesothelioma. *Id.* For specific-causation purposes, it is not the general association between asbestos and mesothelioma that is in issue. *Id.* The issue is whether a defendant may be held liable for having caused a plaintiff's mesothelioma, "which depends on the sufficiency of the exposure, if any, to asbestos in the defendant's product and whether that exposure is capable of causing mesothelioma." *Id.*

As in this case, the opinion proffered by the Junis' specific-causation expert "was mostly based on hypothetical facts she was instructed to assume." *Id.* at 434. The court, assuming the facts in the hypothetical were true, nonetheless ruled the expert's opinion was inadmissible. First, the expert conceded that she could provide no scientific expression—*i.e.*, quantification—of Mr. Juni's exposure absent data, which was not provided and did not exist in the record. *Id.* at 434-35. Second, the expert conceded she did not know whether the dust Mr. Juni was exposed to contained any asbestos, "much less enough to cause mesothelioma." *Id.* at 435.

The court explained that absent knowledge of "the amount, duration, or frequency of Juni's exposures to asbestos-containing dust . . . [the expert] could not and did not establish a dose-

response relationship or even minimally quantify Juni's exposures." *Id.* Nor did the plaintiffs' expert use any other method to quantify Mr. Juni's exposure, such as estimating it through mathematical modeling taking into account his work history. "[A]nd to the extent she mentioned or relied on studies, she did not and could not compare the exposures in the studies with Juni's exposures." *Id.*

The court concluded that because of these failings, the Junis' expert failed to provide a scientific expression of Mr. Juni's exposure and therefore failed to prove specific causation. *Id.* Evidence of Mr. Juni's "regular" exposure to asbestos from the defendant's products during his work-life, "absent any quantification of the exposure," was insufficient to provide a scientific expression of his exposure, and the same is true of exposure descriptions such as "frequent," "excessive," "extensive." *See id.* Likewise, evidence of visible asbestos dust during Mr. Juni's work was insufficient to establish specific causation. *Id.* at 435-36.

The Junis alternatively argued the cumulative-exposure theory; *i.e.*, that because the evidence showed that Mr. Juni was regularly exposed to asbestos from the defendant's products over many years, quantification of his exposures was unnecessary. *Id.* at 436. The court, however, noted that the Junis' experts did not state the basis for their opinion that no single exposure can be discounted and cited no study or authority to support their opinions. *Id.* And the fact that the defendant's expert agreed on cross-examination that cumulative exposure to asbestos increases one's risk for developing an asbestos-related disease "does not fill the evidentiary gap." *Id.*

The court explained that the cumulative-exposure theory conflicts with established science: "The opinion that every single exposure constitutes a significant contributing factor because the exposures cumulatively cause the disease is irreconcilable with the well-recognized scientific requirement, acknowledged by [the plaintiff's expert], that the amount, duration, and frequency of

exposure be considered in assessing the sufficiency of an exposure in increasing the risk of developing a disease.” *Id.* The court reasoned that “[i]n asserting that the cumulative exposure controls, plaintiffs avoid the requirement of showing even an approximate quantification, not only as a matter of law, but as a matter of science, and fail to offer sufficient evidence that any specific exposure increases the risk of a disease and is thus a significant contributing factor to causing the disease.” *Id.*

Elaborating, the court noted that “[a]ccepting the expert’s theory that a cumulative and unquantified exposure proves causation means that if Juni was exposed to asbestos dust when working on one product at one time in his decades-long career, that exposure would be considered just as likely to cause mesothelioma as his greater and more frequent exposures to asbestos dust from other products.” *Id.* at 437. Such a notion, the court said, “is contrary to accepted science that it is the nature and degree of the exposure that affects the risk of developing a disease.” *Id.* Requiring the plaintiff to quantify his alleged exposure “conforms with the case law in other jurisdictions addressing the issue of the sufficiency of the evidence of cumulative exposure in asbestos cases.” *Id.* The court observed that many courts “require specific proof of exposure and have rejected the so-called cumulative-exposure theory and its variant, the ‘each and every’ exposure theory.” *Id.*

3. The fatal flaws in the cumulative-exposure theory render it inadmissible under South Carolina’s test for admissibility of expert testimony and opinions.

The cumulative-exposure expert testimony offered by the Plaintiff suffers from the same flaws as the cumulative-exposure expert testimony in the cases discussed above. And under South Carolina’s test for admissibility of expert testimony and opinions, those flaws render the testimony inadmissible.

Under Rule 702, SCRE, the science underlying the expert’s testimony must be reliable. *Council*, 335 S.C. at 20. The *Jones* factors for assessing reliability include the consistency of the method

with recognized scientific laws and procedures. *Id.* at 19. As demonstrated, the cumulative-exposure theory is not consistent with recognized scientific principles and procedures. *See Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 847 (E.D.N.C. 2015) (“Plaintiffs have failed to show that [Dr.] Brody’s adherence to ‘each and every exposure’ theory has sufficient supporting facts and data.”); *Krik v. Crane Co.*, 76 F. Supp. 3d 747, 752 (N.D. Ill. 2014) (reliance on the cumulative-exposure theory “is not an acceptable approach for a causation expert to take.”); *Smith v. Ford Motor Co.*, 2013 WL 214378, at *2 (D. Utah 2013) (expert testimony based on the cumulative-exposure theory was “inadmissible speculation that is devoid of scientific support.”); *Davidson v. Georgia Pacific, LLC*, 2014 WL 3510268, at *5 (W.D. La. 2014) (the cumulative-exposure theory “is not testable and consequently cannot have an error rate, thus failing to satisfy two *Daubert* factors.”).

Further, even when evidence is admissible under Rule 702, the trial judge should determine whether its probative value is outweighed by its prejudicial effect. *Council*, 335 S.C. at 20. The probative value, if any, of expert testimony based on the cumulative-exposure theory is outweighed by its prejudicial effect. As the Georgia Supreme Court explained, cumulative exposure testimony permits a jury to find that a defendant’s product was a cause of the plaintiff’s disease even if the plaintiff’s exposure to that product was *de minimus*. “[B]y his [cumulative exposure] testimony, Dr. Abraham essentially told the jury that it was unnecessary to resolve the extent of exposure at the Waycross facility—if the jury determined that Knight was exposed at the facility to *any* asbestos above background, that exposure contributed to his cumulative exposure, and according to Dr. Abraham, it was, therefore, a contributing cause of the mesothelioma.” *Knight*, 2016 WL 3658923, at *3. Here, too, the cumulative exposure testimony of the Plaintiff’s experts would tell the jury that it is unnecessary to resolve the extent of exposure to a Scapa product.

4. The literature does not support the cumulative-exposure theory.

The Plaintiff may try to claim his experts’ specific-causation testimony is supported by certain

scientific papers, such as a study by Dr. Iwatsubo. Iwatsubo, et al., *Pleural Mesothelioma: Dose-Response Relation at Low Levels of Asbestos Exposure in a French Population-Based Case-Control Study*, Am. J. Epid. 148(2): 133-142 (1998). But when the plaintiff's alleged exposure was to chrysotile fibers—the type of asbestos allegedly contained in Scapa's dryer felts—courts have rejected efforts to support cumulative-exposure testimony with Dr. Iwatsubo's paper because it does not address chrysotile exposures. See *Butler v. Union Carbide Corp.*, 310 Ga. App. 21, 27 & n.20 (2011); *Yates v. Ford Motor Co.*, 2015 WL 3948303, at *12 (E.D.N.C. 2015); *Smith v. Kelly-Moore Paint Co., Inc.*, 307 S.W.3d 829, 838–39 (Tex. Ct. App. 2010); see also William L. Anderson, Lynn Levitan, Kieran Tuckley, *The “Any Exposure Theory” Round II—Court Review of Minimal Exposure Expert Testimony in Asbestos & Toxic Tort Litigation Since 2008*, 22-FALL Kan. J.L. & Pub. Pol'y 1, 35, n.184 (2012). This limitation on Iwatsubo's case-control study is important because there are major differences between chrysotile and amphibole fibers in terms of their ability to cause mesothelioma.

The Plaintiff may also point to a paper by Dr. Steven Markowitz published in 2015. Steven Markowitz, *Asbestos-Related Lung Cancer and Malignant Mesothelioma of the Pleura: Selected Current Issues*, Seminars in Respiratory & Critical Care Medicine Vol. 36 No.3/2105 (2015). The Markowitz paper, however, does not discuss an independent study but is rather merely a review of the literature. All of the studies he references to reach his conclusion about increased risk at low levels of exposure were done on populations in Europe, where amphiboles were used more frequently than in the United States. Dr. Markowitz admits on page 338 of his article that amphibole exposure is associated with a higher risk of mesothelioma than chrysotile.

Markowitz references, on page 337 of his paper, a German case-control study led Dr. Rodelsperger. K. Rodelsperger, et al, *Asbestos & Man-Made Vitreous Fibers as Risk Factors for*

Diffuse Malignant Mesothelioma: Results from a German Hospital Based Case-Control Study, Am. J. Indus. Med. 39:262-275 (2001). The authors of the Rodelsperger study stated, at page 263, that the type of asbestos is important when quantifying risk, but the study did not distinguish fiber types. In addition, at page 270, the authors admit to biases and methodological changes that could affect the study's results: (i) "Underestimate of the higher past exposure levels may be caused by information bias or even by change in the methods of fiber counting," and (ii) "A magnification of the dose-response relationship may result."²

Markowitz also references, on page 337, a case-control study by A. Lacourt and others published in 2014. A. Lacourt, et al., *Occupational and non-occupational attributable risk of asbestos exposure for malignant pleural mesothelioma*, Thorax 2014;0:1-8. The Lacourt study was a mixed fiber study on a French population, which did not separate out lower-potency chrysotile exposures. The article discusses increased risk for pleural mesothelioma in individuals with exposures to asbestos and silica and asbestos and mineral wool.

Finally, Markowitz references a cohorts study by Nadine Offermans and others from the Netherlands. N. Offermans, et al., *Occupational Asbestos Exposure & Risk of Pleural Mesothelioma, Lung Cancer, & Laryngeal Cancer in the Prospective Netherlands Cohort Study*, JOEM, Vol. 56, No. 1, January 2014. The authors of that paper concede at page 17: "Because exposure assessment in population-based studies like the Netherlands cohort study has to be based on rather brief occupational histories and job exposure matrices, nondifferential exposure misclassification could have biased the exposure-response relationships."

² Courts look with a jaundiced eye on case-control studies as a basis for specific-causation conclusions: "Although, case control studies are not per se inadmissible evidence on *general* causation, this court has frowned on causative conclusions bereft of statistically significant epidemiological support." *Wells v. SmithKline Beecham Corp.*, 601 F.3d 375, 380 (5th Cir. 2010) (internal quotation marks omitted; emphasis added).

Furthermore, a court not long ago rejected Dr. Markowitz's specific-causation testimony based on the cumulative-exposure theory because it was his opinion that "*all* of the decedent's cumulative exposures to asbestos, taken together, were sufficient to cause his cancer." *Wannall v. Honeywell Int'l, Inc.*, 292 F.R.D. 26, 38-39 (D.D.C. 2013). "Dr. Markowitz does not identify any 'level of exposure [that] is sufficient to cause mesothelioma . . . but rather only opines that (1) the decedent's exposures to asbestos were each independently sufficient to cause mesothelioma in and of themselves, and (2) there has not been established a safe level of exposure to asbestos below which individuals are not *at risk* for developing malignant mesothelioma." *Id.* at 43. That cumulative-exposure testimony, which mirrors the testimony of the Plaintiff's experts in this case, was ruled insufficient to create a genuine issue of material fact on specific causation. *Id.*

Lastly, the Plaintiff may cite to a 2015 commentary by the Collegium Ramazzini. That paper provides no support for the notion that exposure to any dose of asbestos above the naturally occurring background level in the ambient air is capable of causing mesothelioma. Instead, the commentary merely attempts to refute a theory apparently offered by Italian defense experts that only a person's initial exposure to asbestos is the cause of his or her mesothelioma, and subsequent exposures are not causative. "The Collegium Ramazzini rejects . . . the claim . . . by the Italian asbestos industry and its expert witnesses that in cases of *prolonged exposures* to asbestos only the earliest periods of exposure contribute to mesothelioma while all subsequent exposures have no causal role."³ The Collegium's use of the term "prolonged exposures" indicates that it does not subscribe to the notion that any exposure above background may be treated as causative of a person's mesothelioma.

In sum, none of the scientific literature the Plaintiff might offer as support for his experts'

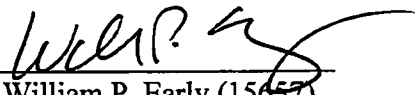
³ [http://www.collegiumramazzini.org/download/Causation_Malignant_Mesothelioma_Comments\(2015\).pdf](http://www.collegiumramazzini.org/download/Causation_Malignant_Mesothelioma_Comments(2015).pdf) at 2 (emphasis added).

cumulative-exposure opinions justify the admission of that testimony. If it did, there would not be dozens of court decisions excluding cumulative-exposure testimony.

Conclusion

For the foregoing reasons, the Court should exclude the unreliable, unscientific specific-causation testimony of the Plaintiff's experts.

Respectfully submitted,

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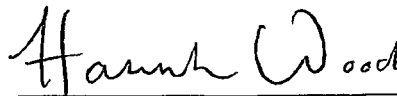
FILED-RECEIVED

12/15, 2017
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 15th day of December 2017.



STATE OF SOUTH CAROLINA

COUNTY OF YORK

STEPHEN R. EDWARDS, Individually and as
Person Representative of the Estate of STEVEN
REDFEARN STEWART,

☐ Plaintiff

v.

Albany International Corp., Et Al.

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2013-CP-⁴⁶~~18~~-00368

MOTION INFORMATION FORM
AND COVER SHEET

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☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Mtn for Setoff of PLs' Settlement Proceeds

Estimated Time Needed: 30 Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion --

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

December 15, 2017
Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached
order.

☐ Other:

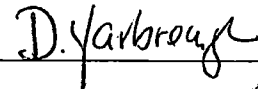
JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by:



Date Filed:

☒ MOTION FEE COLLECTED:

42502

☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

) C/A NO.: 13-CP-46-00368

STEPHEN R. EDWARDS, Individually and as
Personal Representative of the Estate of Steven
Redfearn Stewart,

Plaintiff,

v.

ALBANY INTERNATIONAL CORP., et al.,

Defendants.

FILED-RECEIVED
2017 DEC 18 AM 10:24
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC

**DEFENDANT SCAPA WAYCROSS, INC.'S,
MOTION FOR SETOFF OF PLAINTIFFS' SETTLEMENT PROCEEDS**

Defendant Scapa Waycross, Inc. (hereinafter "Scapa"), moves this Court for an Order directing that any settlement proceeds received by Plaintiff to date arising out of Decedent Steven Redfearn Stewart's alleged asbestos-related injury be applied to any judgment against Scapa in this case pursuant to S.C. Code Ann. § 15-38-50. In accordance with the plain construction and intent of said statute, this Court should impose a setoff in the amount of any settlement proceeds received by Plaintiff, and apply it to any judgment rendered against Scapa in this case.

SETOFF IS MANDATED BY S.C. CODE ANN. § 15-38-50.

Scapa is entitled under S.C. Code Ann. § 15-38-50 to a set off of any judgment against it by the total amount of settlement proceeds Plaintiff has received from all settling defendants and non-parties.

S.C. Code Ann. § 15-38-50 states in pertinent part:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; ...

South Carolina courts unequivocally agree that the setoff is “statutorily mandated” from a total damages award. Ellis v. Oliver, 335 S.C. 106, 515 S.E.2d 268 (Ct.App.1999). In fact, the statute “grants the court no discretion in determining the equities involved in applying a setoff once a release has been executed in good faith between a Plaintiff and one of several joint tortfeasors.” Id. at 113, 515 S.E.2d at 272.

In Ellis, *supra*, the Plaintiff asserted that since the measure of damages is different for wrongful death and survival actions, the application of S.C. Code Ann. § 15-38-50 is inapplicable. The court rejected this argument and found that the Plaintiff was confusing the “concept of damages with the meaning of the word injury as used in the statute.” Id.

The Ellis court specifically held:

“Injury, as used in the statute, is broad enough to include all damages, including those attributable to both survival and wrongful death causes of action which resulted from the joint negligence of the various responsible parties.”

Id.

Besides Ellis, *supra*, defendants in South Carolina have consistently been found to be entitled to a complete credit for the total amount of settlements against the total verdict rendered. See Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967). These holdings were recently reaffirmed in the case of Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012), in which the South Carolina Court of Appeals held that the trial court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same Plaintiff on a claim for the same injury.

When the settlement is for the same injury, the non-settling defendant's right to a setoff arises by operation of law. Smith, *supra*.

Under the statutory authority and case law outlined above, Scapa is statutorily entitled to a setoff from any previous settlements between Plaintiff and other defendants and non-parties.

CONCLUSION

WHEREFORE, Scapa respectfully requests that this Court grant its motion and direct that all settlement proceeds and bankrupt trust compensation received to date by Plaintiff, arising out of any alleged asbestos-related injury to Decedent, be applied to any judgment rendered against Scapa in this case pursuant to S.C. Code Ann. § 15-38-50.

Respectfully submitted,

PIERCE, HERNS, SLOAN & WILSON, LLC

The Blake House

321 East Bay Street

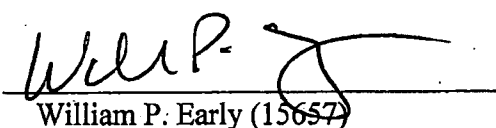
Post Office Box 22437

Charleston, South Carolina 29413

PH: (843) 722-7733

Fax: (843) 722-7732

E-Mail: willearly@phswlaw.com

BY: 

William P. Early (15657)

Counsel for the Defendant Named Herein

12/15, 2016
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 15th day of December, 2016

Hannah Wood

STATE OF SOUTH CAROLINA

COUNTY OF YORK

STEPHEN R. EDWARDS, Individually and as
Person Representative of the Estate of STEVEN
REDFEARN STEWART,

☐ Plaintiff

v.

Albany International Corp., Et Al.

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2013-CP-10-00368

MOTION INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney:
William Graham, Bar No.
Address:
Wallace & Graham, PA
525 North Main Street, Salisbury, NC 28144
phone: 704-633-5244 fax: 704-633-9434
e-mail: bgraham@wallacegraham.com other:

Defendant's Attorney:
William P. Early, Bar No. 15657
Address:
Pierce, Hems, Sloan & Wilson, LLC
321 East Bay Street Charleston, SC 29401
phone: 843 722-7733 fax: 843 722-7732
e-mail: willearly@phswlaw.com other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

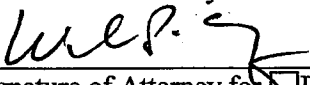
Nature of Motion: Mtn to Compel BK Trust Submissions

Estimated Time Needed: 30 Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached
☐ Form Motion --

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

December 15, 2017

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached
order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED – AMOUNT DUE: _____

FILED-RECEIVED
2017 DEC 18 AM 9:52
DAVID L. HAMILTON
C.C. CHAMBERS, S.S.
YORK COUNTY, SC

§ § § § § § § § § § § §

Case No. 13-CP-46-00368

ALBANY INTERNATIONAL CORP., et al.,

**DEFENDANT SCAPA WAYCROSS, INC.'S,
MOTION TO COMPEL COMPLETE BANKRUPTCY FORMS**

Statement of Facts

The claim forms are, however, substantially incomplete. (Ex. A). They contain no exposure or product information. (Ex. E). These are essentially “placeholder” claims. Plaintiff states the claims were filed to “toll the limitations period while additional investigation and research is sought to support the claims.” [Resp. to Third Req. for Prod., Q. 1]. But Plaintiff has had two and a half years to complete the claim forms. And for the trusts which identify the Bowater mill as a site where the bankrupt company’s products were located, a payment to

Plaintiff is guaranteed once the claim form is filled out. Those trusts include ABB Lummus, Babcock & Wilcox, ABB Combustion, Eagle Picher, GI Holding, and Owens Corning.

Plaintiff intends to introduce expert testimony to the effect that all asbestos exposures contributed to the development of Stewart's illness. Scapa believes that Plaintiff's experts will opine not only that Stewart was exposed to asbestos through his employment at the Bowater plant, but that all exposures contributed to his illness. Although Scapa disputes the legitimacy of that testimony (and filed a pretrial motion about it), if the Court allows that opinion into evidence, it is essential that Scapa be permitted to apprise the jury of the exposures Stewart has had throughout his lifetime. Asbestos bankruptcy trust claims contain essential information regarding a plaintiff's exposure history.

A. Background on Asbestos Bankruptcy Trust Issues.

In 2014, a federal court discovered "a startling pattern of misrepresentation" between what plaintiffs alleged in civil court versus what they were saying in claims to asbestos bankruptcy trusts. *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 86 (W.D.N.C. 2014). Post-settlement and post-verdict discovery in *Garlock* showed that plaintiffs and their attorneys routinely manipulated exposure evidence to implicate only viable companies. *Id.* After recovering from solvent defendants in the tort system, plaintiffs would submit claims to asbestos bankruptcy trusts for the same injury. Scapa is seeking an order requiring Plaintiff to complete the submitted claim forms to prevent such manipulation.

Asbestos bankruptcy trusts were designed to adjudicate the liabilities carried by original asbestos defendants who mined asbestos and manufactured friable asbestos products. *See e.g., O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 354 & n.9; *N.Y. City Asbestos Litig. v. A.C. & S.*, 750 N.Y.S.2d 469, 474 (2002). Beginning in 1982, these first-wave defendants filed for bankruptcy

to settle present and future asbestos liability. Additional “asbestos defendants” were discovered in the subsequent years. The litigation has forced nearly 100 companies into bankruptcy to date. See Mark A. Behrens & Cary Silverman, *Punitive Damages in Asbestos Personal Injury Litigation: The Basis for Deferral Remains Sound*, 8 Rutgers J.L. & Pub. Pol’y 50, 64 (2011).

As part of these companies’ reorganization, a trust is established on behalf of future claimants. See 11 U.S.C. § 524(g). The trust pays any claimant who falls into the class of persons for whom the trust was created. A bankruptcy trust under this procedure is the same as a settled party. See Michael D. Green, *Second Thought About Apportionment in Asbestos Litigation*, 37 SW.U.L.REV. 531, 540 & n.46 (2008).

With the entities responsible for the most damaging exposures to asbestos in bankruptcy, plaintiffs sought new solvent defendants “to shoulder a larger share of the value of asbestos claims and to widen their search for other corporations that might be held liable.” See *O’Neil*, 53 Cal.4th at 354 & n.9. The “remaining defendants are ‘downstream’ users or distributors of asbestos-containing products, or manufacturers of products in which asbestos was jacketed or encapsulated.” See *N.Y. City Asbestos Litig.*, 750 N.Y.S.2d at 474.

Based on allegations that this system was being manipulated and abused, the *Garlock* court allowed discovery in 15 cases where Garlock argued its settlements or verdicts were artificially inflated by concealment of evidence of exposure to products for which Plaintiff could file bankruptcy trust claims. In each of the cases, the court found that the plaintiff and their attorneys intentionally withheld exposure evidence. See *In re Garlock*, 504 B.R. at para. 65.

Garlock concluded that plaintiffs routinely conceal asbestos exposure information related to bankrupt entities to manipulate solvent defendants’ perceived valuation of the case and to manipulate the evidence that came before the jury at trial. *Id.* at para. 58. That this misconduct

was by a number of different plaintiff's firms gave rise to the need for more scrutiny. Where the cases involve opportunities for exposure at "approved sites" for bankruptcy trusts, the need for disclosure becomes more compelling.

B. New Procedures to Prevent Concealment of Exposure Information.

To assist in the disclosure of bankruptcy claims, claim-related materials, and asbestos exposure facts, courts have required plaintiffs to disclose additional information. *See* July 15, 2015, Corrected Case Management Order Requiring Disclosure of Bankruptcy Trust Claims, Claims-Related Materials, and Asbestos Exposure Facts, *Jay Fair, et al Plaintiffs, vs. Pneumo Abex, et al., Defendants*, Superior Court of the State of California, Los Angeles County, central civil west, Case No. BC500628. Indeed, the South Carolina legislature is contemplating imposing the same obligations. (Ex. C). This Court should require it of Plaintiff in this case.

Argument and Citation of Authority

A. This Court Has Authority to Order Plaintiff to Complete the Filed Bankruptcy Trust Claim Forms and Produce the Supporting Documentation.

Plaintiff should be compelled to complete the bankruptcy claim forms he or decedent filed and produce the completed forms before trial. This Court is vested with inherent authority to preside over cases in a manner that furthers respect for the judicial system and ensures the administration of justice. *State ex rel. McLeod v. Hite*, 272 S.C. 303, 251 S.E.2d 746 (1979). The Court should exercise this inherent power to ensure that all evidence in Plaintiff's possession regarding Stewart's exposures be available to all parties and heard by the jury.

Further, Plaintiff can, and should, complete the claims forms. This can be done quickly. Plaintiff could then certify his compliance and furnish those claims and all supporting evidence before opening statements. Once complete forms are produced, they would be included within

the group of bankruptcy forms that Scapa has asked this Court, in its Motion to Publish, to permit the jury to see. This procedure would minimize prejudice to Scapa.

B. Plaintiff Cannot Be Allowed to Conceal Pertinent Exposure Information to Scapa's Disadvantage.

Asbestos plaintiffs have evaded disclosing information regarding exposure to the products of bankruptcy trusts by strategically waiting to file claims until after their underlying tort claims were litigated. This includes late filing of claims, or *filing incomplete claims* and "tolling" them until the trial is complete. *See, e.g.,* Fourth Amendment to and Complete Restatement of Thorpe Insulation Company Asbestos Personal Injury Settlement Trust Distribution Procedures para. 6.3, ("A claimant can withdraw a Trust Claim at any time upon written notice to the Trust and file another claim subsequently without affecting the status of the claim for statute of limitations purposes...the Trust may extend this period for an additional six months.")

This practice of delayed filings skews the exposure history of a given plaintiff to maximize the alleged exposures to a defendant's product, while minimizing exposures to products of bankrupt non-parties. As discussed, Plaintiff will contend at trial that every exposure to asbestos contributed to causing the development of Stewart's illness. Given that fact, Scapa and the jury cannot be denied access to asbestos exposures in addition to those alleged in this lawsuit. Withholding this exposure information is unfair to Scapa and the jury which is tasked with reaching a verdict without all of the information.

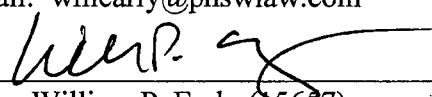
The exposure information Scapa seeks is not only relevant and discoverable as described above, but also will be considered admissions of a party-opponent and thus admissible at trial. (See Scapa's Motion to Publish Bankruptcy Forms to the Jury). This case has been pending for years and the facts have been fully discovered. The information Scapa seeks is reasonably

calculated to lead to the discovery of admissible evidence of alternative exposures. Plaintiff cannot be allowed to dictate when he will provide discoverable information simply because the bankruptcy trusts do not require a complete form to "hold their place".

In light of the foregoing, Scapa respectfully requests that this Court order Plaintiff to produce completed bankruptcy trust forms to all the trusts he or Decedent submitted a claim form with before the commencement of trial.

PIERCE, HERNS, SLOAN & WILSON, LLC

The Blake House
321 East Bay Street
Post Office Box 22437
Charleston, South Carolina 29413
PH: (843) 722-7733
Fax: (843) 722-7732
E-Mail: willearly@phswlaw.com

BY: 

William P. Early (15657)
Counsel for the Defendant Named Herein

12/15, 2017
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 15th day of December, 2017

Hand Wood

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

STEPHEN R. EDWARDS, ET AL.)

Plaintiff,)

vs.)

ALBANY INTERNATIONAL CORP., ET AL,)

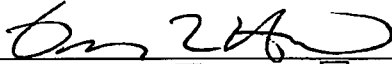
Defendant.)

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2013 -CP-46-00368

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: <u>Gregory L. Hyland, Esquire, Bar No. 76443</u> Address: <u>P.O. Box 130, Summerville, SC 29484</u> Phone: <u>843.410.0711</u> Fax <u>843.302.8329</u> E-mail: <u>greg@hartfirm.com</u> Other: _____		Defendant's Attorney: <u>William P. Early, Esquire, Bar No. 15657</u> Address: <u>P.O. Box 22437, Charleston, SC 29413</u> Phone: <u>843.722.7733</u> Fax _____ E-mail: <u>willearly@phswlaw.com</u> Other: _____	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: <u>Plaintiff's Motion in Limine No. 2 Asbestos Bankruptcies; Trusts and Plaintiff's Claims</u> Estimated Time Needed: _____ Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
 _____ Signature of Attorney for ☒ Plaintiff / ☐ Defendant		December 15, 2017 _____ Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$ <u>25.00</u> ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: <u>LJP</u> Date Filed: <u>12/15/17</u> ☒ MOTION FEE COLLECTED: \$ <u>25.00</u> ☐ CONTESTED - AMOUNT DUE: \$ _____			

FILED-RECEIVED

2017 DEC 18 PM 4:08

CLERK OF COURT
SOUTH CAROLINA
JUDICIAL CIRCUIT
YORK COUNTY, SC

) IN THE COURT OF COMMON PLEAS
) FOR THE SIXTEENTH JUDICIAL CIRCUIT

C/A No.: 2013-CP-46-00368

FILED-RECEIVED
2017 DEC 18 PM 4:08
DAVID HAMILTON
~~C.C.C. #3~~
YORK COUNTY, SC

V.

Defendants.

NOW COMES the Plaintiffs whom, respectfully move this Honorable Court to prohibit Defendant or Defendant's counsel from mentioning, referring to bringing before the jury, directly or indirectly, on voir dire examination or during trial certain matters concerning asbestos-related corporate bankruptcies and/ or any evidence or mention regarding claims submitted to asbestos bankruptcy trusts, namely: 1) That any of the corporations which once made, manufactured, mined, sold or distributed asbestos are in bankruptcy; 2) The fact that Plaintiffs have submitted claims to funds in asbestos bankruptcy trusts; 3) the introduction the claims forms and associated documents themselves; and 4) Whether Plaintiffs have received or will receive money from other defendants.

Plaintiffs seek to exclude evidence of both the fact that certain asbestos-related corporations have entered bankruptcy and the fact that Plaintiffs submitted claims to funds in several bankruptcy trusts. Plaintiffs seek this prohibition on the basis that the evidence is not probative of any fact or is unduly prejudicial even if probative.

It is well-settled that Rule 408 bars the admission of offers to compromise and evidence of settlement negotiations because exclusion of such evidence facilitates an atmosphere of compromise

among parties and promotes alternatives to litigation. *See, e.g., QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 209 (Ct. App. 2004) *Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 558 (Ct. App. 2001). Bankruptcy trust claims constitute inadmissible settlement documents. The claims forms fall under Rule 408, SCRE, because they contain information regarding Plaintiffs' negotiations to obtain compensation from the asbestos liability trusts. The admission of such information would allow Defendant to present disguised causation evidence at trial and prejudice Plaintiffs' case.

Even if the claims forms contain admissible information, introduction of said evidence would be unnecessarily cumulative, and the probative value of such information is substantially outweighed by the danger of confusing the issues and misleading the jury. *See*, Rules 401-403, SCRE. To obtain compensation from asbestos liability trusts, a claimant must meet a burden of proof markedly different from that of civil litigation. Allowing the admission of the information contained in the claims forms without a thorough and time-consuming explanation of these proof differences at trial would blur the distinction between the requirements and mislead the jury. To the extent that certain claim submissions may contain affidavits of co-workers about asbestos exposure, those statements are hearsay and should be excluded.

Lastly, as argued in Plaintiff's Motion *In Limine* No. 1, any benefits that Plaintiffs has received or may receive from asbestos liability trusts should not come into evidence pursuant to Rule 408, SCRE.

Agreed _____ Granted _____ Denied _____ Withdrawn _____

Respectfully submitted,

HART HYLAND SHEPHERD, LLC



Thomas H. Hart, III, Esq.

Gregory L. Hyland, Esq.

Andrew T. Shepherd, Esq.

207 E. 1st N. St.

Summerville, SC 29483

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843-302-8329 (Facsimile)

WALLACE AND GRAHAM, P.A.

Mona Lisa Wallace, Esq.

William Graham, Esq. (pro hac)

525 North Main Street

Salisbury, NC 28144

(704) 633-5244

Attorneys for the Plaintiff

December 15, 2017
Summerville, South Carolina

FILED-RECEIVED
2017 DEC 18 PM 4:08
DAVID HAMILTON
C.C. CLERK, U.S.
YORK COUNTY, SC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Instrument was sent via U.S. Mail First Class, facsimile and/or by electronic mail to all counsel of record on December 15, 2017.



Gregory L. Hyland

Attorney for Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF YORK

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

☐ Plaintiff

v.

Albany International Corp., Et Al.,

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2013-CP-46-00368

MOTION INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney:
William Graham,, Bar No.
Address:
Wallace & Graham, PA
525 North Main Street, Salisbury, NC 28144
phone: 704-633-5244 fax: 704-633-9434
e-mail: bgraham@wallacegraham.com other:

Defendant's Attorney:
William P. Early, Bar No. 15657
Address:
Pierce, Hems, Sloan & Wilson, LLC
321 East Bay Street Charleston, SC 29401
phone: 843 722-7733 fax: 843 722-7732
e-mail: willearly@phswlaw.com other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Setoff of Plaintiff's Settlement Proceeds

Estimated Time Needed: 30 Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached
☐ Form Motion --

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

February 15, 2018
Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
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JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached
order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: *LAP*

Date Filed:

☒ MOTION FEE COLLECTED: \$25.00

☐ CONTESTED – AMOUNT DUE: _____		

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL CIRCUIT

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

C/A NO.: 13-CP-46-00368

Plaintiff,)

vs.)

Albany International Corp., et al.,)

Defendants.)

DEFENDANT SCAPA WAYCROSS, INC.'S,

MOTION FOR SETOFF OF
PLAINTIFF'S SETTLEMENT

PROCEEDS

FILED-RECEIVED
2018 FEB 16 AM 10:46
DAVID HANSEN
C.C.C. REES
YORK COUNTY, SC

COMES NOW, Defendant Scapa Waycross, Inc. (hereinafter "Scapa") and respectfully moves this Court for an Order directing that any settlement proceeds received by Plaintiff to date arising out of Decedent Steven Redfearn Stewart's alleged asbestos-related injury be applied to any judgment against Scapa in this case pursuant to S.C. Code Ann. § 15-38-50. In accordance with the plain construction and intent of said statute, this Court should impose a setoff in the amount of any and all settlement proceeds received by Plaintiff and apply it to any judgment rendered against Scapa in this case.

ARGUMENT

I. Setoff is Required by S.C. Code Ann. § 15-38-50.

Scapa is entitled under S.C. Code Ann. § 15-38-50 to a set off of any judgment against it by the total amount of settlement proceeds Plaintiff has received from all settling defendants.

S.C. Code Ann. § 15-38-50 states in pertinent part:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; ...

South Carolina courts unequivocally agree that the setoff is “statutorily mandated” from a total damages award. Ellis v. Oliver, 335 S.C. 106, 515 S.E.2d 268 (Ct.App.1999). In fact, the statute “grants the court no discretion in determining the equities involved in applying a setoff once a release has been executed in good faith between a Plaintiff and one of several joint tortfeasors.” Id. at 113, 515 S.E.2d at 272.

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The Ellis court specifically held:

“Injury, as used in the statute, is broad enough to include all damages, including those attributable to both survival and wrongful death causes of action which resulted from the joint negligence of the various responsible parties.”

Id.

Besides Ellis, *supra*, defendants in South Carolina have consistently been found to be entitled to a complete credit for the total amount of settlements against the total verdict rendered. See Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967). These holdings were recently reaffirmed in the case of Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012), in which the South Carolina Court of Appeals held that the trial court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement

funds were paid to compensate the same Plaintiff on a claim for the same injury. When the settlement is for the same injury, the non-settling defendant's right to a setoff arises by operation of law. Smith, supra. These holdings were also recently affirmed in the case of Huck v. Oakland Wings, LLC (Appellate Case No. 2015-002025; Opinion No. 5500; Filed July 19, 2017), in which the South Carolina Court of Appeals stated that the defendant was entitled to a setoff pursuant to S.C. Code Ann. § 15-38-50 and held that the trial court erred in denying defendant's motion to disclose settlement and motion for setoff. The case was remanded to the trial court for review of the settlement agreement and determination of setoff entitlement.

Under the statutory authority and case law outlined above, Scapa is statutorily entitled to a setoff from any previous settlements between Plaintiff and other defendants.

CONCLUSION

WHEREFORE, Scapa respectfully requests that this Court grant its motion and direct that all settlement proceeds and bankrupt trust compensation received to date by Plaintiff, arising out of any alleged asbestos-related injury to Decedent, be applied to any judgment rendered against Scapa in this case pursuant to S.C. Code Ann. § 15-38-50.

Respectfully submitted,

PIERCE, HERNS, SLOAN & WILSON, LLC

The Blake House

321 East Bay Street

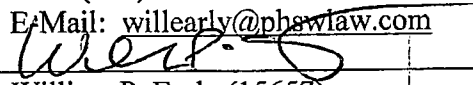
Post Office Box 22437

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PH: (843) 722-7733

Fax: (843) 722-7732

E-Mail: willearly@phswlaw.com

BY: 

William P. Early (15657)

Counsel for the Defendant Named Herein

Feb 18, 2018
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 19 day of February, 2018

R. Tomlin

FILED-RECEIVED
2018 FEB 16 AM 10:46
DAVID BRAMLTON
C.C.P. & G.S.
YORK COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

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

☐ Plaintiff

CASE NO.

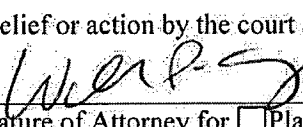
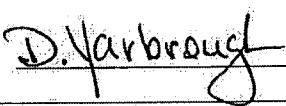
2013-CP-46-00368

v.

MOTION INFORMATION FORM
AND COVER SHEET

Albany International Corp., Et Al.,

☒ Defendant.

Plaintiff's Attorney: William Graham, Bar No. Address: Wallace & Graham, PA 525 North Main Street, Salisbury, NC 28144 phone: 704-633-5244 fax: 704-633-9434 e-mail: bgraham@wallacegraham.com other:		Defendant's Attorney: William P. Early, Bar No. 15657 Address: Pierce, Hems, Sloan & Wilson, LLC 321 East Bay Street Charleston, SC 29401 phone: 843 722-7733 fax: 843 722-7732 e-mail: willearly@phswlaw.com other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion for Production of Plaintiff's Settlements and Payments with all Third Party Tortfeasors			
Estimated Time Needed: 30 Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion Type			
☒ Written motion attached ☐ Form Motion --			
I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☐ Plaintiff / ☒ Defendant		February 16, 2018 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE _____	
		CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: 		Date Filed: _____	

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL CIRCUIT

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

C/A NO.: 13-CP-46-00368

Plaintiff,)

vs.)

Albany International Corp., et al.,)

Defendants.)

DEFENDANT SCAPA WAYCROSS, INC.'S
MOTION FOR PRODUCTION OF
PLAINTIFF'S SETTLEMENTS AND
PAYMENTS WITH ALL THIRD PARTY
TORTEASORS

FILED-RECEIVED
2018 FEB 16 AM 10:42
MID HAMILTON
S.C. C.P. & GS
YORK COUNTY, SC

COMES NOW, Defendant Scapa Waycross, Inc. (hereinafter "Scapa") and respectfully moves this Court for an Order compelling Plaintiff to produce competent evidence pertaining to all settlement amounts or payments received now or in the future from any and all third parties arising out of Plaintiff's injuries relating to his mesothelioma. This Motion is made pursuant to Rule 26 of the South Carolina Rules of Civil Procedure, Section 15-38-50 of the South Carolina Code, and the following arguments and legal authorities.

BACKGROUND

Plaintiff brought the instant action against fourteen (14) Defendants, including Scapa. Prior to trial, Plaintiff settled with or dismissed his claims against all of the Defendants with the exception of Scapa. The trial against Scapa commenced on January 29, 2018 in York County. On February 9, 2018, the jury returned a verdict against Scapa in the amount of \$600,000 on the survival claim and \$100,000 on the wrongful death claim.

Pursuant to S.C. Code Ann. § 15-38-50, Scapa is entitled to a setoff reducing the \$700,000 verdict by the total amount of money received by Plaintiff from any alleged tortfeasor, including but not limited to the other settling Defendants in this case or any bankrupt

entity. As such, this Court should compel Plaintiff to produce evidence and permit access to all pertinent setoff information, including access to all settlement amounts and settlement documents that Plaintiff or his counsel possess related to their claims (and/or potential claims) asserted in this lawsuit against any person or entity, regardless of whether the settlements occurred within the specific context of this lawsuit.

ARGUMENT

There is no question that Scapa is entitled to a setoff reducing the Plaintiff's verdict by the total amount of Plaintiff's settlements, regardless of the way the settlements were allocated. *See* S.C. CODE ANN. § 15-38-50; *see also Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999); *Welch v. Epstein*, 342 S.C. 279, 313, 536 S.E.2d 408, 425-26 (Ct. App. 2000); *Truesdale v. South Carolina Hwy Dep't*, 264 S.C. 221, 213 S.E.2d 740 (1975) (noting that the purpose of allowing setoff credit is to prevent an injured person from obtaining a second recovery for the amount of damages sustained which has already been paid to him). Scapa is contemporaneously filing a Motion for Setoff, and hereby incorporates that Motion and its arguments herein. Given the requirements set forth in section 15-38-50 of the South Carolina Code, all information and documents related to Plaintiff's settlements with third parties are relevant and discoverable under South Carolina law, including proceeds from bankruptcy trusts.

I. SCAPA IS ENTITLED TO DISCLOSURE OF ALL SETTLEMENT INFORMATION AND SETTLEMENT DOCUMENTS BETWEEN PLAINTIFF AND THIRD PARTIES.

In South Carolina, the discovery of relevant information is very broad. *Samples v. Mitchell*, 329 S.C. 105, 110, 495 S.E.2d 213, 215 (Ct. App. 1997); *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994); *Oncology & Hematology Assocs. of S.C., LLC v. S.C.*

Dep't of Health & Envtl. Control, 387 S.C. 380, 387, 692 S.E.2d 920, 924 (2010). Rule 26 provides:

In General. Parties may obtain discovery regarding *any matter, not privileged, which is relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(b)(1), SCRCP (emphasis added). The Rule makes clear that relevant information is obtainable regardless of its admissibility. The information pertaining to settlements with third parties is relevant for the purposes of determining the mandatory setoff requirements of S.C. Code Ann. § 15-38-50. Rule 401 provides that relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Here, evidence relating to all payments from third parties to the Plaintiff is highly relevant to determining the amount that Scapa is entitled to setoff from the jury's verdict. Moreover, Rule 408 of the South Carolina Rules of Evidence specifically provides that settlement information is discoverable even though the same evidence is not admissible. *See* Rule 408, SCRE ("This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.").

Further, the South Carolina Court of Appeals recently held in Huck v. Oakland Wings, LLC (Appellate Case No. 2015-002025; Opinion No. 5500; Filed July 19, 2017), that the trial court erred in denying Defendant's motion to disclose settlement on the basis that such was protected under Rule 8 of the South Carolina Alternative Dispute Resolution Rules, finding as

follows:

“We find the trial court erred in denying Avtex's motion to disclose settlement. The documents referred to in Rule 8 are designed to protect any documents prepared for use by the mediator and the parties to the mediation itself. *Once the parties reach a settlement, documents prepared in conjunction with the settlement and release are not for the purpose of, or in the course of, mediation.* Rather, they are documents prepared in connection with the litigation and to bring the litigation to a close. Rule 8 is designed to protect the communications made during the mediation itself and to protect the process. The parties' mediation agreement reinforces the rule and simply incorporates the same language. *The request for production of the settlement documents does not disclose confidential information from the mediation.*”

Id. (emphasis added).

Further, it is black letter law that South Carolina does not permit plaintiffs to a double recovery. *See e.g., Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012); *Welch*, 342 S.C. at 312–13, 536 S.E.2d at 425; *Truesdale v. S.C. Highway Dept.*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975). Here, without full access to the records pertaining to all of the money obtained by Plaintiff as a result of his alleged injuries, it is impossible for Scapa – and this Court – to determine the proper amount to setoff the \$700,000 verdict. *Rutland*, 400 S.C. 209, 216, 734 S.E.2d 142, 145; *see also Polston v. Eli Lilly & Co.*, 2010 WL 2926159, at *2 (D.S.C. July 23, 2010) (noting the disclosure of settlement documents is warranted after jury verdict for setoff purposes). Moreover, in order to avoid an inequitable apportionment and setoff, evidence pertaining to Plaintiff's efforts to obtain additional funds from the various bankruptcy trusts must be included. *See id.; Reed v. Honeywell Int'l, Inc.*, No. 3022 EDA 2010, 2011 WL 6645694, at *10 (Pa. Super. Ct. Dec. 6, 2011) (finding various bankrupt entities joint tortfeasors for the purpose of offsetting the jury's award); *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 83-84 (Bankr. W.D.N.C. 2014) (noting plaintiffs' ability to use bankruptcy trusts to manipulate asbestos litigation).

CONCLUSION

For the reasons stated herein, Scapa respectfully requests the court to require Plaintiff to produce all pertinent setoff information to Scapa, including settlement information with other third party defendants and third party bankruptcy trusts, to include future potential claims. Without this information, Scapa cannot receive the setoff that section 15-38-50 directs.

Respectfully submitted,

PIERCE, HERNS, SLOAN & WILSON, LLC

The Blake House

321 East Bay Street

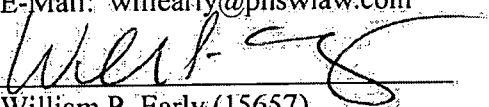
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Charleston, South Carolina 29413

PH: (843) 722-7733

Fax: (843) 722-7732

E-Mail: willearly@phswlaw.com

BY: 

William P. Early (15657)

Counsel for the Defendant Named Herein

Feb. 15, 2018
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 15 day of February, 2018



STATE OF SOUTH CAROLINA

COUNTY OF YORK

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

☐ Plaintiff

v.

Albany International Corp., Et Al.,

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2013-CP-46-00368

MOTION INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney:
William Graham,, Bar No.
Address:
Wallace & Graham, PA
525 North Main Street, Salisbury, NC 28144
phone: 704-633-5244 fax: 704-633-9434
e-mail: bgraham@wallacegraham.com other:

Defendant's Attorney:
William P. Early, Bar No. 15657
Address:
Pierce, Hems, Sloan & Wilson, LLC
321 East Bay Street Charleston, SC 29401
phone: 843 722-7733 fax: 843 722-7732
e-mail: willearly@phswlaw.com other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for JNOV

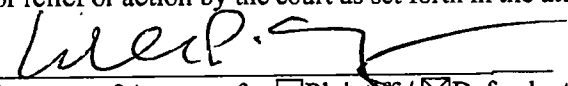
Estimated Time Needed: 30 Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion --

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

February 16, 2018

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached
order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: B. Hanke

☒ MOTION FEE COLLECTED: \$25

☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
Stephen R. Edwards, Individually)
and as Personal Representative of)
the Estate of Steven Redfearn)
Stewart,)
)
Plaintiff,)
)
vs.)
)
Albany International Corp., et al.,)
)
Defendants.)
)
_____)

IN THE COURT OF COMMON PLEAS
C/A NO.: 13-CP-46-00368

FILED-RECEIVED
2018 FEB 16 AM 10:43
DAVID E. MILTON
C.C.P. & G.S.
YORK COUNTY, SC

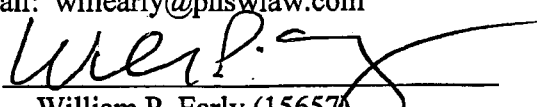
SCAPA WAYCROSS, INC.'S NOTICE OF MOTION AND
MOTION FOR JNOV

PLEASE TAKE NOTICE THAT Defendant SCAPA WAYCROSS, INC. ("Scapa"), pursuant to Rule 50(b), SCRCP, hereby moves for Judgment Notwithstanding the Verdict ("JNOV"), in the above-captioned matter and would hereby ask that the Court enter judgment in favor of Defendant Scapa. Even when viewed in the light most favorable to the Plaintiff, the evidence at trial did not establish that the Defendant SCAPA breached any duty to the Plaintiff's Decedent and further did not establish that any of his injuries were proximately caused by any exposures to the Defendant SCAPA's products. Furthermore, the Defendant SCAPA's product was not hazardous or unreasonably dangerous as a matter of law. Plaintiff Defendant Scapa does not seek a new trial.

Defendant Scapa's motion is based on the pleadings, motions, and memoranda already filed in this matter and memoranda to be filed in support of this motion.

PIERCE, HERNS, SLOAN & WILSON, LLC

The Blake House
321 East Bay Street
Post Office Box 22437
Charleston, South Carolina 29413
PH: (843) 722-7733
Fax: (843) 722-7732
E-Mail: willearly@phswlaw.com

BY: 
William P. Early (156576)
Counsel for the Defendant Named Herein

Feb 18, 2018
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 15 day of February, 2018



FILED-RECEIVED
2018 FEB 16 AM 10:43
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF YORK

STEPHEN R. EDWARDS, ET AL.

Plaintiff,

vs.

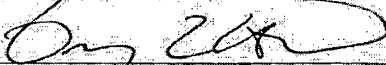
ALBANY INTERNATIONAL CORP., ET AL,

Defendant.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-46-00368

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: Gregory L. Hyland, Esquire, Bar No. 76443 Address: P.O. Box 130, Summerville, SC 29484 Phone: 843.410.0711 Fax 843.302.8329 E-mail: greg@hartfirm.com Other:		Defendant's Attorney: William P. Early, Esquire, Bar No. 15657 Address: P.O. Box 22437, Charleston, SC 29413 Phone: 843.722. 7733 Fax E-mail: willearly@phswlaw.com Other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: <u>Plaintiff's Motion for New Trial Nisi Additur</u>			
Estimated Time Needed: _____		Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☒ Plaintiff / ☐ Defendant		February 19, 2018 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$ <u>\$25.00</u> ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCF) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

SCCA 233 (11/2003)

ROA 0175

STATE OF SOUTH CAROLINA
COUNTY OF YORK

STEPHEN R. EDWARDS, INDIVIDUALLY
AND AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF STEVEN REDFEARN
STEWART,

Plaintiffs,

v.

SCAPA WAYCROSS, INC.

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOR THE SIXTEENTH JUDICIAL CIRCUIT

C/A No.: 2013-CP-46-00368

PLAINTIFFS' MOTION FOR NEW TRIAL
NISI ADDITUR

FILED-RECEIVED
2018 FEB 20 AM 11:17
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

NOW COMES the Plaintiffs whom, respectfully move this Honorable Court for a New Trial *Nisi Additur*, and would respectfully show the Court that the damages awarded by the jury are inadequate and that compelling reasons support an increase of the damages award in accordance with the evidence presented at trial.

INTRODUCTION

At trial, the primary issues of dispute were the extent of Plaintiff Steven R. Stewart's exposure to asbestos from dryer felts manufactured by Scapa Waycross, Inc. ("Scapa"), and the causation of his malignant mesothelioma from that exposure. The jury resolved those issues in Plaintiffs' favor, finding that Scapa was negligent and that Scapa's wrongful conduct was a substantial factor in causing Mr. Stewart's mesothelioma. While liability was fiercely contested, the evidence of the Mr. Stewart's economic damages was not disputed in any way. The expert testimony regarding Mr. Stewart's medical expenses was never contradicted, nor was the evidence of his pain and suffering, loss of enjoyment of life, and mental anguish. Similarly, the defendant did not directly contest Mr. Stewart's surviving children's damages as concern the wrongful death.

claim.

The Court should find that the jury's survival damages award of \$600,000 is inadequate, and that compelling reasons warrant increasing the award to at least \$2,651,000. The Court should similarly find that the jury's wrongful death damages award of \$100,000 is insufficient, and that it should be increased to at least \$600,000.

The Plaintiffs' economic and noneconomic damages, and the fact that those damages arose from Mr. Stewart's mesothelioma diagnosis, were *completely undisputed* issues in this case. The undisputed evidence was that his medical expenses were \$241,000. The record further established that Mr. Stewart lived in pain for over one year, endured chemotherapy and a major invasive surgery, and ultimately died a very painful death from mesothelioma.

During closing arguments, Plaintiffs' counsel suggested the jury award a total of 5.2 million, comprised of 4,600,000 in survival damages and the \$600,000 in wrongful death damages. The Defendant's counsel in turn requested the jury discount any award to factor in other parties' potential contributions to damages. It appears the jury complied with both parties' requests, seemingly apportioning fault by awarding only a fraction of the \$5,200,000 the Plaintiff suggested. The resultant \$700,000 award fails to adequately account for the Plaintiffs' pain and suffering and other non-economic damages. For the reasons set forth herein, Plaintiffs respectfully request the Court to grant a new trial *nisi additur* and increase the total verdict to at least \$3,251,000.

STATEMENT OF FACTS

The undisputed evidence shows the rapid deterioration and ultimate death of a 69-year-old previously active man. Mr. Stewart's life was torn apart by mesothelioma. Mr. Stewart was diagnosed with mesothelioma on October 24, 2012. Prior to getting sick, he was enjoying retirement, traveling, gardening, and spending time with his children and grandchildren. Due to

the severe pain and limitations of his disease, Mr. Stewart was not able to do the things he loved. He even had to give up his beloved dog "Buddy" because he was no longer able to adequately care for his canine companion.

When asked about the effect of mesothelioma on his life and interaction with his family, Mr. Stewart described how he was just too exhausted to do things like drive to meet his family; he became emotional and could only say: "I never imagined that my life would come to what it is." Trial Depo. 67-9-24. Mr. Stewart faced an impending death which he so desperately sought delay. He opted to undergo a pleurectomy, which his surgeon, Dr. David Harpole, described as a "maximally invasive" procedure. Unfortunately, Mr. Stewart was not able to get that extra time he hoped for; despite undergoing the pleurectomy he ultimately succumbed to mesothelioma within one year of diagnosis.

STANDARD OF REVIEW

A new trial *nisi additur* may be granted when the trial court finds the amount of the verdict to be "merely inadequate" in light of the evidence presented at trial. *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (2003); *Vinson v. Hartley*, 324 S.C. 389, 406, 477 S.E.2d 715, 723 (Ct. App. 1996). When granting a motion for *additur*, the court must offer compelling reasons. *Green*, 356 S.C. at 570, 590 S.E.2d at 41; *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). "Great deference is given to the trial judge . . . [because] the trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than [the appellate courts]." *Waring v. Johnson*, 31 S.C. 248, 257, 533 S.E.2d 906, 911 (2000).

"A new trial *nisi* is one in which a new trial will be granted unless the party opposing it complies with a condition set by the court." *Waring*, 31 S.C. at 257, 533 S.E.2d at 911. The trial

court has the authority to grant a new trial to the plaintiff unless the defendant agrees to the payment of an additional amount. *Id.* at 258, 533 S.E.2d at 911.

SUMMARY OF ARGUMENTS AND AUTHORITIES

The jury's verdict is inadequate and should be increased to justly reflect the great extent of the Plaintiffs' losses. A new trial *nisi additur* is warranted when a non-economic damage award is inadequate. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 188, 777 S.E.2d 824, 826 (2015)(upholding trial court's granting of *nisi additur* in the amount of \$600,000 in product liability action with \$228,000 in economic damages); *Graham v. Whitaker*, 282 S.C. 393, 405, 321 S.E.2d 40, 45 (1984) (upholding new trial *nisi additur* of several times the jury verdict, increasing actual damages from \$10,000 to \$67,500). In the instant case the jury was instructed to specify only damages for survival and wrongful death. The jury awarded \$600,000 and \$100,000, respectively. Both are grossly insufficient.

Insufficient Survival Damages Award

The jury was instructed that "[a]ctual damages are designed to compensate a party for their loss and to make that party as whole as near as money can do and to put him or her in the same position they were in before the incident or accident occurred. Actual damages would be the actual losses and expenses the plaintiffs have incurred." The jury was instructed on four categories of actual damages—medical expenses, pain and suffering, loss of enjoyment of life, and mental anguish. The jury was also instructed that they could award damages based on Mr. Stewart's life expectancy, which was 13.99 additional years given he was 69-years-old at the time of this death. The evidence supported damages in each of these categories, and accounting for over a decade of life Mr. Stewart never got to experience.

Importantly, the jury was instructed that:

EVIDENCE WAS PRESENTED OF OTHER PARTIES CONTRIBUTING TO MR. STEVEN STEWART'S CONTRACTION OF MESOTHELIOMA. IT IS PROPER FOR YOU TO CONSIDER THE ACTIONS 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 CLAIMS NECESSARY TO RECOVER AGAINST THIS DEFENDANT.

(Emphasis added). On the contrary, Scapa, in its closing argument, requested the jury only award a fraction of what the Plaintiffs asked for to reflect Scapa's small role in Mr. Stewart's contraction of mesothelioma. Given the small amount of damages awarded coupled with the fact the jury curiously failed to find Scapa liable under strict liability and implied warranty theories, it appears the jury followed Scapa's request to effectively apportion responsibility to other parties. In rendering such a verdict, the jury ostensibly violated the court's charge to only consider actions of other parties as pertains to the Plaintiffs' burden of proof and, thus, further invaded the court's province to allocate set-off between settling and non-settling defendants. Problematically, the jury might have thought a survival award of 4.6 million was appropriate but believed it was incumbent on them to substantially reduce the award to account for other potential defendants. The jury may not have grasped what a fair and just verdict is in a case like this. Whatever their reason or the extent of their confusion, the jury's damages award was substantially deficient.

It is fair to 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. As discussed above, the court instructed the jury to consider the costs of medical treatment, but also pain and suffering, loss of enjoyment of life, mental suffering, and the fact that Mr. Stewart had a life expectancy of an additional 13.99 years at the time of his death. Proper consideration of these factors in this case necessitates a non-economic damages award far greater than \$359,000.

Considering the magnitude of Mr. Stewart's loss associated with his mesothelioma diagnosis, treatment, and painful death, a commensurate non-economic damages award would be between 2 and 5 million dollars.

Damages awards for pain and suffering in comparable mesothelioma cases range from \$1.5 million to more than \$20 million. See, e.g., *Keene v. CNA Holdings, LLC*, No. 2013-CP-42-03915 (S.C. Ct. Comm. Pleas Jan. 8, 2016) (upholding award of \$2 million in survival damages, \$5 million in loss of consortium damages, and \$5 million in wrongful death damages). In *Jolly v. General Electric, et al.*, No. 2016-CP-42-1592 (S.C. Ct. Comm. Pleas), a mesothelioma case tried in Spartanburg County, the court determined it appropriate to multiply medical damages by a factor of 10 to arrive at a fair non-economic damages award. Order Denying Defendant's Post-Trial Motions and Granting Plaintiff's Motion for New Trial *Nisi Additur*, at p. 9, *Jolly v. General Electric, et al.*, No. 2016-CP-42-1592 (S.C. Ct. Comm. Pleas).

Given the significant pain and suffering Mr. Stewart endured throughout treatment and his "maximally invasive" surgery, together with the excruciating pain he experienced prior to his death, Plaintiffs submit that non-economic damages should be calculated by multiplying medical damages by at least a factor of 10. Mr. Stewart's medical damages were \$241,000. Accordingly, Plaintiffs respectfully request this court increase the non-economic damages award to at least \$2,410,000 resulting in a total survival award of at least \$2,630,000.

Insufficient Wrongful Death Award

The jury only awarded a mere \$100,000 for wrongful death, which Plaintiffs submit is inadequate to compensate Mr. Stewart's family for their loss. The general elements of damages recoverable for wrongful death are: (1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use

and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing of the affairs of himself and of his beneficiaries. *Self v. Goodrich*, 300 S.C. 349, at 251, 387 S.E. 2d 713, at 714, (Ct App. 1993). In the instant case, the court instructed the jury as to damages for loss of companionship and the jury heard evidence as to how Ms. Stewart's mesothelioma prevented him from spending time with his children and grandchildren before he passed away at the age of 69. The jury was further instructed that according to the governing life expectancy table for a male of Mr. Stewart's age, that he had a life expectancy of an additional 13.99 years. The jury heard how Mr. Stewart was collecting retirement, actively involved in his children and grandchildren's lives, including both his time and financial support, and was absolved of any contributory negligence regarding his untimely and painful death. Mr. Stewart's children's losses were substantial. The award of a mere \$100,000 lacks any logical relation to the loss suffered.

The Plaintiffs submit that wrongful death damages should be increased to at least \$600,000, which would be in a reasonable proportion to the requested post-*additur* non-economic damages for Mr. Stewart.

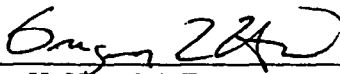
CONCLUSION

For the foregoing reasons, Plaintiffs ask the Court to grant a new trial *nisi additur*.

This motion is supported by the record of the case and applicable law. As additional support, Plaintiffs will also submit a forthcoming Memorandum in Support as well as offer verbal arguments at a hearing on this motion.

Respectfully submitted,

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Attorneys for the Plaintiff

February 19, 2018
Summerville, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion was sent via electronic mail to all counsel of record on February 19, 2018 and was sent to same via U.S. Mail on February 20, 2018 due to the fact South Carolina Courts and the U.S. Postal Service were closed for the President's Day holiday on February 19, 2018.



Gregory L. Hyland

Attorney for Plaintiff

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
Stephen R. Edwards, Individually)
and as Personal Representative of)
the Estate of Steven Redfearn)
Stewart,)
Plaintiff,)
vs.)
Albany International Corp., et al.,)
Defendants.)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2013-CP-46-00368

Defendant Scapa Waycross, Inc.'s Brief in Support of Motion for JNOV

The Court should grant Scapa Waycross's motion for JNOV for the following reasons:

Preliminary Statement

This lawsuit, filed in February 2013, by Mr. Steven Stewart, is based on allegations that Scapa manufactured or supplied asbestos-containing products that were present at Plaintiff's jobsite, the Bowater paper mill in Rock Hill, South Carolina. The evidence showed that Mr. Stewart worked in various positions, from a utility worker through a machine tender, on the number one paper machine from 1963 until 2002. The evidence showed that during Mr. Stewart's career at Bowater, 624 dryer felts were used on the number one paper machine and that Scapa supplied a mere 23 asbestos-containing felts for use on all of the paper machines.

At the trial's conclusion, the jury found that Scapa's negligence proximately caused Mr. Stewart's injury and damages. The jury refused to find that Scapa was strictly liable for selling a defective product and refused to find that Scapa breached an implied warranty. The jury awarded

\$600,000 for the survival claim and \$100,000 for the wrongful death claim. For the following reasons, the Court should render a judgment notwithstanding the verdict.

Argument and Authorities

1. **There was no evidence of regular and frequent exposure to asbestos-containing products in proximity to where Mr. Stewart worked.**

To establish an actionable exposure, Plaintiff was required to prove that Mr. Stewart had exposure to an asbestos-containing product of Scapa's on a regular basis over some extended period of time in proximity to where Mr. Stewart actually worked. *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185 (2007). Plaintiff did not satisfy this burden of proof. Mr. Stewart did not testify to having worked with a Scapa asbestos-containing felt, nor did his co-workers:

Co-worker Hegler

- Q. Okay. Do you recall ever seeing a SCAPA dryer felt taken out of the box?
- A. No.
- Q. And if you didn't see a SCAPA dryer felt taken out of a box, would you know whether or not you've ever seen anyone replacing a SCAPA dryer felt?
- A. I would not know.
- Q. Okay. So you can't offer any testimony today that you saw Mr. Stewart work with or around a SCAPA dryer felt?
- A. I cannot.
- Q. And you can't offer any testimony that you saw Mr. Stewart cut a SCAPA dryer felt?
- A. I cannot.
- Q. Do you have any knowledge regarding any section of test Paper Machine 1 where a SCAPA dryer felt would have been used?
- A. I don't know where they were used or which section.

Q. Okay. So would it be fair to say that you have a general recollection of seeing boxes of SCAPA dryer felts, but you don't recall ever seeing them being used in the plant?

A. That's correct.

(See 1 Tr. 158) (noting that Mr. Hegler's deposition testimony was read into the record).

Co-worker Steele

Q. So when a felt was installed on a paper machine unless you saw the box that it came out of you wouldn't know who made the felt just by looking at it would you?

A. That's correct.

Q. When a felt is removed from the paper machine you wouldn't be able to tell who manufactured that particular felt that was being removed could you?

A. That's correct.

Q. And you wouldn't be able to tell whether a felt contain asbestos just by looking at it would you?

A. I wouldn't have, no.

* * *

Q. Sir you can't testify that a SCAPA felt ever tore off of the paper machine can you?

A. I cannot tell you specifically, no.

(1 Tr. 337-38).

Finally, co-worker Ward testified Mr. Stewart was not present in December 1972 when a Scapa dryer felt allegedly ran off the paper machine. He explained that Mr. Stewart was assigned to a different shift and was not on either of the crews that dealt with the situation. (1 Tr. 511-512).

Additionally, Plaintiff's experts could not and did not provide testimony supporting a finding that Mr. Stewart had exposure to an asbestos-containing product of Scapa's on a regular basis over some extended period of time in proximity to where he actually worked. The evidence showed that by the time Scapa first supplied an asbestos-containing dryer felt to Bowater, Mr.

Stewart was no longer serving as a utility man, fifth hand, or fourth hand—the jobs that involved cutting felts. And Plaintiff's expert DePasquale conceded he could not testify that asbestos fibers were released during papermaking operations not involving any cutting of felts:

Q. I talked to Dr. Millette a little bit about this yesterday, but we can agree -- you can agree as an industrial hygienist that it is actually there has to be some interaction of force on the dryer felt for there to be a potential for fiber release, correct?

A. Yes, I would generally agree with that statement.

Q. You don't have any information that when they're just going through and making paper, nothing else is going on, that there's any fiber release; is that correct?

A. There's a potential for fiber release, but whether it occurs or not, I'm not sure.

(1 Tr. 470-71).

Likewise, Dr. Millette admitted that his glove-box test did not simulate actual mill conditions. During his test, no paper was being made (1 Tr. 399-400), no water was involved, there was no movement of the felt, there was no ventilation, and the test did not replicate the humidity of a paper mill. (1 Tr. 397-98). He also admitted his post-it note and finger test did not cause respirable asbestos to be released into the air. (1 Tr. 409). Furthermore, each worker testified that during a blow down, he would blow air across the felt, not at the 90 degree angle used in Dr. Millette's test. All of the experts agreed that blowing air across the felt did not cause any fiber release.

In short, there was no direct evidence that Mr. Stewart had a regular, frequent, and proximate exposure to asbestos from Scapa dryer felts. No witness could testify that Mr. Stewart had exposure to an asbestos-containing product of Scapa's on a regular basis over some extended period of time in proximity to where Mr. Stewart actually worked.

Nor was there any circumstantial evidence of regular, frequent, and proximate exposure. Although causation may be established by circumstantial evidence, *Seaside Resorts, Inc. v. Club Car, Inc.*, 308 S.C. 47 (Ct. App. 1992), and is usually a question for the jury, *Mims v. Florence County Ambulance Service Comm'n*, 296 S.C. 4 (Ct. App. 1988), it nonetheless must be based on probabilities not mere possibilities. *Harris v. Rose's Stores, Inc.*, 315 S.C. 344 (Ct. App. 1993). *Harris* explains that causation based on a possibility rather than a probability is not sufficient for a plaintiff to recover in a products liability case. The court held that because the cause of the plaintiff's injuries could be as reasonably attributed to an act the defendant was not liable for as to one it was liable for, the plaintiff did not meet her burden of proof in establishing her injuries were proximately caused by the defendant's negligence. *Id.* at 34-47

Here, the evidence established nothing more than a speculative possibility that Mr. Stewart had the requisite degree of exposure to asbestos from a Scapa dryer felt. Again, under *Henderson*, the plaintiff must show "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. A mere showing that an asbestos-containing product was at the same jobsite where the plaintiff worked is insufficient evidence to reach a jury on the issue of exposure. Instead, there has to be evidence of regular exposure to a particular product in proximity to the plaintiff. Here, that evidence is entirely absent.

As noted, there is no testimony, either by Mr. Stewart or any of his coworkers, establishing his work with or around an asbestos-containing Scapa product on a regular basis over some extended period of time. Further, both Mr. Stewart and his coworkers testified that the paper-making process was hot and humid. Millions of gallons of water were used in this process. Moreover, the dryer felts in the dryer section were completely enclosed by hoods that were down

all the way to the floor while the paper machine was running. (1 Tr. 324, 329). The hoods included ventilation systems to remove any excess heat, moisture, and debris from the dryer section of the machine. (1 Tr. 492).

Scapa representative Mr. Doherty and the co-workers testified there was significant build up on the felt from the paper making process (1 Tr. 667), and all experts agreed this build up, the water usage, the ventilation, and the humidity would significantly decrease the opportunity for any fiber release from the felt. (*See, e.g.*, 1 Tr. 396). And Mr. Doherty testified that when asbestos-containing felts were returned to the factory after use, they were not thinner or shedding fibers of any type. (1 Tr. 656). Accordingly, Plaintiff did not establish that, even if Scapa felts were used, and even if they contained asbestos, the use of such felts releases any asbestos whatsoever, much less anything greater than a *de minimus* exposure. As such, judgment n.o.v. is required.

2. Plaintiff's causation evidence is legally insufficient.

Plaintiff's causation experts based their testimony on the cumulative exposure theory. Because that theory is junk science that should have been excluded under *Watson v. Ford Motor Co.*, 389 S.C. 434 (2010), their testimony is legally insufficient to establish causation.

One of the most recent in the long list of decisions rejecting cumulative/any exposure testimony is *Krik v. Exxon Mobil Corp.*, 870 F.3d 669 (7th Cir. 2017). The court noted that "more than thirty other federal and state courts have held that this cumulative/any exposure theory is not reliable." *Id.* Among those decisions are the following: *Schwartz v. Honeywell Int'l, Inc.*, 2018 Ohio LEXIS 339 (Ohio 2018); *Souja v. Owens-Ill., Inc.*, 2016 WL 5660299, at *11 (W.D. Wisc. 2016); *Comardelle v. Pa. Gen. Ins. Co.*, 76 F. Supp. 3d 628, 635 (E.D. La. 2015); *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 858 (2015); *Davidson v. Georgia Pacific, LLC*, 2014 WL 3510268, at *5 (W.D. La. 2014); *Smith v. Ford Motor Co.*, 2013 WL 214378, at *4 (D. Utah 2013);

Moeller v. Garlock Sealing Techs., LLC, 660 F.3d 950, 955 (6th Cir. 2011); *In Re W.R. Grace & Co.*, 355 B.R. 462, 476 (Bankr. D. Del. 2006); *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 493 (6th Cir. 2005); *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 605 (N.D. Ohio 2004).

The Seventh Circuit, and numerous other courts, have rejected testimony based on the cumulative/any exposure theory because it does not satisfy the requirements of Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).¹ As Plaintiff's experts conceded, mesothelioma is a dose-dependent disease. "But rather than testifying that the particular dose of asbestos to which [a plaintiff] had been exposed was a substantial contributing factor to his illness," an expert relying on the cumulative/any exposure theory bases specific-causation testimony on the notion that each and every exposure to asbestos is a substantial contribution to the cumulative total. *Krik*, 870 F.3d at 675. This theory ignores "fundamental principles of toxicology that illnesses like cancer are dose dependent." *Id.*

Testimony based on the cumulative/any exposure theory is "inadmissible speculation that is devoid of scientific support." *Smith v. Ford Motor Co.*, 2013 WL 214378 at *2 (D. Utah 2013). Among other things, as one court recently explained, the cumulative/any exposure theory "is not testable and consequently cannot have an error rate, thus failing to satisfy two *Daubert* factors." *Davidson v. Georgia Pacific, LLC*, 2014 WL 3510268, at *5 (W.D. La. 2014). The theory "elides any differences or nuances of duration, concentration, exposure, and the properties of the fibers to which [the plaintiff] may have been exposed." *Comardelle v. Pa. Gen. Ins. Co.*, 76 F. Supp. 3d 628, 634 (E.D. La. 2015). In light of all its shortcomings, testimony based on this theory fails to satisfy the requirements of Rule of Evidence 702 and was inadmissible at trial. *See Krik*, 870 F.3d

¹ "[W]e routinely look to the federal interpretation of the Rules of Evidence to guide us in our interpretation of our own Rules of Evidence." *State v. Broadnax*, 414 S.C. 468, 477 n.7 (2015).

at 675; *see also* William L. Anderson & Kieran Tuckley, *The Any Exposure Theory Round III: An Update on the State of the Case Law 2012-2016*, 83 Def. Counsel J. 264 (July 2016).

The causation testimony of Plaintiff's experts is no different than the expert testimony the Seventh Circuit held was properly excluded in *Krik* and no different than the testimony in the more than 30 other decisions excluding cumulative/any exposure testimony. Just like the expert in *Krik*, 870 F.3d at 675, they had no idea about the amount of asbestos Mr. Stewart was allegedly exposed to from dryer felts. Instead, their "asserted theory [was] that any and all exposure to asbestos is a substantial contributing factor" to mesothelioma. *Id.* Just like the expert in *Krik*, Plaintiff's experts failed to present "any individualized analysis of the level of exposure," and they relied on the theory with "little to no evaluation of the actual facts of this case." *Id.* (internal quotation marks omitted). Their testimony cannot be salvaged by pretending the "cumulative exposure" theory is different than the "any exposure" theory. The court in *Krik* thoroughly debunked that notion. *Id.* at 675-77 ("To summarize, the principle behind the "each and every exposure" theory and the cumulative exposure theory is the same—that it is impossible to determine which particular exposure to carcinogens, if any, caused an illness.").

In sum, Plaintiff's experts' testimony was "based on [their] holistic view that every exposure to asbestos, no matter how minimal, is a substantial contributing factor to any resulting mesothelioma." *Souja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196, 1207 (W.D. Wis. 2016). Because that view is junk science and inadmissible under Rule of Evidence 702, their testimony was not legally sufficient evidence of causation. *See Rockman v. Union Carbide Corp.*, 2017 U.S. Dist. LEXIS 110181, at *23-24 (D. Md. 2017) ("prevailing authority applying *Daubert* has rejected Plaintiffs' experts' 'each and every exposure' causation theory. That theory is not the

'product of reliable principles and methods,' as required by Rule 702(c) of the Federal Rules of Evidence."'). The Court should therefore render judgment n.o.v. for Scapa.

Conclusion

For the foregoing reasons, the Court should grant this motion and render judgment that Plaintiff take nothing from Scapa.

Respectfully submitted,

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LLC**

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BY: s/William P. Early
William P. Early (15657)
Counsel for the Defendant Named Herein

March 22, 2018
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was electronically filed with the Clerk of Court and notification of such filing was served on counsel of record for the plaintiff as well as all counsel of record.

This 22nd day of March, 2018

s/William P. Early

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	C/A NO.: 2013-CP-46-00368
	)	
Stephen R. Edwards, Individually and as	)	
Personal Representative of the Estate of	)	
Steven Redfearn Stewart,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
Albany International Corp., et al.,	)	
	)	
Defendants.	)	
	)	

Defendant's Response to Plaintiff's Motion For New Trial *Nisi Additur*

The Court should deny Plaintiff's motion for new trial *nisi additur* for the following reasons:

Preliminary Statement

Plaintiff brought this action against 16 defendants, including Scapa. Before trial, Plaintiff settled with or dismissed every defendant but Scapa. A jury trial began on January 29, 2018. On February 9, after almost five hours of deliberation, the jury returned a verdict, finding in favor of Plaintiff on his negligence claim. The jury awarded \$600,000 in damages for Mr. Stewart's survival claim, and \$100,000 in damages for Plaintiff's wrongful death claims. Throughout trial, the Court noted that the jury was highly-educated, diverse, and attentive. After the verdict, the Court stated: "I've seen a lot of juries. I don't believe I've seen a jury in my time that was any more attentive or committed to their job than this jury has been." (Tr. 488).

Argument

"Compelling reasons must be given to justify invading the jury's province by granting a new trial to adjust damages." *Wright v. Craft*, 372 S.C. 1, 35 (Ct. App. 2006). When considering a motion for a new trial based on the inadequacy of the jury's verdict, the trial court must

distinguish between awards that are merely unduly conservative and awards that are actuated by passion, caprice, or prejudice. *Id.* Courts must give substantial deference to a jury's determination of damages. *Harrison v. Bevilacqua*, 354 S.C. 129, 140 (2003). Trial judges are not empowered to simply substitute their judgment for that of the jury. *Graham v. Whitaker*, 218 S.C. 393, 402 (1984). Awards for noneconomic damages are particularly within the jury's province to weight and determine because such damages are indeterminate in character. *Kalchthaler v. Workman*, 316 S.C. 499, 503 (Ct. App. 1994). Here, the jury's damage awards are not "so grossly . . . inadequate that the amount awarded is 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." *Riley v. Ford Motor Co.*, 414 S.C. 185, 192 (2015).

1. The survival damages are not insufficient.

Actual damages in a survival action are those for medical bills, conscious pain, suffering, and mental distress of the deceased. *Welch v. Epstein*, 342 S.C. 279, 303 (Ct. App. 2000). Here, the jury's \$600,000.00 award in damages for the survival claim is sufficient based on the evidence. Mr. Stewart's treating physician testified to that in addition to mesothelioma, Mr. Stewart had a number of co-morbidities. He suffered from a prior heart attack, hypertension, bypass surgery, chronic obstructive pulmonary disease, bladder cancer, prostate cancer, and skin cancer. He had a lengthy smoking history. As such, his physician could not give the jury a life-expectancy estimate for Mr. Stewart had he not contracted mesothelioma. The jury was entitled to take this evidence into account in determining the amount of conscious pain, suffering, and mental distress attributable to Mr. Stewart's mesothelioma, and substantial deference must be paid to its calculation of the appropriate damage amount. *Harrison*, 354 S.C. at 140. \$600,000 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.

Plaintiff's citations to damage awards in other cases do not support additur here. "The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact. For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding." *Bertero v. Nat'l Gen. Corp.*, 13 Cal.3d 43, 65 (Cal. 1974).

2. The wrongful death damages are not insufficient.

The general elements of damages recoverable for wrongful death are: (1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing of the affairs of himself and of his beneficiaries. *Self v. Goodrich*, 300 S.C. 349, 351 (Ct. App. 1989). Mental, moral and physical characteristics of the decedent that actually bear on the relationship of parent and child and the concomitant probability of lost advice, guidance, and counsel are legitimate factors for jury consideration. *Johnson v. Dobrosky*, 904 A.2d 238, 248 (N.J. 2006). Thus, evidence that a parent was wholly absent from the child's life shows that the predicate relationship was lacking, obviating any assumption that future advice, guidance and counsel would have been rendered. *Id.*

The courts "have held admissible evidence of the closeness of the family unit, the warmth of feeling between family members, and the character of the deceased as 'kind and attentive' or 'kind and loving'. . . ." 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1424, p. 905. As one court explained, "[c]learly, evidence regarding a beneficiary's relationship or lack thereof with the decedent would be relevant in determining whether the beneficiary is entitled to damages for

sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent.” *Voelker v. Fredrick Bus. Props. Co.*, 195 W.Va. 246, 251 (1995); *see also* 1 Stuart M. Speiser et al., *Recovery for Wrongful Death and Injury* § 3:37 (3d ed. 1992) (“Obviously the relationship between the decedent and the beneficiary or beneficiaries is a significant element in determining and fixing wrongful death damages[.]”).

Here, the jury heard evidence establishing that for most of their lives, Mr. Stewart had virtually no relationship with his children, visiting them as seldom as once every two years. He relinquished his parental rights so that his ex-wife’s husband could adopt the children. He re-adopted them in 2013 so they could inherit from him. Neither were present when he died, and neither helped him during his dying days.

The jury was entitled to take this evidence into account in determining the closeness of the relationship, and depth of love and affection between Mr. Stewart and his children. It was within reason for the jury to conclude that plaintiffs established no more than \$100,000 as the pecuniary value of the loss of their father’s comfort, society and protection. Mr. Stewart’s extended absence from the lives of his children tempers any evidence of the closeness of the family relationship or significance of the children’s loss of society. The jury’s damage 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.” *Riley*, 414 S.C. at 192. There is no compelling reason to invade the province of the jury and alter its determination of the appropriate amount of damages.

Conclusion

The Court should deny Plaintiff's motion for new trial *nisi additur*.

Respectfully submitted,

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BY: s/William P. Early

William P. Early (15657)

Counsel for the Defendant Named Herein

April 6, 2018

Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was electronically filed with the Clerk of Court and notification of such filing was served on counsel of record for the plaintiff as well as all counsel of record.

This 6th day of April, 2018

s/William P. Early

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	C/A NO.: 13-CP-46-00368
	)	
Stephen R. Edwards, Individually	)	
and as Personal Representative of	)	
the Estate of Steven Redfearn	)	
Stewart,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
Albany International Corp., et al.,	)	
	)	
Defendants.	)	
	)	

Defendant's Brief in Support of Motion to Reallocate Settlement Proceeds

Defendant Scapa Dryer Fabrics, Inc. moves the Court reallocate the settlement proceeds received by Plaintiff for the following reasons:

Facts

The jury awarded \$600,000 for the survival claim, and \$100,000 for the wrongful death claim. The Court has stated its intent to grant additur and increase the survival damages to \$1,000,000, while leaving the wrongful death damages undisturbed. Plaintiff has represented that \$1,036,000 in settlements have been recovered. He is requesting that the Court allocate the settlement proceeds 80% to the wrongful death claim and 20% to the survival claim.

Argument and Authorities

1. The Court should reconsider its additur ruling.

By filing this motion, Defendant Scapa does not acquiesce to, and urges the Court to reconsider its additur ruling. To grant additur, there must be a compelling reason for invading the province of the jury. *Green v. Fritz*, 356 S.C. 566, 570 (Ct. App. 2003). “[S]ubstantial deference must be afforded to the jury’s determination of damages.” *Id.*

This Court's discretion to grant additur for an unduly conservative damages verdict is not so broad as to permit a 67% increase in the jury's award for unliquidated survival damages. The jury's award for unliquidated survival damages was nearly three times the amount of Mr. Stewart's medical expenses. Furthermore, pain and suffering damages are indeterminate in character, are not capable of exact measurement, and there is no fixed standard whereby such damages can be determined. Thus, the amount of damages to be awarded for pain and suffering must be left to the judgment of the jury. *Harper v. Bolton*, 239 S.C. 541, 548 (1962).

2. The Court should reallocate the settlement proceeds to reflect the damages awarded by the jury and the additur ruling by the Court.

An allocation of settlement proceeds between survival and wrongful death claims "must yield to fairness and justice." *Welch v. Epstein*, 342 S.C. 279, 313 (Ct. App. 2000). Thus, under its equity powers, this Court has the discretion to reallocate settlement funds between the two causes of action asserted in this case. *See Rutland v. S.C. DOT*, 400 S.C. 209, 216 (2012).

The South Carolina Supreme Court has, however, enunciated a narrow limitation on the Court's power to reallocate. *See Riley v. Ford Motor Co.*, 414 S.C. 185 (2015). In *Riley*, the supreme court held that a plaintiff's agreement with a settling party to allocate settlement proceeds in a certain manner may not be disturbed "*solely* because the apportionment may have been advantageous to the Estate." *Id.* at 196 (emphasis added). When a settling party allocates settlement proceeds in a manner that best serves its interests, "[t]hat fact alone is insufficient to justify appellate reapportionment for the sole purpose of benefitting [the defendant]." *Id.* at 197 (emphasis added). The supreme court vacated the court of appeals' reallocation because the "trial-court-approved allocation [was] unquestionably reasonable under the facts." *Id.* Thus, under *Riley*, if an allocation is reasonable, reallocation based *solely* on the fact that it is advantageous to the plaintiff is not permitted.

Here, Scapa is not complaining that Plaintiff's proposed allocation is unreasonable based solely on the fact that it is advantageous to Plaintiff. Rather, the 80% wrongful-death-claim/20% survival-claim allocation is not reasonable under the facts. The Court's additur findings support this conclusion. The Court found no reason to increase the jury's award of \$100,000 for the wrongful death damages, given the decedent's limited relationship with his wrongful death beneficiaries. On the other hand, the Court concluded that the evidence concerning the decedent's survival damages warranted a 67% increase in the amount of damages the jury awarded—from \$600,000 to \$1,000,000. In short, the Court was of the view that the evidence supported a finding that it was reasonable and appropriate for 10% of the total damages to be awarded for the wrongful death claim and reasonable and appropriate for 90% of the total damages to be awarded for the survival claim.

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. On the contrary, the allocation should be 10% for the wrongful death claim and 90% for the survival claim.

This allocation would be entirely consistent with Plaintiff's own arguments (at the July 11, 2018 hearing on post-trial motions) concerning the extent and nature of Mr. Stewart's survival damages, as contrasted with nature of the wrongful death beneficiaries' losses as a result of his death. Plaintiff's counsel urged the Court to multiply the survival damages by a factor of ten, while asking for an increase in the wrongful death damages only by a factor of four. The Court will recall that Plaintiff's counsel had very little to say about the wrongful death beneficiaries' losses, and a great deal to say about Mr. Stewart's suffering before his death. In fact, the Court commented:

I understand, and let me just say this: I certainly understand the argument taking one position about the additur and then taking another position about how they want

this thing allocated. The allocations, if you look at it from the standpoint of what I have just done with the additur is 90/10; is it not?

(7/11/2018 Tr. at 34).

Conclusion

For the foregoing reasons, the Court should reallocate the settlement proceeds so that 10% are allocated to the wrongful death claim and 90% are allocated to the survival claim.

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BY: s/William P. Early
William P. Early (15657)
Counsel for the Defendant Named Herein

July 23, 2018
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was electronically filed with the Clerk of Court and notification of such filing was served on counsel of record for the plaintiff as well as all counsel of record.

This 23rd day of July, 2018

s/William P. Early

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) FOR THE SIXTEENTH JUDICIAL CIRCUIT

Stephen R. Edwards, Individually) C/A NO.: 13-CP-46-00368
and as Personal Representative of)
the Estate of Steven Redfearn)
Stewart,)

DEFENDANT SCAPA WAYCROSS, INC.'S,
MOTION TO REALLOCATE
PLAINTIFF'S SETTLEMENT
PROCEEDS

Plaintiff,)
vs.)
Albany International Corp., et al.,)
Defendants.)

COMES NOW, Defendant Scapa Waycross, Inc. (hereinafter "Scapa") and respectfully moves this Court for an Order reallocating all settlement proceeds received by Plaintiff to date. This motion is set forth fully and supported by the brief in support of this motion and any and all pleadings, discovery, and trial materials conducted in conjunction with this matter.

Respectfully submitted,

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BY: s/William P. Early
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Counsel for the Defendant Named Herein

July 24, 2018
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was electronically filed with the Clerk of Court and notification of such filing was served on counsel of record for the plaintiff as well as all counsel of record.

This 24th day of July, 2018

s/William P. Early

STATE OF SOUTH CAROLINA
COUNTY OF YORK

) IN THE COURT OF COMMON PLEAS
) FOR THE SIXTEENTH JUDICIAL
) CIRCUIT

STEPHEN R. EDWARDS,
INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF STEVEN REDFEARN STEWART,

) C/A No.: 2013-CP-46-00368

Plaintiffs,

v.

SCAPA WAYCROSS, INC.

) PLAINTIFFS' RESPONSE AND BRIEF
) TO DEFENDANT SCAPA WAYCROSS,
) INC.'S MOTION TO REALLOCATE
) PLAINTIFFS' SETTLEMENT
) PROCEEDS

Defendant.

Plaintiffs request that this Court deny Defendant Scapa Waycross, Inc.'s Motion to Reallocate Plaintiffs' Settlement Proceeds based on the following reasons:

INTRODUCTION

The jury awarded \$600,000 for Plaintiffs' survival claim, and \$100,000 for the wrongful death claim. Plaintiffs' moved for new trial additur, asking the Court to increase the survival award to at least \$2,651,000 and the wrongful death award to at least \$600,000.

At the hearing on Plaintiffs' motion, the Court explained that it found compelling reasons to increase the survival verdict but not the wrongful death verdict. Accordingly, it would grant additur and increase the survival award to \$1,000,000 but deny additur as to wrongful death. The Plaintiffs further informed the Court they had received \$918,000 in settlement proceeds to date and expect to receive an additional \$118,000. All of the settlements entered allocated 20% of agreed-upon sums to the survival claim and 80% to the wrongful death claim. Scapa requested leave to file the subject reallocation motion, and in so doing advanced the same argument it would

reiterate through its Brief: that the Court's additur ruling created a 90:10 percentage ratio between survival and wrongful death awards, and it would 'make sense' for the Court to apply the same 90:10 percentage ratio when calculating setoff against settlement proceeds.

AUTHORITIES

The right to claim setoff in South Carolina arises both from common and statutory law. S.C. Code Ann. § 15-38-50 provides that, "[w]hen a release ... is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (I) ... it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater.... " "When a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law." *Ellis v. Oliver*, 335 S.C. 106, 112-13, 515 S.E.2d 268, 271-72 (Ct. App. 1999)(citing *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012).

A party seeking departure from the application of standard set-off rules bears the burden of proof and must be "prepared to justify such [reallocation] as fair, bona fide, and just," particularly where "there is an executed contract between [the parties], which is not contested as between them but which is sought to be invalidated by third parties." *Riley v. Ford Motor Co.*, 414 S.C. 185, 197-198 (2015) (citing *In re Wells*, 43 S.C. 477, 21 S.E. 334, 337 (1895).

"Settling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify . . . reapportionment for the sole purpose of benefitting [non-settling defendants]." *Riley v. Ford Motor Co.*, 414 S.C. 185, 196-97, 777 S.E.2d 824, 830-31.

ARGUMENT

This Court should not invalidate the allocation of settlement proceeds based on Scapa's veiled complaint that failure to reallocate would, in the Scapa's view, provide an unfair advantage to Plaintiffs. In arguing the settlement proceeds allocation is unreasonable because it does not use the same percentage ratio as the Court, Scapa invokes the same "percentages analysis" the Supreme Court has dismissed as "manifestly without merit" under similar circumstances. See *Riley*, at 197.

Riley involved a settlement which allocated 80% survival to 20% wrongful death. The jury returned a \$300,000 verdict for wrongful death only, the trial judge subsequently granted additur, increased the wrongful death award to \$900,000, declined to reallocate the 80:20 settlement allocation despite the fact Plaintiffs chose to withdraw their survival claim all together. On appeal, Ford argued—like Scapa does here—that the settlement allocation was unreasonable because the percentage ratio not reasonably proportionate to damages suffered. Even though the *Riley* Plaintiffs did not present the case as requesting survival damages, the Supreme Court determined that with some evidence in the record support survival damages it was error to reapportion damages solely because the allocation may have advantaged the Estate. *Id.* at 196. The opinion emphasized the importance of respecting settlement allocations, especially that Plaintiffs authority attempt to allocate proceeds in a manner most advantageous to them. *Id.* at 197 (indicating the Court agrees with the approach taken by the Illinois Court of Appeals as articulated in *Lard*, 327 Ill. Dec. 273, 901 N.E.2d at 1019).

Scapa's argument relies solely on its belief that the settlement's allocation between survival and wrongful death claims does not seem, in Scapa's view, proportionately reasonable. Scapa stands on the unsubstantiated premise that reasonableness of a settlement allocation is determined by the comparative proportionality of the percentages involved. This Court should askew such an arbitrary measure in determining whether reapportionment is justified. When it comes down to it, Scapa is asking the Court to take an extraordinary step and invalidate the terms of an agreed-upon allocation of settlement proceeds based upon little more than the purported impropriety of an apportionment favoring Plaintiffs. Such reasoning is insufficient and should be rejected. See *Riley*, at 831.

CONCLUSION

For the reasons stated above and as further supported by the record of the case and applicable law, Plaintiffs respectfully request that this Honorable Court deny Scapa's Motion to Reallocate Plaintiff's Settlement Proceeds.

Respectfully submitted,

HART HYLAND SHEPHERD, LLC

/s Gregory L. Hyland

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WALLACE AND GRAHAM, P.A.

Mona Lisa Wallace, Esq.
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Attorneys for the Plaintiff

August 2, 2018
Summerville, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was electronically filed with the Clerk of Court and notification of such filing was served on counsel of record for the Defendant as well as all counsel of record.

This 2nd day of August, 2018

/s Gregory L. Hyland

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2013-CP-46-00368

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

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APR 17 2019

SC Court of Appeals

Respondent,

v.

Scapa Waycross, Inc.,

Appellant.

NOTICE OF APPEAL

Scapa Waycross, Inc. appeals the judgment of the Honorable Jean H. Toal dated March 22, 2019. Appellant received written notice of entry of this judgment on March 25, 2019.

PIERCE SLOAN WILSON KENNEDY & EARLY LLC

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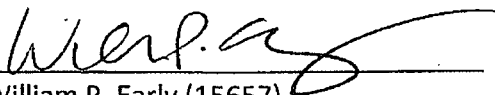
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Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2013-CP-46-00368

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

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APR 17 2019

SC Court of Appeals

Respondent,

v.

Scapa Waycross, Inc.,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Stephen R. Edwards, Individually, and as Personal Representative of the Estate of Steven Redfearn Stewart, by depositing a copy of it in the United States Mail, postage prepaid, on April 15, 2019, addressed to the following:

Attorneys of Record:

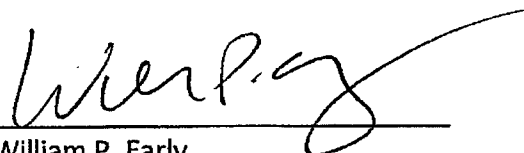
Gregory L. Hyland, Esquire
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William M. Graham, Esquire
525 North Main Street
Salisbury, NC 28144

Circuit Court Clerk:
The Honorable David Hamilton
York County Clerk of Court
2 South Congress Street
York, SC 29745

April 15, 2019

A handwritten signature in black ink, appearing to read 'W. Early', is written over a horizontal line.

William P. Early
Pierce Sloan Wilson Kennedy & Early LLC
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Attorneys for Appellant

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP4600368

Steven Redfearn Stewart

Stephen R Edwards

Scapa Waycross Inc

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: Order re: Post-Trial Motions

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Stephen R. Edwards, Individually	Scapa Waycross Inc.	\$100,000.00 (damages for wrongful death) \$792,800.00 ((damages for survival)
Stephen R. Edwards, as PR of Estate of Steven Redfearn Stewart	Scapa Waycross Inc.	\$100,000.00 (damages for wrongful death) \$792,800.00 ((damages for survival)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/ Jean H. Toal

2758

3/25/2019

Jean H. Toal

Judge Code

Date

(Retired) Circuit Court Judge

RECEIVED
APR 17 2019
SC Court of Appeals

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

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Salisbury, NC 28144
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Carl Everette Pierce II PO Box 22437 Charleston, SC
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H Lane Young II
Joshua Daniel Shaw PO Box 11267 Columbia, SC 29201
Norman S Fletcher

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

STEPHEN R. EDWARDS, INDIVIDUALLY
AND AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF STEVEN REDFEARN
STEWART,

Plaintiff,

v.

SCAPA WAYCROSS, INC.

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL CIRCUIT

C/A No.: 2013-CP-46-00368

ORDER RE: POST-TRIAL MOTIONS

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APR 17 2019

SC Court of Appeals

The above-captioned case came before this Court pursuant to Plaintiff's Second Amended Complaint asserting causes of action for survival and wrongful death against Defendant Scapa Waycross, Inc. ("Scapa"), and requesting awards of damages against Scapa based on claims of its negligence, strict products liability, and breach of implied warranty. A jury trial commenced January 24, 2018. After receiving myriad testimony and evidence over several days, on February 9, 2018 the jury returned a verdict in favor of the Plaintiff on claims of negligence and breach of implied warranty. The jury's awarded Plaintiff \$600,000 in compensatory damages on the survival cause of action and \$100,000 in compensatory damages for wrongful death. Both parties sought certain relief from the jury's verdict, with the Plaintiff filing a Motion for New Trial *Nisi Additur*, and Scapa filing motions for Judgment Notwithstanding the Verdict, Discovery of Settlements, Setoff, and Reallocation of Plaintiff's Settlement Proceeds. For the reasons set forth below, Plaintiff's Motion for New Trial *Nisi Additur* is GRANTED in part and denied in part, Defendant's Motions for Judgment Notwithstanding the Verdict, Discovery of Settlements, and Reallocation of Plaintiff's Settlement Proceeds are each DENIED; and Defendant's Motion for Set-off under

S.C. Code § 15-38-50 is GRANTED.

I. Plaintiff's Motion for New Trial *Nisi Additur*

a. Legal Standard

The consideration of a motion for a new trial *nisi additur* requires the court to consider the adequacy of the verdict in light of the evidence presented. *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006); *Waring v. Johnson*, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000); *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). A trial court may grant a new trial *nisi additur* when it finds the amount of the verdict to be "merely inadequate". *Todd v. Joyner*, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2008), *aff'd*, 385 S.C. 421, 685 S.E.2d 595 (2009); *Green*, 356 S.C. at 570, 590 S.E.2d at 41; *Vinson* 324 S.C. at 406, 477 S.E.2d at 723. A trial court may grant *additur* upon finding inadequate that the portion of the award reasonably attributable to non-economic damages. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 188, 777 S.E.2d 824, 826 (2015) (upholding trial court's granting of *nisi additur* in the (additional) amount of \$600,000 in product liability action with \$228,000 in economic damages); *Graham v. Whitaker*, 282 S.C. 393, 405, 321 S.E.2d 40, 45 (1984) (upholding new trial *nisi additur* of several times the jury verdict, increasing actual damages from \$10,000 to \$67,500). Our Supreme Court has clarified that *additur* may be appropriate even when the jury has awarded some amount for noneconomic damages. *Riley*, 414 S.C. at 194, 777 S.E.2d at 829-30.

When considering a new trial *nisi* or *nisi additur*, it is proper to compare the jury's verdict to damages awards in comparable cases. *See Lucht v. Youngblood*, 266 S.C. 127, 136, 221 S.E.2d 854, 858 (1976); see also *Kapuschinsky v. US.*, 259 F. Supp. 1, 8 (D.S.C. 1966) ("Admittedly not controlling, but worthy of note are treatments of verdicts from all over this country").

The decision to grant a new trial *nisi additur* will not be disturbed on appeal unless the trial judge's findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Proctor*, 368 S.C. at 320, 628 S.E.2d at 518; *Waring*, 341 S.C. at 256, 533 S.E.2d at 910. Great deference is given to the trial judge because "the trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than [the appellate court]." *Rush v. Blanchard*, 310 S.C. 375, 381, 426 S.E.2d 802, 806 (1993).

b. Evidence and Analysis

The primary issues of dispute at trial were the extent of Decedent Steven R. Stewart's exposure to asbestos from dryer felts manufactured by Defendant Scapa Waycross, Inc. ("Scapa"), and the causation of his malignant mesothelioma from that exposure. The jury resolved those issues in Plaintiff's favor, finding that Scapa was negligent, and that Scapa's wrongful conduct was a substantial factor in causing Mr. Stewart's mesothelioma. While liability was fiercely contested, the evidence of the Mr. Stewart's economic damages was not disputed in any way. Plaintiff and Scapa stipulated as to economic damages by way of Mr. Stewart's medical expenses. Scapa did not offer any evidence tending to contradict economic damages, nor did Scapa contradict Plaintiff's evidence of non-economic damages consisting of Mr. Stewart's pain and suffering, loss of enjoyment of life, and mental anguish.

Economic damages were unequivocally established at \$241,000 (the stipulated amount of Mr. Stewart's medical expenses). 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, thoracenteses, a major invasive surgery, and ultimately died a very painful death from

mesothelioma.

The undisputed evidence shows the rapid deterioration and ultimate death of a 69-year-old previously active man. Mr. Stewart's life was torn apart by mesothelioma. Mr. Stewart was diagnosed with mesothelioma on October 24, 2012. 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. He even had to give up his beloved dog "Buddy" because he was no longer able to adequately care for his canine companion.

When asked about the effect of mesothelioma on his life and interaction with his family, Mr. Stewart described how he was just too exhausted to do things like drive to meet his family; he became emotional and could only say: "I never imagined that my life would come to what it is," Trial Depo. 67:9-24. In the midst of such terrible anguish, Mr. Stewart was determined to delay his impending death. He suffered greatly through multiple rounds of chemotherapy. He opted to undergo a pleurectomy, which his surgeon, Dr. David Harpole, described as a "maximally invasive" procedure which involved removing his rib and scraping out the tumor.

Unfortunately, Mr. Stewart was not able to get that extra time he hoped for; despite undergoing the pleurectomy he ultimately succumbed to mesothelioma within one year of diagnosis.

After the close of evidence, the jury was charged and instructed to consider Plaintiff's claims of negligence, strict products liability, and breach of implied warranty. The jury was instructed that "[a]ctual damages are designed to compensate a party for their loss and to make that party as whole as near as money can do and to put him or her in the same position they were in before the incident or accident occurred. Actual damages would be the actual losses and

expenses the plaintiffs have incurred.” The jury was instructed on four categories of actual damages—medical expenses, pain and suffering, loss of enjoyment of life, and mental anguish. The evidence supported damages in each of these categories, and accounting for over a decade of life Mr. Stewart never got to experience. Despite returning a verdict for the Plaintiff on the negligence and breach of implied warranty claims, the jury only awarded \$600,000 in compensatory damages for the survival cause of action and \$100,000 in compensatory damages for the wrongful death cause of action.

Damages awards for pain and suffering in comparable mesothelioma cases range from \$1.5 million to more than \$20 million. See, e.g., *Keene v. CNA Holdings, LLC*, No. 2013-CP-42-03915 (S.C. Ct. Comm. Pleas Jan. 8, 2016) (upholding award of \$2 million in survival damages, \$5 million in loss of consortium damages, and \$5 million in wrongful death damages); *Garvin v. Agco Corp.*, No. 2012-CP-40-6675 (S.C. Ct Comm. Pleas Nov. 14, 2014) (remitting the jury verdict to award \$1.5 million for the plaintiff's pain and suffering and upholding the loss of consortium award of \$1 million); see also *Bobo v. Tennessee Valley Authority*, 855 F.3d 1294 (11th Cir. 2017) (affirming in relevant part the district court's award of \$3 million in pain and suffering damages for woman with asbestos-related mesothelioma); *Romano v. Metropolitan Life Ins. Co.*, 221 So.3d 176 (La. Ct. App. 2017) (increasing pain and suffering award from \$500,000 to \$1.5 million in mesothelioma case where plaintiff had endured invasive surgery and was expected to die from his disease); *John Crane, Inc. v. Linkus*, 190 Md. App. 217, 988 A.2d 511 (Md. Ct. App. 2010) (upholding \$15,335,274 verdict for living shipyard worker diagnosed with mesothelioma at the age of 70, of which \$335,000 was medical expenses and \$15 million was noneconomic loss); *In re New York City Asbestos Litigation* (Re D'Ulisse), 16 Misc.3d 945, 842 N.Y.S.2d 333 (N.Y. Sup. Ct. 2007) (denying motion to reduce award of \$20 million in past and future pain and suffering to

mesothelioma victim and \$5 million to his wife of 51 years); *Williams v. CSX Transp., Inc.*, 176 N.C.App. 330, 626 S.E.2d 716 (N.C. Ct. App. 2006) (affirming verdict in which railroad worker with mesothelioma was awarded \$7.5 million in pain and suffering damages); *Goede v. Aerojet Gen. Corp.*, 143 S.W.3d 14, 17, 27-28 (Mo. Ct. App. 2004) (upholding award of \$2 million for pre-death pain, suffering and emotional distress where 43-year-old had survived one year with mesothelioma).

The South Carolina Supreme Court has held that the goal of compensatory damages is "to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred." *Clark v. Cantrell*, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000). In the court's opinion, the jury's award of damages was insufficient for this purpose.

It is fair to 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. The jury heard substantial, compelling evidence that Mr. Stewart's pain and suffering was severe and extensive. \$359,000 is an inadequate award of damages for just pain and suffering. Regardless of how the jury may have arrived at such a sum, their total survival damages award of \$600,000 fails to accord with the evidence and falls inexplicably short of providing fitting compensation for the magnitude of Mr. Stewart's losses.

What additional amount is required to make the award adequate? As Plaintiff points out, damages awards in similar cases have involved a 10-times multiplier to medical damages. See, e.g. *Jolly v. General Electric, et al.*, No. 2016-CP-42-1592 (S.C. Ct. Comm. Pleas) a mesothelioma case tried in Spartanburg County, the court determined it appropriate to multiply medical damages by a factor of 10 to arrive at a fair non-economic damages award. Order Denying Defendant's

Post-Trial Motions and Granting Plaintiff's Motion for New Trial *Nisi Additur*, at p. 9, *Jolly v. General Electric, et al.*, No. 2016-CP-42-1592 (S.C. Ct. Comm. Pleas). Employing a 10-times multiplier here would yield a total survival damages award of \$2,410,000. The court declines to adopt such a multiplier in this case. Instead, the court finds it necessary and appropriate to increase non-economic damages by \$400,000 so as to reach a total survival damages award of \$1,000,000.

The jury awarded \$100,000 for wrongful death, which Plaintiff submits is inadequate to compensate Mr. Stewart's family for their loss. The general elements of damages recoverable for wrongful death are: (1) pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the intestate's society, including the loss of his experience, knowledge, and judgment in managing of the affairs of himself and of his beneficiaries. *Self v. Goodrich*, 300 S.C. 349, at 251, 387 S.E. 2d 713, at 714, (Ct App. 1993). The court instructed the jury as to damages for loss of companionship and the jury heard evidence as to how Mr. Stewart's mesothelioma prevented him from spending time with his children and grandchildren before he passed away at the age of 69. The jury heard how Mr. Stewart was collecting retirement, actively involved in his children and grandchildren's lives, including both his time and financial support, and was absolved of any contributory negligence regarding his untimely and painful death. The record shows that Mr. Stewart's children suffered substantial losses. Indeed, the evidence in the record would reasonably support a significantly greater compensatory damages award for wrongful death. However, while the award is certainly conservative, this trial judge does not see sufficient reason to disturb it.

c. Ruling

For the reasons discussed above, the court GRANTS Plaintiff's Motion for New Trial *Nisi Additur* in part, increasing the survival damages award from \$600,000 to \$1,000,000 but leaving

the jury's \$100,000 wrongful death damages award undisturbed.

II. Defendant's Motion for Judgment Notwithstanding the Verdict

a. Issues Raised

As grounds for its motion for judgment notwithstanding the verdict, Scapa alleges that Plaintiff failed to show actionable exposure to asbestos and that Plaintiff's expert testimony regarding cumulative exposure is not reliable. The Court denies Scapa's motion on both grounds.

b. Legal Standard

In ruling on a JNOV motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Swicegood v. Lott*, 379 S.C. 346, 351, 665 S.E.2d 211, 213 (Ct. App. 2008); *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 287, 356 S.E.2d 123, 127 (Ct. App. 1987). The court must deny the motion for JNOV when the evidence yields more than one inference, or its inference is in doubt. *Id.*; *Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). The jury's verdict may not be overturned if any evidence sustains the factual findings implicit in its decision. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.W.2d 408, 419 (Ct. App. 2000); *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000).

c. Evidence and Analysis

The primary issues disputed at trial were the extent of Decedent Steven R. Stewart's exposure to asbestos from dryer felts manufactured by Scapa Waycross, Inc. ("Scapa"), and the

causation of his malignant mesothelioma from that exposure. The jury resolved those issues in Plaintiff's favor, finding that Scapa was negligent; and that Scapa's wrongful conduct was a substantial factor in causing Mr. Stewart's mesothelioma.

A plaintiff in an asbestos case may defeat summary judgment with evidence of "actionable exposure" to a defendant's asbestos product. *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). To determine whether exposure is actionable, South Carolina courts apply the "frequency, regularity and proximity" factors set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). *Id.* Therefore, "[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Id.* (quoting *Lohrmann*, 782 F.2d at 1162). The Court finds that the *Henderson* causation standard is satisfied by the evidence presented at trial.

Both circumstantial and direct evidence was introduced tending to show asbestos-containing dryer felts manufactured by Scapa were regularly and frequently used on the machines which Mr. Stewart worked on and around during the time he worked on said machines. Mr. Stewart identified Scapa products via their shipping boxes. Mr. Steele identified Scapa as well. Scapa admitted that there were at least 23 asbestos-containing Scapa felts. Scapa corporate representative Harry Merk testified that he could not verify all sales were recorded due to document destruction that occurred in 1974.

Mr. Stewart and his co-workers explained how each of the various job on Paper Machine Number 1 would regularly expose the workers to asbestos. Mr. Stewart testified that he worked each of the jobs that involved relatively more frequent, closer proximity and/or regular exposure to activities releasing respirable asbestos, which Mr. Steele and other coworkers confirmed.

Messrs. Stewart, Steele, Ward and Hegler all testified with particularity that when a worker occupied the position of utility—which all of them did as an entry-level position—that they were in the basement receiving the felts at the end of the paper-manufacturing process. The testimony indicated that at this point the felts were in the dry part of the process, by which time the felts were dry and contained about five percent moisture content, much like the paper itself did at that dry part of the process. They testified that they had to manhandle these felts, that they did not do that while the machines were running, but rather, they shut off the machines and the felts would sometimes be frayed off of the cans and the various loops and configurations they went through at the dry end of the process and push them down an opening into the basement. And when they were in the basement, they were folded up and manhandled to get them in a manageable position, then placed on pallets and stacked in a corner. Often, in order to get them out to disposal, they were quite often cut up with a knife and that cutting threw a lot of dust into the atmosphere, quite apart from the dust that was in the atmosphere from blowing dust with an air hose on the floor, but just the process of handling these felts threw a lot of dust in the air. All of the workers also testified as to the process for blowing on these felts when they were still running on the machines. They also testified as how they would shut the machine off and use the air hoses to blow directly on the felts to try to dislodge debris and paper and so forth and that all kinds of dust would go into the atmosphere from the felts and from the material that was being blown off of the felts. The record included extensive expert testimony from Drs. Millette and DePasquale which, in part, stated that the process of handling the felts and blowing off the felts put respirable asbestos into the air.

Scapa offered a lot of testimony about the use of resin coatings on many of their asbestos yarns. Regardless of how effectively the resin may have encapsulated the asbestos, common sense

would certainly dictate that the resin would wear off over time with the felts constantly spinning around. Indeed, Scapa acknowledged that their dryer felts deteriorate over time.

The evidence was certainly sufficient for the jury to conclude that Mr. Stewart had frequent, regular, and proximate exposure to asbestos from Scapa dryer felts and to support the jury's determination that Mr. Stewart's mesothelioma was caused by his exposure to Scapa's asbestos products for which they are responsible.

The parties each presented voluminous conflicting expert testimony on the element of causation. Defendant's experts contended that chrysotile asbestos cannot cause mesothelioma in general, and more particularly questioned whether it was possible for asbestos from their products to have contributed to Mr. Stewart's contracting mesothelioma. Notwithstanding, Plaintiff offered convincing evidence that chrysotile asbestos can cause mesothelioma, that Mr. Stewart had a vast amount of plaques in his lungs, and that that plaque by his respiration of asbestos fibers.

The parties also offered conflicting expert testimony concerning whether and what other sources of asbestos Mr. Stewart may have been exposed to, with a good deal of testimony concerning the extent thermal pipe insulation may have been used at Bowater, what such insulation may have been made of, whether and how it may have been a contributing factor to Mr. Stewart's mesothelioma relative to Scapa's asbestos-containing dryer felts.

Scapa contests the admissibility of certain expert testimony regarding causation. The admissibility of expert testimony is governed by South Carolina Rule of Evidence 702. That rule provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." S.C. R. Evid. 702. Courts evaluating the admissibility of scientific expert evidence

"must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *State v. Council*, 335 S.C. 1, 20,515 S.E.2d 508 (S.C. 1999). The reliability of scientific evidence is evaluated based on several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. White*, 382 S.C. 265,274,676 S.E.2d 684 (S.C. 2009) (citing *Council*, 335 S.C. at 19).

"[C]ross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" are the ordinary means to attack an opposing expert. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993). Courts should not exercise their gatekeeping responsibility by excluding expert testimony that falls within the range of matters on which reasonable experts can disagree. See *Milward v. Acuity Specialty Prods. Group, Inc.*, 639 F.3d 11, 22 (1st Cir. 2011). While the trial court may look at the reliability of the expert's methodology, it is for the jury to determine the soundness of the facts underlying the expert's opinion and the correctness of the expert's conclusions. See *Id.* 22.

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 in. That does not mean that they concluded that "each and every exposure" that Mr. Stewart had was a substantial factor in causing his disease. This distinction was recently explained by the Pennsylvania Supreme Court in an opinion upholding the admissibility of Dr. Frank's causation opinions. See *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1045-46 (Pa. 2016). The court found his testimony to be entirely compatible with the substantial factor causation standard. *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1045-46 (Pa. 2016). The Eleventh Circuit has held the same. In *Bobo*

v. Tennessee Valley Auth., 855 F.3d 1294 (11th Cir. Apr. 26, 2017), the court noted that expert testimony that "there is no evidence that there is a threshold level of exposure below which there is zero risk of mesothelioma," and that "all 'significant' exposures to asbestos 'contribute to cause mesothelioma,'" is not the same thing as saying that each and every exposure is causative. *Id.* The expert's causation opinion was admissible because it was based on the exposure facts in the case and was supported by scientific literature, including the Helsinki Criteria. *Id.*

Judge Robreno of the federal asbestos MDL has similarly found that a "cumulative exposure" opinion is not the same as the "each and every exposure" opinion. The court agreed with the plaintiff that the "cumulative exposure" opinion is different "in substance and by definition" from the "any exposure" opinion. *Mortimer v. A.O. Smith Corp.*, 2015 WL 12533103, at *8 (E.D. Pa. Oct. 23, 2015). The court therefore rejected the defendant's argument that the experts' opinions were inadmissible on grounds that they are the same as the "any exposure" opinion. *Id.*

As recognized by these other distinguished courts, which have all admitted the causation testimony of Dr. Frank and/or Dr. Brody, it is not proper to evaluate the experts' medical opinions with reference to only one narrow part of the basis for the opinion. In reaching their opinions, Drs. Frank and Brody both relied on their many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including epidemiology and other scientific literature, the dose-response relationship, the science regarding the low levels of exposure that can cause mesothelioma, the exposure levels documented from working with dryer felts, and the facts surrounding Mr. Stewart's exposure to visible dust from Scapa's felts.

The specific causation opinions of Drs. Frank and Brody were firmly grounded in the exposure evidence presented at trial. Dr. Frank testified that he had reviewed Mr. Stewart's medical records, the deposition transcripts of Mr. Stewart and his co-workers and other case-

specific materials. Dr. Millette and DePasquale explained how Mr. Stewart's exposures were many orders of magnitude above background levels. In stating his causation opinion, Dr. Frank relied on a summary of the exposure facts proven to the jury.

The trial testimony of Plaintiff's experts demonstrates that their causation opinions are based on the record of Mr. Stewart's repeated exposures to asbestos from Scapa asbestos-containing dryer felts for during the majority of his career at Bowater, as well as the scientific literature. The methodology and approach used is exactly the same as that approved by Judge Hill in *Garvin* and by Judge Toal in *Jolly*.

The Court finds that the causation testimony of Plaintiff's experts is admissible. It is supported by the scientific literature as well as the facts of this case and was relevant and helpful to the jury.

d. Ruling

For the reasons discussed above, Defendant Scapa's Motion for Judgment

Notwithstanding the Verdict is DENIED.

III. Defendant's Motion for Production of Plaintiff's Settlements and Payments with all Third-Party Tortfeasors

Defendants argue that they are entitled to disclosure of Plaintiffs' confidential settlement documents because they are "relevant" to set-off. The Court does not find a compelling reason to require disclosure of the confidential releases. The only matter of relevance is the amount of the settlements, and that information has been disclosed. The Court reviewed the releases *in camera* and verified that Plaintiff's pre-trial settlements are in the amount of \$1,036,000.

Defendant's motion for production of settlement documents is DENIED.

IV. Defendant's Motion for Setoff

In general, defendants are entitled to a set-off in the amount of Plaintiffs' settlements with other defendants in this case. S.C. Code Ann. § 15-38-50 provides that, "[w]hen a release ... is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (I) ... it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater " S.C. Code Ann. § 15-38-50.

Scapa correctly asserts that Plaintiff has received settlement money from other defendants in this case and that they are entitled to setoff for such funds. Plaintiff does not argue Scapa should be precluded from setoff; Plaintiff merely argues that while subject to setoff, the settlement allocation between the two causes of action should not be disturbed (see below).

Trial defendants are only entitled to "credit for the amount paid by another defendant who settles for the same cause of action." *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (emphasis added). Survival and wrongful death causes of action are different claims for different injuries. *Smith v. Widener*, 397 S.C. 468, 481 n.1, 724 S.E.2d 188, 195 n.1 (Ct. App. 2012).

As discussed above, the court examined the Plaintiff's settlement agreements *in camera* and verified that the Plaintiff reached pre-trial settlements totaling \$1,036,000.00. The court further confirmed that Plaintiff internally allocated 20% of each settlement to the survival cause of action and 80% to the wrongful death cause of action. For purposes of calculating setoff amounts, the corresponding settlement totals equal \$207,200 and \$828,800 for survival and wrongful death, respectively.

Pursuant to § 15-38-50, the \$1,000,000 survival award is reduced by \$207,200 to a balance of \$792,800; in turn, the wrongful death award is negated by application of the setoff rules, as the

applicable setoff amount, \$828,800, is greater than the wrongful death damage award amount. Accordingly, after setoff, the balance of the damages awards due to Plaintiff from Scapa equals \$792,800.

V. Defendant's Motion to Reallocate Settlement Proceeds

Scapa now requests the Court issue "an Order reallocating all settlement proceeds received by Plaintiff to date" so that 90% would be allocated to the survival claim and 10% to the wrongful death claim.

In support of their request, Scapa correctly points out that Plaintiff's counsel have consistently proposed award amounts weighted in favor of survival damages over wrongful death. Scapa essentially argues that because both the jury and the trial judge saw fit to award damages in similar proportions weighted in favor of survival, that such proportionality is inherently reasonable. Indeed, the resulting proportions of both were certainly reasonable given the manner and substance of Plaintiff's case as presented to the jury. Perhaps if Plaintiff had presented their case differently Plaintiff may have received damages awards resulting in different relative proportions but, of course, it is impossible to determine whether one resulting proportion is any more or less reasonable than the other based solely on their relative proportionality.

The Supreme Court has noted that "[s]ettling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify... reapportionment for the sole purpose of benefitting [non-settling defendants]." *Riley*, 414 S.C. at 196-97, 777 S.E.2d at 830-31 (2015). As discussed above, should the court deny Scapa's request to reallocate for purposes of setoff, Scapa owes a balance of \$792,800. However, if the court grants Scapa's request and reallocate 90% to survival and 10% to wrongful death, would only owe a balance \$67,600 (a substantial savings). Scapa does not contend—or is there any

evidence--that Plaintiff acted in bad faith concerning the allocations. Plaintiff has not obtained a double recovery by virtue of additur nor will it as a consequence of denying reallocation. The Court finds and concludes that the internal allocation of settlement proceeds received by Plaintiff is reasonable.

VI. Conclusion

The Court GRANTS Plaintiff's Motion for New Trial *Nisi Additur* in part and raises the verdict to \$1,000,000 for survival damages while leaving the \$100,000 wrongful death damages undisturbed. The Court

The Court DENIES Defendant's Motions for Judgment Notwithstanding the Verdict, Discovery of Settlements, and Reallocation of Plaintiff's Settlement Proceeds.

The Court GRANTS Defendant's Motion for Set-off under S.C. Code § 15-38-50, and reduces the \$1,000,000 additted survival damages award by \$207,200 (i.e. ten percent of Plaintiff's pre-trial settlements), resulting in Scapa owing the balance of \$792,800. The wrongful death damages award is likewise reduced by \$828,000, which exceeds the jury's wrongful death damages award. Judgment will therefore be entered against Defendant Scapa Waycross, Inc. in the amount of \$792,800.00. Scapa may, of course, reject the additur, and a new trial will be scheduled.

Defendant's remaining post-trial motions are DENIED.

IT IS SO ORDERED.

JEAN H. TOAL, Chief Justice of the Supreme Court of
South Carolina (Retired), acting as Circuit Court Judge

January ____, 2019

Columbia, South Carolina



York Common Pleas

Case Caption: Steven Redfearn Stewart , plaintiff, et al VS Albany International Corp , defendant, et al
Case Number: 2013CP4600368
Type: Order/Other

IT IS SO ORDERED.

s/ Jean H. Toal #2758

Electronically signed on 2019-03-22 10:51:46 page 18 of 18

State of South Carolina) In The Court of Common Pleas
) Sixteenth Judicial Circuit
County of York) 2013-CP-46-00368

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

Plaintiff,

VS.

Transcript of Record

Albany International Corp.,)
et al.,)

Defendants.

January 9, 2018
Columbia, South Carolina

B E F O R E:

The Honorable Jean Hoefer Toal, Judge

A P P E A R A N C E S:

William M. Graham, Esquire
Gregory L. Hyland, Esquire
Fritz J. Jekel, Esquire
Attorneys for the Plaintiff

S. Christopher Collier, Esquire
William P. Early, Esquire
H. Lane Young, Esquire
Attorneys for Defendant Scapa Waycross, Inc.

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

I N D E X

<u>Witness/Description</u>	<u>Page No.</u>
Summary Judgement Motion by Defense	7
Motions by Defense.	26
Motions by Plaintiff.	135
Certificate Page.	175

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Ev.</u>

No exhibits introduced.

1 THE COURT: All right, this is the matter of Edwards,
2 as personal representative of the estate of Stewart,
3 against Albany International and others. I take it that
4 you've all given your contact information to Ms. Elizabeth
5 Harris, who is the court reporter, so we are ready to
6 proceed.

7 This is a hearing on all pretrial motions in
8 connection with this York County case, 13-CP-46-00368,
9 which is being heard here in Richland County by way of all
10 pretrial motions, which include motions for summary
11 judgement, motions *in limine*, and other related matters.

12 There may be others in the courtroom with other
13 asbestos cases from time to time during the course of these
14 proceedings who have other matters they may wish to take up
15 with me. What I would like to do is proceed with the
16 Stewart case and when that is concluded, then we'll go to
17 other matters.

18 I see, Ms. McVey, that you are here and you are not in
19 this case, but you don't have any immediate need to be
20 heard about anything as I understand it.

21 MS. McVEY: No, ma'am.

22 THE COURT: Very good. All right, let me say a couple
23 of preliminary things about what I would like to see done
24 with respect to the trial of this case. Before the day is
25 over, I want to have us be on the same page with respect to

1 very specific information about exactly which witnesses
2 will be heard, exactly when, sooner the better, exhibits
3 will be exchanged and marked and given both to each side
4 and to me. These cases follow a set path and, therefore,
5 can very readily be planned to the gnat's eye before they
6 begin. That's how I like to handle them. Everybody says
7 it's a two-week case, but I am -- you know, you've got one
8 defendant. We will talk some as we proceed about exactly
9 which witnesses will be used when we get to the witness
10 lists and, of course, we have some objections to some
11 witnesses because of late disclosure, and we'll get into
12 all of that. But I want us to leave here with an
13 understanding exactly how this case is going to proceed and
14 what kind of timing issues are going to be agreed to or
15 imposed by me if that becomes necessary, and I hope it does
16 not. I hope we can come to some agreement how we're going
17 to proceed.

18 I would hope that we can get anything that is
19 necessary to deal with objections to matters that can be
20 handled before the case start resolved before the case
21 starts so that we don't trouble the jury, and that includes
22 designation of video or read depositions and all the other
23 kinds of things that help us come to the table on the 29th
24 ready to select a jury and try the case. So, if you could
25 just keep that general concept in mind, that's how I would

1 like to proceed.

2 Let me disclose one thing now for your planning
3 purposes for this trial. If the trial does not resolve in
4 a week, the Monday and Tuesday of the following week I will
5 not be available because of a previous obligation. So the
6 case, if it goes on to a second week, would be in a hiatus
7 for Monday and Tuesday of the following week and then would
8 recommence on Wednesday, and I will let Ms. Strait know.
9 I've done some cogitation about what I can do to rearrange
10 things, but I can't. So, that's how we're going to proceed
11 unless I hear howls of disagreement from everyone about it.
12 And if so and if there's a problem with witnesses that you
13 have scheduled, then let me know and we'll talk about that.

14 All right. So with that, if there are no preliminary
15 cogitations, let me first turn to plaintiff and ask
16 plaintiff if there are any things preliminary that should
17 be said before we begin to go through the motions for
18 summary judgment and the other motions.

19 MR. JEKEL: Good morning, Your Honor. Fritz Jekel on
20 behalf of plaintiffs. Nothing from us before we get into
21 the summary judgment.

22 THE COURT: Great.

23 Mr. Early.

24 MR. EARLY: Thank you, Your Honor. One preliminary
25 matter, my colleague from -- colleagues from Atlanta, Lane

1 Young, Christopher Collier. I think you've met Chris
2 before.

3 THE COURT: I have.

4 MR. EARLY: Mr. Young, I'm not sure if you've met
5 before.

6 THE COURT: Nice to have you both with us.

7 MR. EARLY: Any objection? Lane's *pro hoc*.

8 MR. JEKEL: Absolutely not.

9 THE COURT: And if you want to hand that up right now
10 before I forget about it, Will, I'll sign it right now and
11 then you can go on and file it.

12 MR. EARLY: Thank you, Your Honor.

13 (A PAUSE.)

14 THE COURT: We're glad to have you with us.

15 MR. EARLY: Mr. Collier is going to argue the summary
16 judgement on behalf of Scapa.

17 THE COURT: Very good. Now, am I correct in my
18 understanding that Scapa is the only remaining defendant in
19 the case?

20 MR. EARLY: That is correct, Your Honor.

21 THE COURT: Very good. All right. Well, the first
22 motion, then, that I have is the motion for summary
23 judgment on behalf of Scapa. So, we will proceed with
24 defendant's motion for summary judgment.

25 Mr. Collier.

1 MR. COLLIER: Yes, Your Honor. Thank you. Good
2 morning, Your Honor. Chris Collier on behalf of Scapa
3 Waycross, Inc., and this is our motion for summary judgment
4 pursuant to Rule 56.

5 Mr. Stewart worked at the Bowater Papermill outside of
6 Rock Hill from 1963 to 2002, and he held a variety of
7 positions during that period of time, working up from a
8 utility person all the way up through the machine tendered
9 position on the number one paper machine. And I'll go
10 through the relevant facts in just a minute, but it's
11 Scapa's position the plaintiff cannot meet the frequency,
12 regularity, and proximity test that was established in the
13 1986 *Lohrman* case that was adopted in South Carolina in
14 *Henderson vs. AlliedSignal* in 2007.

15 Mr. Stewart and all five of the coworkers testified
16 about how hot and humid the papermaking process was and how
17 much moisture was generated during that process. The
18 number one paper machine used 25 million gallons of water a
19 day, and it had eight dryer felts running on it at any
20 given point in time, but these dryer felts were enclosed by
21 a hood over the dryer section of the paper machine, and it
22 had doors that came down to the operating floor level when
23 the paper machine was running. So, the, the dryers were
24 essentially enclosed. The hood over the number one paper
25 machine, its purpose was to control the heat to assist with

1 the drying of the paper, but there were also massive
2 exhaust fans in the hood that helped with constantly
3 removing moisture from the papermaking process.

4 So, Mr. Stewart generally identified Scapa as a felt
5 supplier during the timeframe he worked at Bowater, but he
6 couldn't testify as to a particular installation, removal,
7 or any time, any specific time that he used a Scapa dryer
8 felt, and he assumed that all the dryer felts that were
9 used at the Bowater mill contained asbestos, and he
10 admitted that he did not know that. And he admitted, he
11 also admitted that once a felt was out of its box, there
12 was no way to identify who manufactured it.

13 A coworker by the name of Mr. Rhodes was deposed, and
14 he worked at the Bowater mill from 1960 until 2000, and he
15 testified that outside of seeing a Scapa box at the mill,
16 he couldn't distinguish one dryer felt from the next. So,
17 the same, similar testimony as Mr. Stewart. Mr. Rhodes did
18 not know if any Scapa dryer felt contained asbestos, and
19 Mr. Rhodes had no specific memory of Mr. Stewart either
20 working with or cutting a Scapa dryer felt.

21 Mr. Ward was another coworker who was deposed. He
22 worked at the Bowater mill from '72 until 2010, and he
23 mainly worked on a different shift than Mr. Stewart, and he
24 also had a general recollection of Scapa being present at
25 the mill. But he couldn't testify, importantly, that Mr.

1 Stewart ever worked with or worked around a Scapa dryer
2 felt.

3 A Mr. Hegler worked at the mill from 1961 until 1998,
4 and he didn't identify Scapa at all, and because he didn't
5 identify Scapa, he likewise couldn't testify that Mr.
6 Stewart ever worked with, around, or cut Scapa dryer felt.

7 And then we've got Mr. Steele, who worked at the mill
8 from '63 to 2001, who again had a general recollection that
9 Scapa was at the mill, but he didn't know when Scapa was
10 first there, when Scapa was last there, and he couldn't
11 even limit it to a decade. Mr. Steele did not know which
12 dryer felts contained asbestos, and he didn't know if any
13 Scapa dryer felt ever contained asbestos. And importantly,
14 he couldn't place Mr. Stewart in the vicinity of any Scapa
15 dryer felt on any particular date or time between 1963 and
16 when he left in 2001.

17 And finally we've got a coworker, Mr. Hollis, who
18 worked the Bowater mill between 1967 and 2008. Mr. Hollis
19 couldn't identify the manufacturer of any dryer felt at any
20 point in time, and didn't know if any of the dryer felts
21 contained asbestos. He again had a general recollection of
22 the name Scapa, but he wasn't sure if Scapa sold any
23 asbestos-containing dryer felts or if Mr. Stewart worked
24 with or around any Scapa asbestos-containing dryer felts.

25 So in short, we have Mr. Stewart with a general

1 identification of Scapa, but neither he nor his coworkers
2 can establish the frequency, regularity, and proximity
3 that's required by the *Lohrman* and *Henderson* cases. And
4 in, in *Lohrman* there were invoices and there was other
5 evidence that placed the defendants in that case, their
6 products, at the site, and we have that here with Scapa's
7 Master Cards, which are essentially sales records. But we
8 have no evidence linking Mr. Stewart with those felts on a
9 regular basis over an extended period of time. And this is
10 what the *Lohrman* case found to be casual or minimal
11 exposure and affirmed a directed verdict in that case.

12 THE COURT: I thought you all admitted that (a) Scapa
13 supplied Bowater in a timeframe from in the '70s and maybe
14 some in the '60s; that Mr. Stewart worked at machine number
15 one his whole career, forty years; that your felts
16 contained asbestos; and that the felts were put on machine
17 number one from time to time. I thought you conceded all
18 of that.

19 MR. COLLIER: Yes, Your Honor, we did, and that's,
20 that's what ---

21 THE COURT: Well, then do you not apply any kind of
22 circumstantial evidence test to product identification?

23 MR. COLLIER: Well, Your Honor, which respect to
24 establishing the frequency, regularity, and proximity that
25 *Henderson* requires, there's no testimony to do that in this

1 case.

2 THE COURT: Well, there's the same testimony in this
3 case that was in *Lohrman*, is there not, and *Lohrman* is the
4 granddaddy. That's where our courts got the *Henderson* test
5 was from the *Lohrman* case.

6 MR. COLLIER: Your Honor.

7 THE COURT: In *Lohrman*, similar to this case,
8 defendant's invoices were used to establish the use of the
9 material, asbestos-containing, at the site where *Lohrman*
10 worked.

11 MR. COLLIER: Your Honor, that's right. There were
12 sales invoices in *Lohrman* that established that the, that
13 the product was sold there, and we're not disputing that
14 here. We're, we're saying that *Scapa* did have sales to
15 this particular ---

16 THE COURT: *Scapa* had felts that contained asbestos
17 and were used on machine number one at Bowater during the
18 period of time when Mr. Stewart worked there. You conceded
19 that, did you not?

20 MR. COLLIER: Yes, Your Honor. *Scapa* was one of ---

21 THE COURT: One of about three or four felt suppliers,
22 correct?

23 MR. COLLIER: One of multiple felt suppliers, yes,
24 Your Honor.

25 THE COURT: All right, multiple felt suppliers, but

1 they supplied more than just a *de minimis* amount of felt to
2 Bowater, did they not?

3 MR. COLLIER: Well, Your Honor, if you -- actually, if
4 you look at the numbers on the paper machine, according to
5 Mr. Stewart there were eight dryer felts running at any
6 particular time. There were four dryer sections and two
7 dryer felts per section, so eight dryer felts. And Mr.
8 Stewart testified that the average lifespan of a dryer felt
9 was roughly 180 days. The records that we have in the case
10 show that it was somewhat ---

11 THE COURT: But sometimes they tore up more frequently
12 than that, and in terms of maintaining the machines, the
13 testimony from both Mr. Stewart and his coworkers were that
14 they worked on those things many times every week,
15 including seeing if they were frayed, blowing air over
16 them, and all kinds of things related to maintaining the
17 paper machines, did they not?

18 MR. COLLIER: Yes, Your Honor. That was part of the
19 papermaking process.

20 THE COURT: Sure.

21 MR. COLLIER: But between this '63 to 2002 timeframe,
22 if you take that entire timeframe and you look at the
23 roughly eight dryer felt or eight dryer felts on the paper
24 machine at any given point in time lasting for
25 approximately 180 days, you come up with 640 dryer felts

1 that were used on that paper machine over the timeframe
2 that Mr. Stewart worked there. And if you compare that to
3 the Scapa records during that period of time, Scapa had
4 seventy-nine dryer felts that were sold to the number one
5 paper machine, but only seventy-six of those seventy-nine,
6 so about a third of them contained asbestos. And the
7 asbestos dryer felts were used during the same timeframe
8 that the non-asbestos dryer felts were being used. So, if
9 you look at it over the entire timeframe of Mr. Stewart's
10 career, Scapa asbestos-containing dryer felts were only 4
11 percent of the total dryer felts that were used on that
12 paper machine during his career.

13 THE COURT: I don't know whether those facts will
14 stand up, but they are disputed. And of course as I sit
15 here right now, all I'm doing is making a preliminary
16 determination as to whether they may proceed with their
17 case. You may well win the case. You may persuade the
18 jury that 4 percent is not enough for them to have been
19 responsible for his mesothelioma, but I'm not permitted to
20 make that judgment right now. I must construe all the
21 evidence in the light most favorable to the nonmoving
22 party.

23 So, I'm kind of in a bind here a little bit. I
24 understand where you're going, and I understand the
25 persuasiveness of your argument, but similar degrees of

1 exposure to supplies that contained asbestos have survived
2 a motion for summary judgment and moved on to trial many,
3 many times and have been found to meet the frequency and
4 the like test of *Henderson*. So, what am I to do with that?

5 MR. COLLIER: Well, Your Honor, we would, we would
6 submit that there is -- that the testimony in this case
7 does not meet the frequency, regular ---

8 THE COURT: I know that's what you submit, but again
9 it's a circumstantial evidence case with the construction
10 being in the light most favorable to the nonmoving party,
11 and I don't get to weigh and make a verdict unless I
12 disobey my superiors at the Supreme Court. I only look to
13 see if there is any evidence to support what is averred in
14 the plaintiff's pleadings and discussed in some of the
15 competing testimony factually and expert wise that they
16 have.

17 You told us what your view of the testimony is, and
18 they, of course, argue what their view is. How can I avoid
19 reversal by the court if I throw the case out just because
20 there's disputed evidence about this frequency and
21 particularity, et cetera?

22 MR. COLLIER: Your Honor, with respect to the, with
23 respect to the standard that exists in South Carolina, it
24 would be -- if, if you take the facts in the light most
25 favorable to the plaintiff, you, you've got nothing more

1 than a *de minimis* type exposure which *Lohrman* and those
2 cases said didn't, didn't hold water.

3 THE COURT: All right. I understand your argument.

4 MR. COLLIER: Thank you, Your Honor.

5 THE COURT: All right.

6 MR. JEKEL: Your Honor, Fritz Jekel. Excuse me.

7 Fritz Jekel on behalf of the plaintiff. I'm not going to
8 take long, Your Honor, but, but I do think it's important
9 to note in terms of frequency, proximity, and regularity in
10 the *Henderson* test that the critical time period is really
11 1963 through 1983. After that, I think it is unlikely that
12 any asbestos dryer felts were being used at the Bowater
13 plant.

14 There's, there's no dispute that Mr. Stewart was there
15 every say, that he worked on the number one machine every
16 day. That every day -- they want to talk about twenty-nine
17 dryer felts, Your Honor. I think what is critical to
18 understand, each one of these dryer felts likely contains
19 over 500 pounds of asbestos per felt. So, when you look at
20 twenty-six dryer felts that they admitted to, that's tons
21 of asbestos fibers, Your Honor.

22 The testimony identifies the activities. The
23 deposition testimony we've cited identifies activities
24 putting Mr. Stewart in contact with the Scapa dryer felts
25 as well as others. They're blowing them out. They're

1 putting them on. They're taking them off.

2 The blowouts are significant. When the paper machine
3 is running, Scapa would have you believe that that paper
4 machine is running 24/7. That's not necessarily the case.
5 When there is a paper blowout, they shut that machine down.
6 There are guys crawling on that paper machine so they can
7 blow that paper out so they can get the machine back up and
8 running. It's those type of activities where the exposures
9 are happening.

10 And just on another issue, Your Honor ---

11 THE COURT: Well, let's stay there for a second.

12 MR. JEKEL: Yes.

13 THE COURT: What does your evidence disclose as the
14 timeframe when Scapa sold felts to Bowater?

15 MR. JEKEL: Well, let's talk about that. It's
16 certainly '63 through '81, I would suggest. The last
17 record that Scapa talks about, and it's in some of their
18 motions *in limine*, is '76, I believe.

19 Your Honor, what you need to understand about Scapa
20 sales records, we're lucky to have whatever we have. There
21 was a document retention policy that Scapa changed in 1974,
22 and they had a little party there in Waycross, Georgia, and
23 they got all their records together and they lit them on
24 fire. They destroyed them. Sales records were some of the
25 records they destroyed. So, when Scapa says we only had

1 twenty-six asbestos felts there, Scapa would have to admit
2 -- and their corporate representatives have -- that, that
3 that's likely they're all, but they can't testify. They've
4 destroyed records.

5 THE COURT: Well, if their records are not available,
6 what other evidence do you have that shows a longer period
7 of time that the felts were sold to ---

8 MR. JEKEL: Bowater?

9 THE COURT: --- Bowater in 1976?

10 MR. JEKEL: Your Honor, again it would be
11 circumstantial evidence. The defendant's own files suggest
12 that they did not make the changeover from asbestos to
13 non-asbestos. And, and, Your Honor, I don't want to get
14 too in depth, but there are papermaking processes that are
15 more likely to use asbestos felts than non-felts. The
16 number one machine, given its history, used a lot of
17 asbestos felts, different types, but the defendant's yarn
18 sales, which are some of the records that survived
19 destruction, do show asbestos yarn purchases and sales
20 through 1981, Your Honor. And, and I have seen evidence
21 where some asbestos dryer felts have run for years. So,
22 that's why I say '83 is likely the cutoff for any asbestos
23 yarn sales.

24 But given that, even with just twenty-six, given --
25 assume each one only has 300 pounds of asbestos. Each one

1 of these dryer felts weighs over one thousand pounds
2 primarily, and each of them have been 40 and 60 percent
3 asbestos fibers. So, when they talk about only twenty-six
4 felts, those are tons of asbestos fibers, Your Honor, tons.

5 Now what I wanted to say, the plaintiffs will present
6 evidence that gets the fibers off of these felts under the
7 conditions in which the plaintiff worked such that we can
8 prove an occupation exposure to respirable asbestos fibers
9 coming off of the Scapa dryer felts. That would be through
10 the testimony of the industrial hygienist DePasquale.
11 He'll talk about these, these exhaust fans and the
12 conditions at the plant. But Dr. James Millette, who's
13 tested Scapa asbestos-containing felts, will provide the
14 testimony indicating that when you do the type of actions
15 that Mr. Stewart did on these felts, that will create an
16 exposure to the asbestos.

17 Primarily, Your Honor, putting the felts on, taking
18 them off where the testimony was they would cut them up,
19 you are cutting through asbestos fibers, Your Honor. When
20 you remove them, carrying them around, things like that,
21 but also on a daily basis, you clean the felts. You blow
22 the felts down when there's a paper break. If you are
23 changing the paper you're making on that felt, you're going
24 to clean those felts because impurities in the papermaking
25 process ruin the whole thing.

1 And that's one thing they -- in some of these motions,
2 Your Honor, they're talking about all the insulation, and
3 they would have this insulation falling into the paper
4 pulp. That's not happening; that would ruin the quality of
5 the paper that's coming out of the machine.

6 So, plaintiffs would submit, Your Honor, that between
7 1963 and 1983, there is little contrary evidence that Mr.
8 Stewart was at the Bowater plant on the number one machine
9 every day. During that time, we know of at least twenty-
10 six asbestos-containing felts on the number one machine.
11 Now, this is not taking into account all the other
12 machines, all the other asbestos felts that may be on those
13 machines that are in his work environment, but plaintiff
14 maintains that on the number one machine alone, we can
15 establish frequency, proximity, and regularity. He worked
16 twenty years straight with these felts, Your Honor, tons of
17 asbestos fibers. We will produce evidence through the
18 experts getting the fibers into Mr. Stewart.

19 THE COURT: Now, I know we're going to go into experts
20 more in the motion *in limine* phase of these arguments
21 today. But I, of course, have read everything that's been
22 submitted, and there is a good deal of contention by
23 defendant that neither Millette nor Pasquale have conducted
24 the kind of baseline tests that an expert would have to
25 conduct to opine as they have opined about these particular

1 uses at Bowater.

2 Let me ask you this. Did Pasquale ever visit Bowater?

3 MR. JEKEL: Yes, he did.

4 THE COURT: How about Millette?

5 MR. JEKEL: He did not.

6 THE COURT: And do you have other experts that
7 will ---

8 MR. JEKEL: Yes, we have medical experts, Your Honor,
9 but as it relates to the job site, the activities with the
10 felts, our two primary experts are DePasquale and Dr.
11 Millette.

12 THE COURT: And Pasquale visited -- or is it
13 DePasquale or Pasquale?

14 MR. JEKEL: DePasquale.

15 THE COURT: DePasquale. So, DePasquale did view the
16 Bowater site?

17 MR. JEKEL: Yes.

18 THE COURT: Millette based his findings more on the
19 things that you all have listed?

20 MR. JEKEL: Yes, laboratory tests, Your Honor.

21 THE COURT: Lab tests, right.

22 MR. JEKEL: And I do, I want, want to make clear one
23 thing, Your Honor. I've had the pleasure of trying two of
24 these cases in the past with Mr. Young against Scapa. Both
25 file -- both cases resulted in plaintiffs' verdicts. Both

1 cases Mr. -- Dr. Millette was allowed to testify in full,
2 and in both of those cases they've appealed them through
3 the highest courts in each of those states, New Jersey and
4 Maryland, and not -- in neither case did they challenge Dr.
5 Millette's testimony on appeal. And in both cases through
6 the highest courts, those cases were upheld. We can talk
7 about that later, but Dr. Millette did laboratory tests on
8 specific Scapa asbestos-containing felts.

9 Again, Your Honor, viewing the facts in the light most
10 favorable to the plaintiff in this case, we believe the
11 defendant's motion for summary judgement should be denied.
12 If you don't have any further questions ---

13 THE COURT: Thank you, sir.

14 Any reply, Mr. Collier?

15 MR. COLLIER: Your Honor, Chris Collier for Scapa.
16 Just briefly. There were a lot of different issues covered
17 in, in the response there. With respect, though, to the,
18 to the facts of this case, not getting into the records
19 destruction and all the types of other issues related to
20 that, Scapa's first asbestos-containing dryer felt was not
21 sold to Bowater for use on the number one paper machine
22 until sometime in the '68 timeframe. So, it's not all the
23 way back in '63 when Mr. Stewart started there. And by the
24 time that Scapa sold its first asbestos-containing dryer
25 felt to the Bowater Papermill, Mr. Stewart had already

1 worked his way up the line of progression so that he was in
2 a higher position on the paper machine than the utility
3 position or the fifth hand or the forth hand. So, he was a
4 third hand at the time of the first asbestos-containing
5 felt sale there.

6 And Mr. Stewart didn't go backward in the line of
7 progression. He kept progressing throughout the rest of
8 his career, and the significance of that is that, as he
9 testified to, his hands-on work on different parts of the
10 machine changed as he moved up the line of progression.
11 So, his quote unquote laborer, grunt-type work would have
12 been as a labor crew member as a fifth hand, as a fourth
13 hand. He might be the person in there changing the dryer
14 felts, cutting the dryer felts. But as he progressed up
15 the line of progression, his responsibilities on a daily
16 basis were more focused on working on the winder, the
17 rewinder, actually supervising the operation of the paper
18 machine. Thank you, Your Honor.

19 THE COURT: All right. All right, if there's nothing
20 further, ruling of the court is that the motion for summary
21 judgment is denied. I find that the material presented by
22 plaintiff discloses at least enough information with
23 respect to circumstantial evidence of the use of
24 asbestos-containing felt supplied by Scapa to a machine
25 upon which Mr. Stewart worked for his entire career. And

1 even during the times that he progressed up the ladder, by
2 his testimony and others, he continued to work in a dusty
3 environment, and that the dust was in part generated by the
4 felts, and work on the felts and cutting and cleaning and
5 removing and dealing with the felts, and that during that
6 time some of the felts upon which Mr. Stewart and his
7 colleagues worked were supplied by Scapa.

8 I don't weigh this evidence, but the evidence exists,
9 enough to create a genuine issue of material fact with
10 respect to the frequency, proximity, and regularity of Mr.
11 Stewart's exposure to asbestos materials which were
12 generated from the use of Scapa felts at Bowater. That is
13 the allegation. There is at least a scintilla of evidence,
14 which is all there has to be at this time for me to make
15 the ruling denying the motion for summary judgment. This
16 issue, of course, will be revisited as the case is
17 presented, and different conclusions may be reached at the
18 end of the plaintiff's case or at the end of the
19 defendant's case or both, but for present time I deny the
20 motion for summary judgment.

21 If plaintiff, if you have any great need to submit a
22 proposed motion -- or proposed order in that regard, you
23 may do so, although I think all these issues are
24 sufficiently preserved at this time, based on what I have
25 said. That you'll have plenty of time, both you and

1 defendant, to interpose legal objections and information
2 that will protect you on the record with respect to these
3 issues. But if either side desires to have an order, I'll
4 depend upon you to assist in the preparation of the same
5 and if you do, share it with Mr. Early and his colleagues
6 before it is submitted to me. I don't think it's
7 necessary; I think what I've said preserves it on the
8 record, but that's up to you gentlemen to discuss further.

9 Now, the next thing we'll go to then is a good many
10 motions *in limine*, and I'm just looking at my notebook, and
11 the first document I have is an index that was kindly
12 provided.

13 And I thank you very much, Mr. Early, and I'm sure Mr.
14 Felker appreciates your preparing these notebooks.

15 But if I'm looking in the wrong place, well, I'm sure
16 you will tell me, but the first thing I see is an index
17 which shows documents at tabs 1 through 15, and then those
18 are connected with Scapa's motion *in limine*, and I would
19 propose just to go down those in order. And then, of
20 course, you have plaintiff's motions *in limine*, which are
21 tabs 16 through 20, and there are some other issues raised
22 by some other matters that are also contained, and we'll
23 get to those at the proper time.

24 MR. JEKEL: Your Honor, if I might suggest? A lot of
25 these issues are ones we, we encounter. If we could have

1 five minutes, the lawyers? We do think we might be able to
2 cut down the numbers.

3 There are obviously some oppositions in the omnibus
4 that we did not oppose. There are also several other
5 motions *in limine* that plaintiffs did not oppose that, that
6 if we could have five minutes ---

7 THE COURT: Well, you can have five minutes to
8 consult.

9 MR. JEKEL: Yes.

10 THE COURT: But what I'm going wanted to do after the
11 end of the five minutes is to go ---

12 MR. JEKEL: Down the list.

13 THE COURT: --- sequentially and then you will tell me
14 resolved and whatnot. So, of course we'll adjourn for ten
15 minutes.

16 MR. JEKEL: Thank you, Your Honor.

17 THE COURT: Very good.

18 (OFF THE RECORD.)

19 THE COURT: Okay, we are going to begin with Scapa
20 motions *in limine*, and the first one is an omnibus motion,
21 and it has a number of parts to it.

22 MR. JEKEL: It's got forty-some parts to it, Your
23 Honor. We had gone through the list, and we were going
24 through the actual omnibus subparts. Chris was there, so
25 some of these, we're just going to move through to the ones

1 we disagree on.

2 THE COURT: Well from my records, I'm just going to
3 mention each one of them, and you all tell me. I know what
4 I would do with them, so we'll see what you all ---

5 MR. JEKEL: Yes, Your Honor.

6 MR. COLLIER: Yes, Your Honor.

7 THE COURT: All right, nonparty witnesses.

8 MR. COLLIER: Plaintiffs didn't have any objection to
9 that one, Your Honor.

10 THE COURT: Granted, which means that nonparty
11 witnesses except for experts will come into the courtroom
12 only after they have testified.

13 Now, I assume that there's one further exception to
14 that, and that is that there's going to be a representative
15 for the Stewart estate, personal representative. The
16 personal representative can be there the entire time; I
17 don't care whether he's a witness or not. And similarly
18 Scapa, I'm sure, will have a representative who will be
19 their principal representative individual, and that
20 individual will be identified, and that individual may be
21 in the courtroom the entire time.

22 All right, number 2, use of the term asbestos victims
23 or similar references in front of the jury.

24 MR. COLLIER: Your Honor, with respect to that one, we
25 believe that that, the use of the term victim, is

1 prejudicial under 403 in that it implies that Scapa did
2 something wrong. And it's an attempt to unfairly create
3 sympathy to influence the jury.

4 MR. JEKEL: Your Honor I, I think that 90 percent of
5 mesotheliomas, in excess of 90 percent among males in the
6 United States are asbestos related. I think it is
7 appropriate to refer to the decedent, Mr. Stewart, as an
8 asbestos victim. I don't think it's prejudicial.

9 THE COURT: I would deny the motion.

10 Number 3 is trading places, the Golden Rule.

11 MR. JEKEL: We have no objection to granting that,
12 Your Honor.

13 THE COURT: It should be granted.

14 Number 4, improper and prejudicial references to the
15 media.

16 MR. COLLIER: We have withdrawn that, Your Honor.

17 THE COURT: I would have granted it. I'm sure they're
18 not going to refer to the media in any way. They
19 shouldn't.

20 All right, inflammatory photographs and videotapes.
21 It's a two-part thing, as I see it. One is mentioning
22 anything that hasn't been exchanged with counsel.
23 Certainly we're going to exchange everything with counsel
24 and predetermine whether it's going to be admitted. So,
25 that ought not to be a problem. Hopefully nothing will be

1 referred to unless we've already exchanged it and already
2 determined admissibility.

3 But with respect to the day in the life, is there a
4 day-in-the-life film?

5 MR. JEKEL: Yes, Your Honor.

6 THE COURT: Those are pretty ordinarily admissible.
7 What is there, Mr. Collier, about this one that's a
8 problem?

9 MR. COLLIER: Your Honor, we would argue that it's
10 prejudicial under 403. It doesn't have anything to do with
11 an actual day in the life of Mr. Stewart. It's a video of
12 him lying in his hospice bed, which looks like he's -- you
13 know, that death is, death is imminent. So, we would say
14 that any probative value is outweighed by the prejudicial
15 effect of it.

16 THE COURT: Is there more to the video than that? Are
17 there other videos or photographs that show him when he was
18 still vigorous and so forth? I assume there are.

19 MR. COLLIER: Your Honor, there were photographs out
20 -- throughout some of these depositions about Mr. Stewart
21 with his family.

22 THE COURT: Right, engaged in normal activities that
23 people engage in before they become very ill, right?

24 MR. COLLIER: Right, Your Honor.

25 THE COURT: Those are routinely admitted, and these

1 photographs of the defendant -- I mean, the plaintiff at
2 the end of life, the jury would have been permitted to see
3 Mr. Stewart at the end of life since he was alive when this
4 thing first started. And I'm going to allow, subject to
5 taking a look at them if there's something particular
6 that's prejudicial, but I'm not going to deny admissibility
7 simply because they show him in a debilitated conditional.

8 MR. COLLIER: Your Honor.

9 THE COURT: Unless you can tell me something else
10 about it that is problematic.

11 MR. COLLIER: Your Honor, just so you're aware, it's
12 not, it's not necessarily still photos of him in a hospice
13 bed. It's a video of about -- I hadn't looked at it in
14 preparation for this, but it's roughly forty-five minutes
15 of him lying in a hospice bed.

16 THE COURT: Well, I assume he's talking or he's just
17 lying there?

18 All right, Mr. Jekel, tell me about it.

19 MR. JEKEL: Your Honor, I'm sure that we would never
20 admit the whole forty-five minutes. In fact, we were going
21 to do the plaintiff's deposition. We do think that it is
22 important to see Mr. Stewart as the mesothelioma was taking
23 his life from him so they can understand truly how painful
24 a disease it is and how unnecessary it was.

25 But there, there is not a lot of talking due to the

1 illness, but it is forty-five minutes. I can't imagine I
2 will play that whole thing for the jury, Your Honor.

3 THE COURT: Let me ask you this. When his deposition
4 was taken, and I assume it was, is there a video of that?

5 MR. JEKEL: There is.

6 MR. COLLIER: Yes, Your Honor.

7 THE COURT: And then he descends into more disability
8 when this other film is made?

9 MR. JEKEL: Yes, Your Honor.

10 THE COURT: Well, I am going to allow some edited
11 portion of this day in the life. I certainly won't allow
12 any forty-five minutes, Mr. Collier. I think a couple of
13 minutes to show what his situation is would, subject to my
14 examination of it, be admissible, but I'm not going to
15 allow forty-five minutes, but I'm not going to completely
16 exclude it.

17 MR. COLLIER: Your Honor, could we have some sort of
18 limitation on it so that the video is shown but the moaning
19 or whatever may be on the audio is excluded?

20 MR. JEKEL: I would object to that, Your Honor. I ---

21 THE COURT: Well, here's what's going to have to
22 happen. Y'all are going to have to get together and see if
23 there's any way you can agree to a small snippet being
24 shown. I don't want a lengthy snippet, but I do think that
25 some can be shown, even with the audio. But I haven't seen

1 it yet, and it may be that its prejudicial value outweighs
2 whatever probative value it may have, but it has probative
3 value. And the fact that it is a sad thing is not
4 necessary dispositive of the prejudicial analysis, but
5 agonial breathing and that kind of thing that happens right
6 at the end of life is a very tough thing to see. I've
7 certainly seen it many times with some of my relatives.
8 And so we would want to limit that to something that makes
9 the point without making it in such a dramatic way that it
10 becomes too prejudicial.

11 So, I'm going to ask y'all to get together and look at
12 this, knowing that I would allow some very edited portion
13 of it, but not anything lengthy and not anything that is so
14 dramatic in terms of the suffering that it really overcomes
15 any probative value it has.

16 Obviously many people are going to testify, as is
17 common in mesothelioma cases, that it's a bad death. The
18 last case I tried, even defendant's expert freely testified
19 it's a terrible way to go. It's a bad death, so forth.
20 So, let's kind of look and see what we can do to make the
21 point in as straightforward a way as possible.

22 MR. GRAHAM: Your Honor, in terms of the time, if we
23 edit this down, did you have any timeframe in mind?

24 THE COURT: I don't know it well enough to know. I
25 think you guys have got to look at it, but I cannot imagine

1 my allowing a jury to sit there transfixed for any more
2 than a couple of minutes to look at it.

3 MR. GRAHAM: Okay.

4 THE COURT: So, y'all kind of look and see what you
5 can do to make it reasonable.

6 MR. JEKEL: We'll get an edited version to the
7 defense, Your Honor.

8 THE COURT: All right, number 6 is evidence designed
9 to inflame, and we've got a good many things. So, let's
10 just go down them.

11 Nonexperts' belief that certain consequences resulted
12 from defendant's alleged exposure to Scapa dryer felts
13 containing asbestos. If there's no foundation for what
14 family members or other people say about what they observed
15 as the result of his illness and what they knew by way of
16 any medical advice to them that he was suffering from
17 mesothelioma, then it would not be admissible because
18 nonexpert's opinion as to causation is not admissible, and
19 I agree with you completely on that, Mr. Collier. But I am
20 not going to make that ruling so tight that it prevents
21 family members from talking about what he was going through
22 and what happened after the diagnosis from the experts in
23 terms of what his daily life was like. So, can y'all ---

24 MR. JEKEL: Your Honor, there's ---

25 THE COURT: Am I understood about that?

1 MR. JEKEL: Yes. They're also talking about some
2 Scapa-specific items in the list of items under number 6.
3 Some of these things I might suggest are ---

4 THE COURT: Well, I'm going to go through each one of
5 them, Mr. Felker. I'm just going through the first one,
6 first dot right now, which is nonexperts' belief that
7 certain consequences resulted. And what I've said there is
8 nonexperts may not testify as to matters of causation, but
9 nonexperts, particularly family members or those close to
10 Mr. Stewart, may testify as to what his physical situation
11 was before and after his diagnosis with mesothelioma, but
12 they can't themselves be opining about the causation.

13 Number 2 is settlement of claims would obviate the
14 need for a trial. I would grant that in a minute. You
15 can't say any of that.

16 That Scapa's felt killed Mr. Stewart, the experts are
17 going to say for the plaintiff that he died as a result of
18 his exposure to the asbestos material in the Scapa felts.
19 I like to avoid using such pejorative terms as they killed
20 him, implying some intentional conduct.

21 That does not mean that they cannot fully explore
22 conduct by means of intentional conduct, knowing what they
23 knew. That does not mean that they cannot explore grossly
24 negligent conduct, but I would hope that the word killed
25 would not be used. I agree with that.

1 Scapa's asbestos-containing dryer felts have been
2 declared defective, unreasonably dangerous by any court
3 official, entity, or jury. I would divide that up. With
4 respect to other jury verdicts, that's a no-no. But with
5 respect to any governmental citations with respect to the
6 Bowater's plant and the environment in which this plaintiff
7 worked, if there are such things, they would be admissible.

8 So, I would not allow just kind of general
9 governmental or jury verdicts or anything, but if there's
10 something official from a governmental agency that has
11 regulatory authority, then I would not exclude it.

12 That juries in prior asbestos cases have awarded
13 damages or the size of award, I would grant the motion to
14 exclude that.

15 The plaintiff's recovery will be shared with his
16 attorney, grant. Nothing along those lines can be said.

17 That the jury would be setting safety standards in
18 South Carolina, most everybody argues that kind of thing to
19 a jury. And while we try to avoid sending them a message
20 and all that kind of thing, I am not going to restrict
21 absolutely an argument to the jury with respect to safety
22 practices that involve Bowater and the need for whatever
23 you're requesting of the jury.

24 I think that is particularly something that could be
25 said not in the liability portion but in the punitive

1 damage portion, and I will bifurcate this matter so that
2 that will obviate the problems.

3 Now, that doesn't mean that you can't put on all the
4 evidence you want, plaintiffs, about gross negligence and
5 intentional conduct in the liability portion, but it does
6 mean that you can't go further than that and get into the
7 punitive aspect of it until we have the second phase of
8 trial if the first phase of the trial results in a verdict
9 in your favor. And what that means is no financial
10 information about the defendant, things of that nature that
11 are only appropriate in the punitive, but the conduct of
12 the defendant, whether that conduct is merely negligent or
13 grossly negligent or subject to some strict liability
14 standard because of what they knew, that's all fair game to
15 be explored. Does that ---

16 MR. JEKEL: I'm fine with that, Your Honor, yes.

17 THE COURT: Scapa is without a heart and soul. I
18 would grant that.

19 Send Scapa a message. I don't like that, and I hope
20 that would not be done, plaintiffs.

21 MR. JEKEL: No, Your Honor.

22 THE COURT: I think there are other ways of talking
23 about safety without going to that extent.

24 Scapa is a murder, criminal, liar, fraud, cheat,
25 conspirator. I would grant that with this caveat. If

1 there is real evidence that Scapa collaborated with other
2 asbestos manufacturers to conceal something, then that's
3 going to be appropriate, but I don't know if there's any of
4 that kind of information available or not. But just the
5 use of these pejorative terms would be out.

6 Any inference that Scapa manufactured, generated, or
7 concealed evidence. There is some contention that Scapa at
8 a certain point in time -- they say because of, like they
9 always say, because of retention policies, and plaintiff
10 says because of a deliberate plan to get rid of evidence
11 that might be used against them. The fact that the company
12 at a certain point in time destroyed its records is able to
13 be explored because it is a predicate for what exists and
14 what does not exist about their sales record. And it means
15 that facts relative to their sales have to be explored by
16 means of Bowater's records and other kinds of ways rather
17 than Scapa's records. So, an explanation can be the
18 subject of some testimony.

19 I would frankly hope that, now that you all hear me
20 say this, that you all would have some kind of stipulation
21 that would take care of that so that the records retention,
22 unless it turns out there's some direct evidence or strong
23 circumstantial evidence of a deliberate policy of trying to
24 prevent its use in this case, that you all would agree.
25 But I'm not going to force that agreement, and I simply say

1 to you I would carefully monitor how this is presented to
2 the jury. But the fact that the records are no longer
3 available is a fair subject for the introduction of
4 evidence.

5 Mr. Collier, you got any reaction to that?

6 MR. COLLIER: Your Honor, it's actually covered in a
7 little bit more detail in a subsequent motion.

8 THE COURT: Very good. Very good. We'll wait then
9 until we get there.

10 Implying or suggesting that Scapa destroyed records
11 about asbestos to keep them from being seen in this case.
12 You know, if there's direct evidence of that, that's one
13 thing, but you indicated, Mr. Collier, that we're going to
14 explore this again in another motion. So, I can wait until
15 that time if that's what we want to do.

16 Mr. Felker.

17 MR. JEKEL: Mr. Jekel, Your Honor.

18 THE COURT: I mean Mr. Jekel, sorry.

19 MR. JEKEL: That's all right. No, I will wait then,
20 Your Honor.

21 THE COURT: Very good. We've got a place to take it
22 up.

23 MR. JEKEL: Yes.

24 THE COURT: Very good.

25 All right, 7, pain and suffering. Statements of

1 mental and physical condition are inadmissible hearsay.
2 Statements of those other than Mr. Stewart or medical
3 experts regarding Mr. Stewart's physical, mental condition
4 on the grounds it's hearsay would necessitate a waste of
5 time and create substantial danger of undue prejudice.

6 I allow, and have in every one of these cases that
7 I've dealt with, testimony by family members as to the
8 deterioration of condition of plaintiff if that is what
9 happened, and I will allow that here. So, and that would
10 mean mental deterioration and physical deterioration,
11 keeping in mind that that has to be their observation and
12 not the hearsay recitation of the testimony of others like
13 medical experts.

14 So, I agree with you that they can't just simply say
15 what they think the doctors told Mr. Stewart, but they can
16 certainly testify about his condition as they observed it.

17 Number 8, personal beliefs or opinions of counsel for
18 the plaintiff. Personal beliefs of course I grant as to
19 that, but you do have plaintiff's right to recover damages
20 for the reason that same has been -- plaintiff's right to
21 recover damages. You can't state your personal belief, but
22 you can -- but counsel are very free to argue that he's got
23 a right to recover certain damages because that is what the
24 facts show, and that is what the law allows. That's not an
25 expression of a personal opinion. That is an expression of

1 counsel's summary of what the facts and the law show. So,
2 keep it in that framework and not as an opinion of counsel,
3 I believe it's all right.

4 illnesses. Mentioning or referencing the alleged
5 exposure of family members, friends, coworkers to
6 asbestos-containing products. What are we talking about
7 here?

8 MR. COLLIER: Your Honor, I think plaintiffs agree to
9 this one. There's no -- we have no issues.

10 MR. JEKEL: We don't anticipate -- occasionally, Your
11 Honor, coworkers have an asbestos claim and pursued those.
12 It's generally the defense that brings it up. I am unaware
13 of any of the coworkers or lay witnesses that will testify
14 in this case that have claims or that we would bring that
15 out.

16 THE COURT: Okay. Very good. So, that is resolved
17 and would be granted.

18 MR. COLLIER: Your Honor, I believe you skipped over
19 number 9. I don't know that it's...

20 THE COURT: Number 9, personal, that's what I -- let
21 me make sure. Personal beliefs or opinions of plaintiff or
22 plaintiff's witnesses. Any statement or remark by
23 plaintiff or any witness as to his personal beliefs as
24 opposed to stating what the facts should show you.

25 Just like the personal opinions of counsel, I'd make

1 the same ruling about the personal opinions or beliefs of
2 the witnesses, which is they can talk about the facts, the
3 witnesses can, but they can't talk about the equities of
4 the justice or all that. That is a matter of argument by
5 plaintiff's counsel when presenting the case to the jury,
6 and the limitation is that it can't be counsel's personal
7 beliefs, but what he believes or she believes that the
8 evidence shows and the law requires and, therefore, what
9 the equities are in that context.

10 Does that cover it, Mr. Collier?

11 MR. COLLIER: Yes, Your Honor.

12 THE COURT: All right. Number 11 is asbestos-related
13 diseases other than mesothelioma. You know, I'm inclined
14 to grant that, but I will tell you, defense, if I grant
15 that, then you're not going to get into tobacco, alcohol,
16 or anything else. What's sauce for the goose is sauce for
17 the gander, and if y'all don't want to get into any other
18 conditions except mesothelioma, whether asbestos related or
19 not, then we won't get into them. But I'm not going to --
20 I'm going to feed everybody out of the same spoon is what I
21 guess I'm trying to say.

22 MR. JEKEL: Your Honor, I would, I would argue --
23 again Mr. Jekel on behalf of plaintiff -- that the other
24 diseases, while they will not be a prime focus of the case,
25 that it is important for the jury to understand how the

1 knowledge about the hazards of asbestos developed through
2 the state of the art, and it did start with asbestosis.
3 And what did we learn is a lot less exposures can cause
4 even greater harm, and then the knowledge grew. And all
5 that we learned from the knowledge was that the exposures
6 are smaller, the latency period is greater, but the harm is
7 greater. So, I think there will be some minor testimony
8 for foundation of the state of the art and the knowledge of
9 the asbestos hazards.

10 THE COURT: I think that's appropriate. I think
11 that's appropriate.

12 Mr. Collier, I would think you'd want that, too, quite
13 frankly.

14 MR. COLLIER: Your Honor, with respect to some of the
15 other -- we'll, we'll withdraw this because we do -- we
16 would intend to talk about some of the other health
17 conditions that Mr. Stewart had.

18 THE COURT: All right. So, 11 is withdrawn.

19 MR. JEKEL: I must have messed up there, Judge.

20 THE COURT: What's that?

21 MR. JEKEL: I said I must have messed up there.

22 THE COURT: All right, number 12 is improper or
23 prejudicial comparisons, making comparisons between Scapa
24 and cigarettes, talc, Ford Pintos, et cetera. Granted.
25 Stipulations. Referring to refusals to stipulate.

1 Granted.

2 Depositions at which Scapa was not present. I don't
3 know. What are we talking about there?

4 MR. JEKEL: I don't think it's going to be an issue,
5 Your Honor. The depositions we have designated, Scapa was
6 present at all of them. They were obviously present in the
7 cases that, that -- or the depositions that were taken in
8 this case.

9 THE COURT: I mean, it is quite common in these cases
10 to have depositions that were taken in other cases used in
11 this case, and I allow that if the defendant was present
12 and it otherwise has probative value because of the
13 relationship of the deposed person to the facts of the case
14 we're trying.

15 MR. COLLIER: Your Honor, the motion was filed before
16 we had the formal designations of the witnesses.

17 THE COURT: Okay.

18 MR. COLLIER: And the deposition designations that
19 they intended to use. So, we did it more as an affirmative
20 issue.

21 THE COURT: Okay.

22 MR. COLLIER: Like Mr. Jekel said, I don't think it's
23 going to be an issue.

24 THE COURT: So, withdrawn.

25 MR. YOUNG: Judge, Lane, Lane Young. I was at most of

1 them. Some of them are so old that I had a little bit of
2 hair back then. I was at most of them.

3 THE COURT: Okay. Well, then that one we'll say
4 withdrawn.

5 15, the deposition cross-examination or similar live
6 testimony of James D. Crapo. Is this the time we want to
7 get into the admissibility of Dr. Crapo's testimony?

8 MR. COLLIER: Your Honor, I -- we spoke before, and I
9 don't think that's going to be an issue here. What, what
10 we were seeking with this motion -- because Dr. Crapo is
11 going to now come live and testify at trial. He -- his
12 testimony had been previously preserved in connection with
13 one of the prior trial settings, and all we were trying to
14 do is not have it played during plaintiff's opening.

15 THE COURT: I gotcha.

16 MR. COLLIER: And they've indicated they're not going
17 to.

18 THE COURT: I gotcha.

19 Does that, Mr. Felker, does that ---

20 MR. JEKEL: Yes, Your Honor.

21 THE COURT: Mr. Jekel, I'm sorry.

22 MR. JEKEL: That is our position.

23 THE COURT: I don't know why I've got Felker on my
24 mind. Sorry, sir.

25 MR. JEKEL: Is he here?

1 THE COURT: But, Mr. Jekel, is that okay with you?

2 MR. JEKEL: Yes, Your Honor, that's, that's fine.

3 THE COURT: I just give you this caveat. We know
4 these experts and how they do, and sometimes they tell you
5 they're coming, they're coming, they're coming. Then at
6 the very last minute, they don't come and you're stuck with
7 having to use the deposition.

8 MR. JEKEL: And again, I've not -- I don't intend to
9 use it during the opening.

10 THE COURT: But how it, how it presents in live
11 testimony, you're not boxing yourself in by ---

12 MR. JEKEL: Right. It doesn't ---

13 THE COURT: --- having me grant this motion?

14 MR. JEKEL: That's right.

15 THE COURT: Okay. Granted.

16 16, absent witnesses. Failure to call witness equally
17 available to both parties that is not under the control of
18 Scapa. I'm not inclined to grant that; I'm inclined to
19 deny that. You can subpoena witnesses, and if you don't
20 subpoena them and present them and they turn out they're
21 real important, then sometimes you get tagged with that.

22 What do you have in mind, Mr. Collier?

23 MR. COLLIER: Your Honor, I don't think Mr. Jekel had
24 any objection to that particular ---

25 MR. JEKEL: I don't generally say that they didn't

1 call somebody, Your Honor.

2 THE COURT: Okay.

3 MR. JEKEL: It's just not...

4 THE COURT: Well, generally these cases you know
5 exactly who's going to do what.

6 MR. JEKEL: Yes.

7 THE COURT: All right. Then you're saying grant?

8 MR. JEKEL: You should grant that, Your Honor.

9 THE COURT: I'll grant. Very good. I'll grant.

10 17, treatises. I will follow the rule with regard to
11 the use of learned treatises, which means this thing isn't
12 granted or denied. I'll follow the rule with respect to
13 how learned treatises are used.

14 MR. JEKEL: Very well.

15 THE COURT: 18, undisclosed witnesses. Introducing
16 offers of testimony that wasn't divulged to Scapa. We do
17 have, as I understand it, something that we're going into
18 later, which is more witnesses that they say were disclosed
19 too late or one thing and another. But undisclosed
20 witnesses, if they're completely undisclosed and they
21 attempt to use them at trial, I would grant this. That's
22 just what we want to avoid.

23 MR. JEKEL: Yes, Your Honor. I don't think we have
24 any objection if you granted that. I think we have
25 disclosed all the witnesses that will actually testify.

1 THE COURT: Great.

2 19, evidence or exhibits not included on the exhibit
3 list. That would be granted.

4 MR. JEKEL: Your Honor, the only issue that I
5 anticipated, there was the potential during
6 cross-examination that a document not previously on the
7 exhibit list does become relevant and after used in
8 cross-examination, the parties might seek to admit it. I
9 imagine that's a very small universe of documents.

10 THE COURT: That's a small universe, and I don't
11 consider myself bound if something comes up ---

12 MR. JEKEL: Right.

13 THE COURT: --- in the trial that neither party
14 anticipated, but if the witness says it, and we will
15 evaluate its admissibility at that time.

16 MR. JEKEL: Thank you, Your Honor.

17 THE COURT: But something you could have gotten
18 beforehand and you knew about beforehand and didn't do,
19 that's what we're talking about here.

20 MR. JEKEL: Yes.

21 THE COURT: All right, 20.

22 MR. COLLIER: Your Honor, I'm subbing out, and Mr.
23 Young's coming up for this one.

24 THE COURT: All right.

25 MR. COLLIER: Thank you.

1 THE COURT: Mr. Young, the first one I got for you
2 that is evidence regarding the alleged duty of Scapa to
3 warn absent a showing of requisite knowledge.

4 MR. YOUNG: Judge, we've got a separate motion on that
5 that we might -- it sort of encompasses ---

6 THE COURT: You want to defer it until we get to
7 exhibit 2?

8 MR. YOUNG: Yeah. That's it.

9 MR. JEKEL: Your Honor, there was a motion to strike
10 on a postsale duty. I think that this discussion is best
11 suited to arguing that motion which we'll argue.

12 THE COURT: Very good. We'll pass over it.

13 MR. JEKEL: Yes.

14 THE COURT: All right, 21. All evidence and argument,
15 testimony that a single fiber of asbestos can cause
16 asbestos-related disease.

17 MR. YOUNG: Judge, Mr. Jekel said that he wasn't going
18 to argue that. Sorry?

19 MR. COLLIER: Court reporter. Court reporter needs to
20 hear him.

21 COURT REPORTER: I need Mr. Young to speak up, please.

22 MR. YOUNG: Oh. Sorry.

23 THE COURT: Yeah. I agree with that.

24 MR. YOUNG: Mr. Jekel told us that he wasn't going to
25 argue that. It's encompassed to some extent in the all

1 exposures contribute motion which we will argue extensively
2 later, but I think it might be better to do that then.

3 MR. JEKEL: I, I do, too, Your Honor. I generally do
4 not make the suggestion to a jury that an ambient exposure
5 can cause disease.

6 THE COURT: All right. So, that's withdrawn, and
7 we'll take up this issue on the subject of every exposure
8 rather than a single fiber.

9 MR. JEKEL: Yes, Your Honor.

10 THE COURT: All right, 22, knowledge by third-parties
11 and the dangers of asbestos cannot be imputed to Scapa.
12 Where are we on that? Are we going to take that up in this
13 other motion, too?

14 MR. YOUNG: Yes, Your Honor. That's -- yes, that
15 would, I think that would be better.

16 THE COURT: Okay. All right.

17 MR. YOUNG: Response dealt a little bit with Aston,
18 who's no longer in the case, so yes.

19 THE COURT: Okay.

20 MR. YOUNG: Sorry.

21 THE COURT: 23, evidence related to the Asbestos
22 Textile Institute and Industrial Hygiene Foundation. Scapa
23 was never a member; therefore, it's irrelevant. I don't --
24 I have not in other cases that I have tried blanket
25 excluded that kind of evidence.

1 You know, it really depends on the company's
2 representative and what the company representative knows by
3 means of their library or their status in the industry
4 about any standards that are propounded by industrial
5 organizations common to the industries, whether it's
6 Asbestos Textile Institute or the Industrial Hygiene
7 Foundation or whatnot. And I would not be inclined at this
8 moment to grant a blanket forbidding of any exploration of
9 that because I think it really depends on -- if you've got
10 an industrial hygienist on the stand and that industrial
11 hygienist is expressing certain opinions based on their
12 education, training, and knowledge, then I'm not going to
13 say they can't be asked about the widespread knowledge of
14 what some industrial organization might have put out there
15 or had to say. So, I'm very hesitant to just blanket grant
16 that kind of request.

17 MR. YOUNG: Your Honor, you're going to find as we go
18 along that Mr. Jekel and I do have a long history, and
19 Scapa did not belong to ATI, the Asbestos Textile
20 Institute, or the Industrial Health Foundation. And these
21 are very discrete organizations that only publish
22 information to their members. So, I would simply ask that
23 some of the ATI -- Scapa's medical -- I mean, Aston's
24 medical director was also the medical director for ATI at
25 one point in time when the plaintiffs claimed that ATI did

1 a study to try and cover up the hazards of asbestos in
2 cancer.

3 So, some of this is extremely prejudicial, in my
4 opinion. So, if we could just ask Mr. Jekel to alert the
5 court if he's going to go into something like that so we
6 can have an offer of proof and object to it then. I think
7 that would be fair to us.

8 THE COURT: Mr. Jekel.

9 MR. JEKEL: I have no objection to that, Your Honor.

10 THE COURT: All right. Well, then the way we will do
11 this, I will not make a blanket grant of this motion, but
12 if the topic is explored, an offer of proof outside the
13 presence of the jury will be made to begin with.

14 MR. JEKEL: Yes, Your Honor.

15 MR. YOUNG: Thank, thank you, Your Honor.

16 THE COURT: Okay, number 24, experts testifying about
17 opinions allegedly drawn by governmental regulatory
18 agencies, nongovernmental organizations, OSHA, EPA, WHO,
19 WTO, and the like. I have certainly allowed testimony as
20 to the development of EPA regulations and the like. I have
21 not been faced with much information about the World Health
22 Organization, WTO, those kind of things, but OSHA and EPA
23 are very routinely -- their regulations, when they were
24 developed, how they were developed, what the process of it
25 was is something that's a stock piece in these trials, and

1 I would not exclude that unless y'all can tell me
2 something.

3 MR. YOUNG: Judge, you're dealing with really two
4 different situations. I don't think anybody's going to
5 disagree that the permissible exposure levels that OSHA set
6 for asbestos are relevant. That's part of our case.
7 That's part of the plaintiff's case, but what Mr. Jekel
8 wants here is to be able to stand up. Judge, our products
9 only contain chrysotile asbestos, and I know ---

10 THE COURT: I've heard this argument many, many times
11 about the difference between amphibole ---

12 MR. YOUNG: Right.

13 THE COURT: --- and chrysotile, and the attempt to
14 discuss there's good asbestos and bad asbestos, there's
15 really super dangerous asbestos, and there's less dangerous
16 asbestos. That is certainly something that defendants can
17 project as their view of what the science is, and the
18 plaintiff is going to project just the opposite and say it
19 doesn't matter. And they are going to have experts that
20 testify in that regard, or they're going to testify that
21 this -- that some of this asbestos was never used and some
22 of it was. But I'm not going to, on the front end, forbid
23 or favor one side as opposed to the other.

24 If there's going to be a discussion about the
25 defendant's claim that though they only used only the

1 asbestos that wasn't nearly as dangerous and -- there's no
2 information that I know about that says that mesothelioma
3 is caused by anything other than asbestos. And they are
4 going to be permitted to show that, and they are going to
5 be permitted to show whatever they can show about the
6 asbestos they say caused his problem and what Scapa used in
7 terms of what its asbestos was like. And you equally are
8 going to be able to show what you can show and what your
9 experts say about the difference between chrysotile and
10 amphibole, and the jury will have to make its mind up, but
11 I'm not going to ---

12 MR. YOUNG: Judge.

13 THE COURT: I'm not going to forbid expert testimony
14 about this either way.

15 MR. YOUNG: Your Honor, I, I don't disagree with that.
16 The expert testimony is the key to the kingdom. I spent a
17 lot of time yesterday, and it looks to me like South
18 Carolina is crystal clear that stuff like this has to come
19 from a scientifically reliable investigation, and what Mr.
20 Jekel wants to do ---

21 THE COURT: Well, scientifically reliable is part of
22 it, Mr. Long, but I'm also saying that governmental
23 regulatory agencies' pronouncements about this are
24 admissible in and of themselves without regard to whether
25 you have the government expert on the stand. So,

1 understand where I'm going with this if you disagree with
2 that.

3 MR. YOUNG: Yes, Your Honor. I just need to finish my
4 argument, if it's okay.

5 THE COURT: Sure.

6 MR. YOUNG: He's going to present a slide that says
7 the World Health Organization and, I don't know, World
8 Trade Organization and blah, blah, blah says that
9 chrysotile asbestos causes mesothelioma. But more
10 importantly, Judge, they're going to say -- and they also
11 said there's no safe level of exposure to asbestos, and
12 there's going to be absolutely no information that any of
13 those -- that -- first of all, there's no scientifically
14 reliable article that says that to begin with, much less
15 any evidence that the World Health Organization or the
16 World Trade Organization or any of them actually did a
17 study that's scientifically reliable that says that.

18 I don't dispute, Your Honor, that their experts can
19 come in if a foundation is laid to say that, but just to
20 stand up and have this hearsay testimony from these
21 organizations come in in that blanket fashion, at the very
22 least the prejudice outweighs the probative value.

23 THE COURT: Mr. Jekel.

24 MR. JEKEL: Your Honor, well, I, I do believe it is
25 appropriate for me in opening argument to say that the

1 evidence will be that organizations around the world have
2 found that chrysotile is just as dangerous as other forms
3 of asbestos, and argue that these same entities believe
4 that there is no safe level.

5 Mr. Young is certainly capable of cross-examining any
6 witness. Well, let's talk about the World Health
7 Organization. What is that based on? And they'll have to
8 answer that question. But I do believe it is appropriate.

9 They want to say that it's -- it goes without
10 knowledge that, that chrysotile is the safe asbestos.
11 Well, that's just -- they are, they -- defendants in
12 asbestos litigation are the only people that say that, Your
13 Honor, and I do believe it's both relevant and probative.
14 Mr. Young can deal with it on cross-examination, and it
15 deals with the weight, not the admissibility of given
16 testimony.

17 THE COURT: Mr. Long, any response?

18 MR. YOUNG: Yes, Your Honor. I mean, he still hasn't
19 said that there was any scientifically reliable
20 investigation done by any of those organizations that's the
21 foundation for them to make that statement.

22 And, you know, Judge, you're going to hear -- this is
23 another motion. You're going to hear over again even from
24 their experts that ambient air levels of asbestos don't
25 cause disease. So, it's extremely prejudicial for them to

1 be able to come in and say that this entity that we can't
2 cross-examine who hasn't done an investigation says there's
3 no safe level of exposure to asbestos because there is.
4 Because even their experts agree ambient air levels of
5 exposure to asbestos don't cause disease. So ---

6 THE COURT: Well, their experts, as I understand it --
7 and I could be wrong, so if I'm not understanding this
8 right, you all correct me right now. This is a battle of
9 the experts. Your experts say that there's no scientific
10 justification for the World Health Organization coming to
11 that conclusion or WTO coming to that conclusion. Their
12 experts are going to say we in part make our expert
13 testimony based on the literature in the area. And the
14 report of the World Health Organization is part of what
15 we've read, and we rely upon with our expertise in this
16 area in opining that there's no safe level and whatever
17 else they say, and chrysotile not the safe asbestos, et
18 cetera.

19 And I would allow that if the experts say that, and I
20 will allow him to open and say that if that's what his
21 experts are going to say. And I have at least read enough
22 of the snippets in here to conclude that's what his experts
23 are going to say. You think it's junk science and totally
24 unreliable. We're going to talk about that, but I think
25 his experts are going to say exactly that, and yours are

1 going to say that's hooley.

2 MR. YOUNG: Exactly.

3 THE COURT: And that's for the jury to decide.

4 MR. YOUNG: Judge, I just -- one further comment. I
5 don't want to have the sense I'm arguing with you because
6 I'm not. But the problem is is that when you use things
7 like the World Health Organization or World Trade
8 Organization, it gives this aura of credibility to that
9 that we really can't cross-examine. I mean, I understand
10 that we can have Dr. Crapo or whoever come in and say,
11 well, I've looked at this and there is no scientific basis
12 for them to say that, but by then the cow's out of the
13 barn, Judge. There's already been this laundry list of
14 what appears to a jury to be super important organizations
15 that said something that is diametrically opposed to ---

16 THE COURT: Well, what would be different from saying
17 that the World Health Organization said that and saying the
18 leading scientists that I studied under at Stanford
19 University and Princeton say the very same thing? These
20 experts rely on what they've studied and other people in
21 the field, and this is one of the reports that they rely
22 on.

23 MR. YOUNG: Well, Judge, I just -- the only thing, if
24 that was the case, we could go cross-examine that other
25 doctor, but I'm not aware of any independent doctors that

1 say that, but I understand your ruling, Judge. I just
2 wanted to put my ---

3 THE COURT: Very good.

4 MR. YOUNG: --- arguments on the record.

5 THE COURT: Very good. All right.

6 MR. YOUNG: Judge, can I ask you one question? This
7 is in the nature probably of an advisory opinion, but I
8 assume once you've denied our motions, then we don't need
9 to object again when Mr. Jekel goes into that in his
10 opening in order to keep our objection valid.

11 THE COURT: That's what I think, but you may rely on
12 your South Carolina counsel, Mr. Will Early, who knows the
13 law quite well and has clerked for judges here to see what
14 they think of the kind of moving target that has been
15 presented by appellate courts in South Carolina with
16 respect to preservation rules. I'm not ---

17 MR. EARLY: That's what I think right now, but between
18 now and trial, I'll certainly look at it again.

19 THE COURT: I, I ---

20 MR. EARLY: I don't want to disrupt opening arguments.

21 THE COURT: If you read the writings that I made at a
22 time when I was in another role in this state, you will see
23 that I do not -- I think you've preserved your rights when
24 the ruling is made. But I would not presume to overcome
25 the good advice you're going to get from Mr. Early about

1 this.

2 MR. YOUNG: Our last, my last judge, Your Honor, Judge
3 Hill, he got -- he believed that and he got promoted, so
4 hopefully he'll stick to that.

5 THE COURT: Yeah, and now he's grading my papers.

6 All right, 24, experts testifying about conclusions
7 allegedly drawn by governmental regulatory agencies ---

8 MR. YOUNG: That, that ---

9 THE COURT: --- and nongovernmental organizations.

10 MR. YOUNG: Is that the one?

11 THE COURT: That's what we've been talking about.
12 I've denied it.

13 MR. YOUNG: Right.

14 THE COURT: Number 25, lay testimony regarding
15 product composition. What are we talking about there?

16 MR. YOUNG: Well, Judge, I mean, as you heard this
17 morning from Mr. Collier, there's nothing on the -- there,
18 there were asbestos felts and non-asbestos felts from Scapa
19 at Bowater and from everybody else, and there were more
20 non-asbestos. And so we just don't want -- in their
21 depositions, all these fellows came and said they had no
22 idea if the felt had asbestos in it or not. And we just
23 think that a proper foundation needs to be laid for, you
24 know, a lay witness to come in and say, you know, I think
25 there was asbestos in this felt, having -- particularly not

1 having said it before and ---

2 THE COURT: I think you are being pretty restrictive
3 in terms of your reading of the testimony of these
4 coworkers. Y'all asked some very specific questions
5 intended to try to nail them down that they didn't really
6 know whose asbestos it was, and these gentlemen were very
7 truthful about saying I don't know when a specific piece of
8 it -- because it wasn't labeled. It was in boxes, some
9 wooden boxes. It said Scapa on some; it said Albany on
10 some, et cetera. But they certainly expressed some
11 opinions about the dusty nature of the environment and that
12 asbestos fibers were part of that dusty environment, and I
13 would let -- I'm not going to prevent a layperson from
14 saying that.

15 MR. YOUNG: Judge, that's the exact point of our
16 motion. There's tons and tons of paper dust at Bowater, in
17 any paper mill.

18 THE COURT: Yes, and ---

19 MR. YOUNG: But, but ---

20 THE COURT: --- there's also fibers that they
21 testified about. They testified about what kind of felt
22 this was. It metal fiber reinforced, and it also has
23 asbestos fibers in it, and when you cut it or blow on it or
24 do a whole bunch of things to it, dust comes from that
25 felt. And that dust may be some of it from ambient paper,

1 but some of it is the product of the ripping and tearing of
2 the felts themselves which releases whatever is a part of
3 the composition of those felts, and I'm going to allow them
4 to testify about that.

5 MR. YOUNG: Judge, the asbestos felts and the non-
6 asbestos felts look exactly the same. They don't say
7 asbestos on them. The non-asbestos ---

8 THE COURT: Right, and it's circumstantial evidence
9 that establishes that some of them were asbestos and some
10 were not. But you're not going to get a ruling out of me
11 that completely forbids them from saying what they say
12 about these felts on the altar that they can't say which
13 ones omitted. That's not the *Lohrman* test. The *Lohrman*
14 test is whether the exposure is frequent and regular and
15 proximate, and that can be established by circumstantial
16 evidence, and most often is by sales records.

17 Most of these materials do not have labels on them,
18 whether they're asbestos brake shoes, whether they're valve
19 packing, or whatever else they are. They don't say
20 asbestos on them, and they don't say no asbestos, Teflon,
21 on it, and that's not going to be the altar upon which
22 we're going to decide what these lay witnesses can say
23 about the environment in which they work.

24 MR. YOUNG: Just, just one more comment, Judge, and
25 then I'll shut up. I'm going to adhere to your ruling no

1 matter what, but the, the problem, Your Honor, is that
2 those other products you're talking about, during, during a
3 certain time period they all contained asbestos. So, if
4 dust came out of a brake in the '60s and '70s, it was
5 asbestos.

6 But here dust comes out of dryer felts whether they're
7 asbestos or not asbestos, and it's impossible for a
8 layperson to say aha, that's asbestos dust as opposed to
9 cotton dust or paper dust, and that's the, the basis of our
10 motion.

11 THE COURT: I understand.

12 Mr. Jekel.

13 MR. YOUNG: I, I understand.

14 MR. JEKEL: Your Honor, I believe Your Honor is right
15 on, and that is the argument I would make. I do believe
16 that that is cross-examination for Mr. Young. Do you know
17 if that was cotton? Do you know if it was paper? Fine.
18 That could be the case.

19 But I would also suggest that there are 100 percent
20 synthetic dryer felts that do look different than
21 asbestos-containing felts that have fibers and weaves, and
22 that that would be competent testimony for a lay witness
23 with knowledge.

24 MR. YOUNG: Judge, and, and my judge friends in
25 Georgia say judge has already ruled in your favor. You

1 don't need to talk anymore, so I don't have anything else
2 to say.

3 THE COURT: Very good. That is -- that motion is
4 denied.

5 Suggestion that the jury should punish Scapa. I've
6 explained the bifurcated nature of this trial, and no
7 suggestion can be made in the liability phase about
8 punishing Scapa, and only can such request be made of the
9 jury in the punitive damages phase, if we have a punitive
10 damage phase.

11 MR. YOUNG: Judge, I think Mr. Jekel's okay with 26,
12 27 ---

13 MR. JEKEL: Those can be granted, yes.

14 MR. YOUNG: --- 28.

15 THE COURT: Very good. So, 26, 27, and 28 are
16 granted.

17 MR. JEKEL: With regard -- and, and, Mr. Young, with
18 regard to 29, I don't really have objection. I, I just --
19 other than I believe felt sales and yarn sales is evidence
20 we seek.

21 MR. YOUNG: Yeah, Judge.

22 THE COURT: Yeah. Well, sales testimony is fine.
23 Financial status of Scapa would not be fine.

24 MR. YOUNG: All right, I think we probably need to
25 take that up when we see how it's presented because ---

1 THE COURT: I'm not going to exclude any sales
2 information, but I would certainly exclude financial
3 information about Scapa until you get to the punitive
4 stage. But sales information that relates to an attempt to
5 show the volume of material that Scapa provided to Bowater
6 is going to be permitted.

7 MR. YOUNG: Right. We don't have any objection to
8 that.

9 THE COURT: Okay.

10 MR. YOUNG: But that's not where he's going to stop
11 the evidence.

12 THE COURT: Mr. Jekel.

13 MR. JEKEL: No, Your Honor, as it relates to this
14 topic, the defendant wants to claim the last felt was sold
15 to, to Bowater in '76. Again, we've had the problem with
16 their records. We also have the records that they show
17 showing that they're selling thousands of pounds of
18 asbestos yarn in a, in a given quarter in the '80s without
19 testing that product, and I do like to believe that ---

20 THE COURT: Oh, well, that's going to be permitted;
21 that's going to be permitted. That's a matter of their
22 conduct in manufacturing this material, and I would permit
23 that.

24 MR. YOUNG: Judge, I just, I just want to make sure my
25 argument is clear. I thought it was, but first of all

1 there's -- the, the evidence in the case is going to be
2 that there is a Master Card for all the felts that were
3 shipped anywhere. None of them were destroyed. So, I, I
4 think my friend Mr. Jekel was taking a little liberty with
5 that, but I think it'd be best just to raise the objection
6 at the time if he -- it, it looks like he's going outside
7 of what we think is proper, understanding Your Honor's
8 ruling.

9 THE COURT: Well, you're certainly going to be able to
10 do that. I wouldn't preclude you for one minute if you
11 think it's outside what you think can be shown about sales
12 and just jumping straight to these volumes of sales if
13 there's anything to back up that Scapa was supplying
14 Bowater because that can be demonstrated by more than just
15 Master Cards. But let's see what happens when we get
16 there. But my general reaction is as long as there is
17 something that indicates that Scapa was still supplying
18 Bowater -- whether it's your Master Cards, or if you've
19 destroyed some of your Master Cards, it might be something
20 else -- then the volume of sales and so forth is one way of
21 showing how much felt was going into the plant.

22 MR. YOUNG: Your Honor, I'd just like for you to hear
23 the evidence about this alleged destruction of Master
24 Cards.

25 THE COURT: Sure, and that's going ---

1 MR. YOUNG: Because I don't think it exists.

2 THE COURT: I understand. I understand.

3 All right, 30 liability insurance, certainly granted.

4 MR. YOUNG: And, Judge, I think Mr. Jekel is okay with
5 30, 31, 32, 33, and 34.

6 THE COURT: All right. Very good.

7 MR. JEKEL: That is correct, Your Honor.

8 MR. YOUNG: Because he doesn't want us to talk about
9 all the cases we've won.

10 MR. JEKEL: Oh come on.

11 THE COURT: 35, asbestos industry, I would deny that.
12 They are an asbestos company and they are part of the
13 industry. I don't think that is inflammatory at all.

14 MR. YOUNG: We agree to that one, Judge.

15 THE COURT: Good. Concern of action among former
16 defendants. I would grant that unless there's specific
17 evidence of some joint conduct.

18 MR. JEKEL: Your Honor, I don't foresee any of that
19 type evidence coming into this case.

20 MR. YOUNG: And he agreed to 37.

21 THE COURT: 37 he agreed, which is?

22 MR. JEKEL: I, I don't think I'm going to have a
23 witness testify that, that Scapa did anything wrong. They,
24 they will testify that they didn't see any testing of their
25 product, and they would have done this testing, but that

1 would be the extent.

2 THE COURT: Well, I don't think he can object to that.

3 Evidence or references -- this is 38 -- about Scapa
4 manufacturing facilities. I would deny that. If there's
5 proper foundation for talking about manufacturing as it
6 relates to the felts that were supplied to Bowater, then
7 that's going to be permitted.

8 MR. JEKEL: Or, Your Honor, their general knowledge of
9 the asbestos hazards. One of the things that Your Honor
10 may not know is that Scapa Waycross, Georgia, started out
11 in Blackburn, England. There's a whole bunch of evidence
12 about how the parent fostered the child and how momma
13 looked after the children, but that there are other
14 manufacturing facilities that there may be evidence about.

15 What I do not anticipate is going into the felt
16 manufacturing at these facilities, but the fact that they
17 had a plant in Blackburn, England in the '50s and the '60s
18 utilizing asbestos textiles is relevant on the issue of
19 their knowledge of the hazards of asbestos, Your Honor.

20 THE COURT: Mr. Long.

21 MR. YOUNG: Judge, I have -- if that's what he's
22 planning on doing, then I think we're okay with that.
23 That's not, you know, that's not really the way this
24 evidence is usually tried to be put in by the plaintiff.
25 So, I guess we should wait and see.

1 THE COURT: Okay. I mean, now what he's talking about
2 is notice and knowledge.

3 MR. YOUNG: Right.

4 THE COURT: And that's certainly legit to explore.
5 Talking about whether you had comp claims against you by
6 your own workers for what they were doing at your own plant
7 would be a different kettle of fish perhaps.

8 MR. YOUNG: Right.

9 THE COURT: All right, 39, to include nonparties,
10 bankrupt trust entities, settled defendants. You have
11 certainly acknowledged in this that you're trying to
12 preserve your position that *Smith vs. Tiffany* is wrong, but
13 *Smith vs. Tiffany* is what I must go by. So, I would deny
14 that.

15 MR. YOUNG: Judge, Will was going to argue that
16 because he's by himself.

17 THE COURT: Okay, Will, come on.

18 MR. EARLY: Well, Your Honor, that's why I put in
19 there I've heard the court's ruling on that. I'm familiar
20 with *Smith*. My law firm argued *Smith*, the plaintiff
21 actually, and I'm familiar with the ruling.

22 We would agree with Justice Pleicones's analysis in
23 the dissent. We just wanted to preserve this for the
24 record. We think it may go up and continue to be fostered
25 in the appellate courts, and we think the court got -- we

1 -- frankly Justice Kittredge, I love him, but I think he
2 got it wrong when it comes to the applied uniform
3 contribution among Joint Tortfeasors Act, trying to strike
4 a balance between that and Rule 14, Rule 19, setoffs, and
5 all other kinds of things. But I understand the court's
6 ruling. I've heard you rule before. We respect it. I
7 just wanted to preserve my -- preserve it.

8 THE COURT: You know, I'm just a trial judge now, so
9 *Machin vs. Carus, Inc.* and *Smith vs. Tiffany* are both the
10 rules of the road for me.

11 MR. EARLY: I understand, Your Honor, and I will be
12 using those as a, as a, as a shield right now, a sword
13 later, so I, I agree with those ruling in some extent.

14 THE COURT: Right.

15 MR. YOUNG: I had made a note earlier on that. I'd
16 just like to add this to what Will said. You know, the
17 plaintiffs want to be able to say that the plaintiff was an
18 asbestos victim, and the argument is that all mesos are
19 caused by asbestos. And it just seemed to me patently
20 unfair, and we'll get to this more when we get to the
21 bankruptcy claims. But if you're an asbestos victim, that
22 encompasses all your asbestos exposure, and so ---

23 THE COURT: I'm not going to violate the direct
24 pronouncements of the South Carolina Supreme Court on this.
25 I may agree with you about the logic of what you're saying,

1 Mr. Long, but the court has spoken in very unmistakable
2 terms that the bankruptcy trust -- and, of course, other
3 courts have also spoke about that particular thing -- but
4 bankruptcy trust, other defendants, other codefendants,
5 contributions, settlements, workers' comp, all that is off
6 the table as far as I am concerned because of what our
7 courts said about our contributions act.

8 MR. YOUNG: My point -- Judge, I'm not trying to go
9 against the court -- is that allowing the term asbestos
10 victim seems to me to be unfair and inappropriate in light
11 of the rulings that, that -- I'm not sure I articulated
12 that very well.

13 THE COURT: I understand your position, and I will
14 stay with what I ruled in that regard.

15 MR. YOUNG: Thank you, Your Honor.

16 THE COURT: All right, and of course that this motion
17 *in limine* has been filed or granted in whole or in part,
18 certainly that can't be mentioned.

19 All right, that completes what is termed the omnibus
20 motions *in limine* by defendant, and so we now move to...

21 MR. EARLY: Your Honor, going down the plaintiff's,
22 the rest of the plaintiff's motions *in limine* ---

23 MR. JEKEL: These are defendant's motions *in limine*.

24 MR. EARLY: I'm sorry. He's correct. Since we're
25 doing these, number 2 Fritz and I have agreed on, not only

1 the motion itself, but we've also agreed on a proposed
2 questionnaire.

3 THE COURT: Well, let me tell you something. Let me
4 just make clear right now where I'm coming from. I am not
5 going to allow a jury questionnaire; I do not allow jury
6 questionnaires. And both parties normally do agree because
7 both parties want to *voir dire* the jurors, and we don't
8 have *voir dire* in civil cases in South Carolina except by
9 the court.

10 And I have looked over this questionnaire, and most of
11 what is pursued in this is an attempt to condition the
12 thinking of the jury, in my humble opinion, rather than an
13 attempt to get information that is needed to decide whether
14 to accept or to strike a juror or to ask that a juror be
15 dismissed for cause. So, I can tell you there is no
16 agreed-upon jury questionnaire that I will accept; we're
17 not going to give a jury questionnaire to the jury.

18 Now having said that, what I have done consistently is
19 to hope that the parties will agree on questions to be
20 asked of the jury, and those would be rather simple
21 questions and rather straightforward, in my view. They
22 can't get into their opinions about the American tort
23 system or whether they think verdicts are too low or too
24 high or any of that kind of thing. But I think it is
25 legitimate to get basic information about the jurors, their

1 educational background, their jobs, their marital status,
2 but when you get beyond that to specific questions about
3 the occupations of the children other than if you worked in
4 Bowater or in a paper mill, whether -- questions about
5 whether you or anyone close to you has filed a lawsuit
6 ever, I don't do that. I don't think it's necessary to get
7 a jury that will be fair, and that's what you're talking
8 about is not a jury that doesn't have a background, but
9 jurors that can set aside whatever background they have and
10 look fairly and objectively at the evidence and the
11 instructions as I give them to the jury and render a
12 verdict based thereon. So, I just explain to you that's
13 how I handle it.

14 And if you would like to get some of your brothers and
15 sisters that most recently were before me in *Jolly* and get
16 from them what we used as the questions in *Jolly*, then I'm
17 perfectly willing to ask those same questions in this case.

18 MR. JEKEL: We'll follow that, Your Honor.

19 MR. EARLY: And, Your Honor, if we're trying the case
20 on the 29th, what I'm hearing you say is the plaintiff and
21 defense would propose a set of *voir dire* that we agree upon
22 that we would submit to the court you would ask the jury
23 during the *voir dire* process?

24 THE COURT: That's correct, and again I reserve the
25 right, even if both of you agree, to not ask certain things

1 that I don't think are appropriate but rather may condition
2 the jury to a point of view. I don't like to ask questions
3 like that or questions that are too intrusive like what
4 they read and what TV shows they watch and what bumper
5 stickers they have on their car, things of that nature. I
6 don't generally ask those kind of questions.

7 MR. YOUNG: Judge, just, just, I assume you'll ask
8 about asbestos disease and asbestos lawsuits.

9 THE COURT: I'll ask, if it's phrased properly,
10 whether they, whether they or their spouse, anybody in
11 their immediate family has had mesothelioma, but that's
12 about as far as I'm going to go with it. I'm not going to
13 ask for any -- I am not going to examine jurors
14 individually about the specifics of all of that. I am
15 simply, when I get to those questions, I ask them to raise
16 their hands and unless there's some need to go further,
17 they recite their numbers and you take them down. And you
18 then know that that's someone who had someone in their
19 immediate family have a claim for asbestos-related disease
20 or have died from it, and that's about the extent that I
21 ask about it.

22 MR. YOUNG: Will you then ask them if that would cause
23 them to be ---

24 THE COURT: I always ask ---

25 MR. YOUNG: Okay.

1 THE COURT: --- whether it would cause them to have
2 any problems and let them tell me if they think it would
3 interfere with their ability to be fair, then absolutely
4 certain would ask that, Mr. Young.

5 MR. YOUNG: Judge, when we did the trial with Judge
6 Hill, he allowed some limited follow-up questions. If
7 somebody said something that was extremely relevant, could
8 we hand it to Your Honor, either side? Is that...

9 THE COURT: Sure. That can be done; that can be done.

10 MR. YOUNG: Thank you.

11 THE COURT: Absolutely.

12 MR. EARLY: Your Honor, going -- continuing to go
13 through the defendant's, if I may?

14 THE COURT: All right.

15 MR. EARLY: Is that what you want to keep doing?

16 THE COURT: I think we've dealt with 2, right?

17 MR. JEKEL: Yeah.

18 MR. EARLY: We did. Number 3 is the motion *in limine*
19 for equitable division of time.

20 MR. JEKEL: Yeah, we do need to talk about that.

21 MR. EARLY: I think we do because in the context of
22 what you said earlier, Your Honor, the second week of
23 trial, you're going to be out Monday and Tuesday. And
24 assuming we get, after juror qualifications, opening
25 statements, if we get about eight days of trial, maybe six,

1 seven, then what we're concerned about is the amount of
2 time we're going to have to put up our witnesses. If the
3 plaintiffs try to monopolize the entire two weeks with all
4 their witnesses, we're not going to have any chance for
5 rebuttal.

6 THE COURT: I'm not going to let you be disadvantaged;
7 don't worry about that. I do want there to be some
8 limitations on how many -- the plaintiff's got way too many
9 witnesses here. I'm not about to let the plaintiff put on
10 all those witnesses. I mean, it's something like thirty
11 witnesses. We're not going to have a trial with thirty
12 witnesses; that's not going to happen.

13 What I generally like to do is see no more than three
14 experts and then some folks beyond that who've got some
15 specific and non-overlapping things that need to be said
16 about the condition of the plaintiff. And that would
17 include the physician, and that would include some family
18 members, but I can't imagine that I would allow any huge
19 amount of witnesses like what's been proposed.

20 And that's why I want y'all to sit down and let me
21 know. Not everybody you think knows everything, but who
22 you specifically plan to use, and then we'll go over that
23 and decide whether that's -- who's going to say what and
24 whether you've got some overlap to reach a fair verdict the
25 jury doesn't really need.

1 MR. COLLIER: Your Honor, Chris Collier. That was,
2 that was the basis for our motion as opposed to any
3 division of how much time everybody gets for opening and
4 closings. It was more about the number of witnesses.

5 THE COURT: Sure, and I think that's just something,
6 y'all are going to have to submit something to me. We're
7 going to talk at the end about when those submissions are
8 going to be made, but they're going to be made pretty soon
9 so that you can get a reading from me as to what is allowed
10 and what is not allowed.

11 MR. YOUNG: Your Honor, I need to ask you a question.
12 I apologize you. You recall the phone hearing we had with
13 Mr. Hart? You recall the phone hearing we had with Mr.
14 Hart where he said he couldn't try the case because he had
15 another case?

16 THE COURT: Yes.

17 MR. YOUNG: Starting? Well, Mr. Collier and I are the
18 defense lawyers in that other case. So, is it still
19 accurate that we will finish in two weeks?

20 THE COURT: Well, we're going to try. You know, I
21 explained to Mr. Hart that he's just going to have to
22 understand that people can't be two places at one time. I
23 did not -- he wanted this trial to be just taken out after
24 we had already had agreement by everybody that that's when
25 this case was going to be tried. Stewart is a 2013 case,

1 and we're going to try it until we conclude it.

2 MR. YOUNG: Okay. Yes, Your Honor. That's all I
3 wanted to know because Mr. Collier and I are going to have
4 to get some backup for that other case now that we know
5 that it might go over the two weeks. That, that's all I
6 was asking. I wasn't ---

7 THE COURT: Well, I am going to do my dead level best
8 to see that we do not go over two weeks because I don't
9 think this case needs any more than that to be tried, and I
10 frankly think it can be tried in a lot less time than that.
11 It's just one defendant.

12 MR. YOUNG: That will be good for us, Judge, so we're
13 all for that. So, I mean, I was just asking because we
14 actually -- that other case is set. The judge is not going
15 to move it, so I'm just -- we need to get another lawyer in
16 our office. Like they got Mr. Jekel, we're going to get
17 another lawyer in our office.

18 THE COURT: Well, that's ---

19 MR. YOUNG: Right. Yeah. I'm not complaining.

20 THE COURT: Yeah. What's sauce for the goose is sauce
21 for the gander.

22 MR. YOUNG: Right.

23 THE COURT: But we're going to finish this case.

24 MR. YOUNG: Right. So, it -- okay. Thank you, Judge.
25 Sorry.

1 THE COURT: Mr. Jekel, anything from you on that?

2 MR. JEKEL: No. No, Your Honor.

3 THE COURT: Very good.

4 MR. JEKEL: I'm here for the duration.

5 MR. EARLY: Your Honor, our number 4.

6 MR. JEKEL: 4 was the attorney *voir dire*. 5 was
7 demonstrative.

8 MR. EARLY: Okay.

9 MR. YOUNG: Judge, I would -- could you put on the
10 record that you denied our request for attorney *voir dire*
11 just to make my clients happy?

12 THE COURT: I want you to explain to me what you think
13 in our rules permits that.

14 MR. YOUNG: Judge, I don't think anything in your
15 rules prevents that, but I just ---

16 THE COURT: Permits that.

17 MR. YOUNG: Right. I, I ---

18 THE COURT: The rule in South Carolina is that
19 attorney *voir dire* is not done. The judge *voir dire*s the
20 jury, and the only time attorney *voir dire* is required is
21 in a death penalty case. And even then attorney *voir dire*
22 is controlled and limited, and the judge begins the *voir*
23 *dire*, and then that is supplemented by attorney *voir dire*,
24 both defense and solicitor. But that apparently is not
25 true in Georgia, and it's not true in some other places.

1 And my ruling is that I will not permit attorney *voir dire*
2 in this case because that is what I understand to be the
3 prevailing rule of the road. But my court has considered
4 several different times whether to change our rules in that
5 regard, and so far that has not been done.

6 MR. YOUNG: Judge, I'm not arguing with you. I don't
7 want you be upset with me. It's just ---

8 THE COURT: I'm not upset with you.

9 MR. YOUNG: I have been asked to present to the court
10 and get a ruling on it.

11 THE COURT: It's very interesting that defense counsel
12 does that. Generally that's not something defense counsel
13 feels real strongly about, but be that as it may.

14 MR. YOUNG: Well, the last case I tried here didn't
15 have a happy ending for our client, and so somehow they --
16 people got the idea that maybe if there had been more *voir*
17 *dire*, it would have had a happier ending.

18 THE COURT: Y'all always got to blame something other
19 than ---

20 MR. YOUNG: Right.

21 THE COURT: --- the testimony of your own witnesses.

22 MR. YOUNG: Right.

23 THE COURT: So, I understand that.

24 MR. YOUNG: Or the fact that your lawyer's not any
25 good, but we did have a juror that turned out to the middle

1 of the trial, he realized that he worked at the same place
2 as the plaintiff and he had talked -- it's part of the
3 enumerations of error, but it was, was kind of a big to-do
4 and ---

5 THE COURT: Well, I just hope that doesn't happen
6 here.

7 MR. YOUNG: Right.

8 THE COURT: It's not going to change my ruling at this
9 time.

10 MR. YOUNG: I'm just trying to explain to you ---

11 THE COURT: I understand.

12 MR. YOUNG: --- why I'm stuck in this bad position.

13 THE COURT: I understand.

14 MR. YOUNG: Thank you, Your Honor.

15 THE COURT: I think Judge Hill did just as I did, just
16 as I propose to do here.

17 MR. YOUNG: He did exactly.

18 THE COURT: All right, number 5.

19 MR. EARLY: Your Honor, I think we ---

20 Well, go ahead, Fritz.

21 MR. JEKEL: Your Honor, there's no objection to this
22 other than demonstrative exhibits, which I do anticipate
23 some publication to the jury of demonstratives for
24 cross-examination on a learned treatise, for example. But,
25 but I think with demonstratives, what I suggested was as

1 long as we share it with, with opposing counsel in a
2 reasonable enough time so that they can raise an objection
3 prior to it being shown to the jury.

4 THE COURT: Sure, and that's the watch word.

5 MR. EARLY: Just, just for the record, Judge Hill did
6 an order back in January of 2015 after the Muldoon trial
7 setting that portion associated. We got a full paragraph
8 on that. We would just ask that that -- anything be shown
9 to us, including things in opening.

10 THE COURT: You're talking about the order of Judge
11 Hill of January 27, 2015?

12 MR. EARLY: I am, Your Honor.

13 THE COURT: And I intend to go by that and adopt that.
14 So, that rule with respect to all kinds of things is, you
15 know, excuse of testifying witnesses after they've
16 testified, no requirement to say may I approach the witness
17 and all that kind of thing. All those things I would -- is
18 going to be the way we operate.

19 MR. JEKEL: I have no objection to that.

20 THE COURT: Very good.

21 All right, number 6.

22 MR. EARLY: Judge, that is one we do have to argue.
23 That is our motion to allow -- and this I told you a second
24 ago I was going to argue. I don't know if you pronounce it
25 *Machin* or *Machin*, but it was decided in the same term as

1 *Smith vs. Tiffany* trial -- I mean, appeal, and this case is
2 analogous to that. Well, it's not really because that case
3 was in federal court, but Judge Joe Anderson certified
4 questions in our Supreme Court essentially saying -- hold
5 on. Let me go back to the facts real quick.

6 *Machin* was a exposure case to some chemical, somewhat
7 analogous to us, and there was a previous workers'
8 compensation case because Mr. Machin was a claimant in that
9 comp case when he was working for the town of whatever it
10 was. I can't remember which municipality, but that doesn't
11 really matter. But the court asked, Judge Anderson asked
12 your former colleagues whether ---

13 THE COURT: I was a part of that case.

14 MR. EARLY: Okay.

15 THE COURT: Yeah.

16 MR. EARLY: I don't realize that, Your Honor. When a
17 decision came out, I guess it was after you'd left the
18 Supreme Court.

19 THE COURT: Yes. I had stayed around for a lot of
20 them, including the church case and some other very tough
21 cases, so.

22 MR. EARLY: I understand.

23 THE COURT: The tale was there long time.

24 MR. EARLY: Yes, ma'am. Well, anyway, to cut to the
25 chase, Your Honor, I think what *Machin* makes very clear is

1 that, you know, you can't put the workers' comp -- what
2 would, what would essentially be the defendant, whatever
3 you call them in a comp case, you can't put the town on the
4 verdict form.

5 What they also made very clear is you can -- the empty
6 chair defense is alive and well not only for nonsettling
7 defendants or bankruptcy entities like we're going to talk
8 about with regards to the *Smith vs. Tiffany*, but also with
9 regards to the town in that case, and in this case it would
10 be Bowater.

11 When we allege that Bowater did certain things wrong,
12 we should be allowed to introduce evidence of the workers'
13 compensation action. And I think the court made it pretty
14 clear, had some great quotes in the *Machin* case, and that's
15 what we intend to do in this case, Your Honor.

16 Mr. -- you heard Mr. Collier say Mr. Stewart worked
17 for Bowater for many years. There will be testimony about
18 OSHA and certain things like that. They have a duty to
19 provide a very safe workplace, and not just for scaffolding
20 and things like that, but for amosite, all the, all the bad
21 asbestos, all the amosite stuff. And if we provide
22 evidence and we put up a case that suggests that, we
23 believe we should be able to introduce evidence with regard
24 to his workers' compensation file which we've subpoenaed
25 and listed as exhibits.

1 Not all of it, but there are certain things in there
2 like there are abatement records in there showing that --
3 you know, DHEC records going in and all the stuff you do
4 when you take asbestos out, and my colleagues know that a
5 little better than I do. But we believe that based on the
6 *Machin* or *Machin* case, we should be able to introduce
7 evidence from his bank -- from his workers' compensation
8 file in the trial of this case.

9 MR. JEKEL: Your Honor.

10 THE COURT: Mr. Jekel.

11 MR. JEKEL: Yes, Your Honor, I, I -- the *Machin* case,
12 the *Machin* case says what it says, and we have certainly
13 will follow that.

14 What we, what we would not want is I do believe that
15 an order from this court saying his worker compensation
16 file is admitted is unnecessary at this time. That it's
17 only a limited amount of documents. There are still
18 requirements within the *Machin* case about the relevance and
19 what the evidence must show before it comes in. So, what I
20 do not want is an, is an order saying the entire comp file
21 comes in. I think that it's a limited number of documents
22 that may be relevant. Certainly abatement documents, I
23 don't really think those are relevant necessarily to a
24 no-fault worker comp -- workers' compensation settlement.

25 I do think there's also prejudicial material within

1 the comp file that the court needs to examine. There are
2 settlements. It creates an unfair belief among the jury
3 that the plaintiff is somehow double dipping, that if any
4 of the file ---

5 THE COURT: Let me just to stop you right there and
6 say this, Mr. Jekel. I am not going to permit any
7 reference of any kind in any form or fashion to the comp
8 claim or the resolution of the comp claim. If there are
9 individual pieces of evidence, whether they come out of a
10 comp file or something else, that standing on their own
11 would be admissible, then I'm going to make a ruling about
12 the admissibility of those documents.

13 Those documents are going to have to be carefully
14 looked at to avoid having any stamp on them that says
15 workers' compensation or anything like that because as I
16 read *Machin vs. Carus, Inc.*, none of that is permitted to
17 be shown to the jury. It's just like mentioning insurance
18 in the opinion, in the *Machin* opinion. So, that cannot be
19 done.

20 So, that would be my ruling, and I certainly would
21 never rule that anything in any file is just coming in as a
22 blanket matter. We'd have to look at individually proposed
23 evidentiary materials and see if they're admissible.

24 MR. JEKEL: I have no objection with Your Honor on, on
25 that aspect.

1 MR. EARLY: And I don't know what's going to become
2 relevant during trial. I can't anticipate that obviously,
3 Your Honor.

4 But question number 3 that was certified did, did
5 allow Judge Anderson -- was answered by Justice Kittredge
6 that the jury could be instructed that there was a workers'
7 compensation claim and that the workers' compensation forum
8 determined, if you will -- in that case the town, in this
9 case Bowater -- so, so they would know that. I'm not sure
10 it's going to come to that in this case. But I think if
11 you look at certified question number 3, and I've got a
12 copy of it, Your Honor.

13 (A PAUSE.)

14 THE COURT: Well, I'm going to follow the ruling of
15 the Supreme Court, specifically as contained at page 9 of
16 the Westlaw version, which is after the Tennessee case and
17 all that is discussed. The court says:

18 If a defendant asserts defense that assigns fault
19 for the plaintiff's injury to the plaintiff's
20 employer, the defendant shall under well
21 established empty chair defense have the right to
22 present such evidence and require the factfinder
23 to consider whether employer's actions were the
24 cause of plaintiff's injuries. Of course the
25 employer cannot be found the proximate or legal

1 cause of the plaintiff's injury because the
2 employer is immune from tort liability. That is
3 not to say, however, that the employer cannot be
4 found by the factfinder to have been responsible
5 for plaintiff's injuries. A defense that the
6 product was not defective or unreasonably
7 dangerous when it left defendant's control would
8 not be credible unless defendant were permitted
9 to produce evidence as to what actually happened
10 to the product leading up to the incident that
11 injured the plaintiff. Under no circumstance may
12 reference to the amount of comp benefits be made
13 at trial. Upon the party's request or if
14 responsive to questions from the jury, the jury
15 shall be charged under the applicable law. We
16 suggest the following instruction.

17 And then the court gives an instruction. That is what
18 I will do, and that is all I will do. But that does not
19 deal with what we've been talking about here for a little
20 while, which is evidence being admitted as to the comp
21 claim and what happened in the comp claim. I'm not going
22 to allow that.

23 MR. EARLY: I'm not suggesting dollar amounts or
24 anything like that. I'm -- there, there ---

25 THE COURT: I'm not going to allow any reference to

1 the comp claim. If the circumstance that the court
2 outlined of the jury asking for it or it otherwise being
3 asked at some point during the testimony relative to the
4 employer's responsibility, and the example given was it
5 left in one condition and the employer did something that
6 caused it to become dangerous -- I mean, the big thing
7 y'all are going to say is the employer should have provided
8 respirator equipment, and the employer should have -- it
9 knew that there was asbestos in the air, and it should have
10 done something to mitigate this.

11 And you certainly are going to be permitted to do
12 that, but that can be done without any discussion of comp.
13 And if comp is discussed, then we're instructed by the
14 court to let the jury know in very specific terms that it's
15 a no-fault situation and what comp is, and that is all I
16 will do. But y'all are not going to be permitted to put in
17 front of the jury here's the comp claim, and they're double
18 dipping if they get from you and that kind of thing. I'm
19 not going to allow that, and that's what would happen if
20 you lead with putting in the comp claim.

21 MR. EARLY: Thank you, Your Honor, but just so I'm
22 clear, the -- just because something is contained within
23 the workers' compensation subpoena I've got, such as
24 documents that would go to Bowater's knowledge of safety
25 and asbestos, I'm not not permitted to use that just

1 because it's in the workers' compensation case?

2 THE COURT: No. It's just you can't refer to where
3 you got it and to its presence in the file.

4 MR. JEKEL: Your Honor, just on that matter, is there
5 a date upon which that evidence stops because I, I, I think
6 that to the extent there are no asbestos felts, they're
7 talking about May of '76, which I disagree with. But when
8 does that evidence cease to be relevant in the causation of
9 the mesothelioma? Certainly something that happened after
10 the year 2000 would not have a sufficient latency period to
11 involve ---

12 THE COURT: I don't know what you're talking about,
13 Mr. Jekel. What are you talking about? Evidence of the
14 claim or evidence of ---

15 MR. JEKEL: Evidence from the Bowater plant.

16 THE COURT: Of what they were doing to ---

17 MR. JEKEL: Well, they did a removal of asbestos in
18 2004, Your Honor, of pipe insulation. The fact that they
19 did a removal in 2004 is not, not hardly relevant to
20 causation of Mr. -- their evidence -- their experts will
21 not testify necessarily that in 2004, asbestos removal ---

22 THE COURT: I guess I agree with that, but that
23 doesn't sound like what he's asking about at all.

24 MR. EARLY: It's not, and here's the problem with
25 those documents. In 2004, that asbestos they were taking

1 out was put in in the '70s. He was exposed to it way back
2 when. So, I think he's talking apples and oranges.

3 MR. JEKEL: Potentially. I just, I want to make sure
4 that evidence in a workers' compensation file from the
5 2000s, you know, I at least have the opportunity ---

6 THE COURT: It may be ---

7 MR. JEKEL: --- to exclude.

8 THE COURT: It may be some evidence of a comp file in
9 the 2000s that very well relates to his exposure in the
10 '70s. I'm sure it does because otherwise he wouldn't be
11 claiming what he's claiming in the comp claim. So, I don't
12 really think I understand what the problem is.

13 MR. JEKEL: Well, we'll see the evidence first, Your
14 Honor.

15 THE COURT: That's what I think you need to do.

16 Now, let's hold on for a minute.

17 Elizabeth, do you need a little break?

18 All right, we're going to take a little break for our
19 court reporter. Now, let me say this. We're at 12:30 now.
20 We could take a little break for lunch if we want to, or we
21 could give Elizabeth a little bit of a break and go
22 forward.

23 Elizabeth, how to do you feel?

24 COURT REPORTER: I just need a quick break.

25 THE COURT: Well, why don't we take about a ten-minute

1 break? We've got a bunch more stuff to go and do.

2 MR. JEKEL: That's fine with us, Your Honor.

3 THE COURT: But I'd love to get through a few more of
4 these things before we take our break for lunch. Why don't
5 we take a ten-minute break?

6 (OFF THE RECORD.)

7 THE COURT: All right, I believe we're at 7 now, which
8 is ---

9 MR. JEKEL: 6, Your Honor.

10 THE COURT: 6?

11 MR. JEKEL: Or, no 7. You were, you were correct. I
12 apologize.

13 THE COURT: 6 was the comp matter. So, we're now at
14 7, which is defendant's motion *in limine* to admit
15 bankruptcy claim forms and as an admission of party
16 opponents.

17 Mr. Long.

18 MR. YOUNG: Your Honor, it, it's Young.

19 THE COURT: Or Mr. Young. I'm sorry.

20 MR. YOUNG: Well, I just didn't want you to leave here
21 without me telling you.

22 THE COURT: No. Y'all keep me straight.

23 MR. YOUNG: Most people call me Mr. Lane because my
24 name is Lane Young, and everybody thinks I have two last
25 names. But -- and actually one of our local lawyers in

1 West Virginia, his name is Scott Long and he's probably the
2 greatest guy I've ever met in my life, so I'll be happy to
3 be Mr. Long if I could be him.

4 But, Judge, this motion is, it's a little bit -- the
5 title is a little bit misleading because I don't want you
6 to go down the path of thinking that, that it's like a
7 workers' comp claim. The only part of these bankruptcy
8 claims that we want to put into evidence is simply not that
9 they made a claim for money, but just that there was a
10 filing in which the plaintiff, or now plaintiff's
11 representatives, which according to Will and it's in our
12 brief -- it's crystal clear; it's an admission either way
13 -- that they allege asbestos exposure to these defendant's
14 products. Nothing about them being bankrupt. Nothing
15 about asking for money. Just the fact that they claimed
16 exposure to those defendant's products.

17 And, Judge, given -- I don't want to get back to my
18 asbestos victim thing, but I think that makes it real. But
19 certainly Your Honor hadn't ruled on the each and every
20 exposure contributes motion, but it's clear that the
21 plaintiffs are going to take the position that each and
22 every exposure to asbestos that Mr. Stewart had caused and
23 contributed to his mesothelioma. So, Judge, this is a
24 classic, classic admission against interest insofar as
25 Scapa is concerned.

1 I know they can't go on the verdict form, but in, in
2 almost every case I've ever tried, the fact that they make
3 that claim for exposure in a formal manner is much more --
4 much different than just a complaint. I mean, this is a
5 formal, verified claim of exposure is -- to me, it's just a
6 classic admission against interest that we should be able
7 to talk to the jury about.

8 MR. JEKEL: Your Honor, very briefly.

9 THE COURT: Mr. Jekel.

10 MR. JEKEL: I, I do not -- (a) bankruptcy claim
11 submissions are done on a deadline established by the
12 court. Failure to file something in response to this may
13 result in a waiver of that claim and potentially
14 malpractice by a claimant's attorney.

15 Two, the exposures and the manner in which the
16 bankruptcy courts evaluate them are completely different
17 than what the jury will be asked to evaluate in this case.
18 In some bankruptcies, money is paid based on being at a job
19 site alone. That's how different they evaluate asbestos
20 exposures.

21 Also, if Mr. -- I'm not going to disagree with Mr.
22 Young that if the plaintiff, the decedent, signed an
23 affidavit suggesting he was exposed to certain products,
24 that, that -- the same goes for was Mr. Stewart correct on
25 his assumption that that product was asbestos containing.

1 The problems that we have is the manufacturers didn't
2 advertise their asbestos content, and some manufacturers
3 had non-asbestos-containing products.

4 To the extent there are claims that have not been
5 decided as well, Your Honor, if I, if I made a 3M
6 submission, for example -- and they aren't in bankruptcy --
7 if I made a submission, I'd submit it in affidavit, but the
8 trust does not come back to question the affidavit of
9 exposure that I submit. I believe that's not appropriate
10 for the jury to consider because while I believe I was
11 exposed to asbestos, when the boss comes and says, well,
12 that wasn't an asbestos-containing product that you worked
13 with -- and the trust does that on occasion. They, they
14 deny claims. They dispute claims, but they give you an
15 opportunity to correct them.

16 THE COURT: Well, Mr. Felker and Mr. ---

17 MR. JEKEL: Jekel.

18 THE COURT: Mr. Jekel and Mr. Young, I view this thing
19 as much more simple than what you all are arguing about.

20 MR. JEKEL: Okay.

21 THE COURT: This is a *Smith vs. Tiffany* issue. Our
22 court has said that you're not going to have settling
23 defendants, other pots of money, and claims mentioned in
24 this kind of case anymore. The time when we will consider
25 the bankruptcy trust is if a verdict is rendered in the

1 plaintiff's favor. You will then have a setoff issue, and
2 we will deal with it at that time.

3 But in all kinds of direct and indirect ways, the
4 attempt has been made to place in front of the jury the
5 concept that the plaintiff had claims against others than
6 the defendant whose liability is being pursued in this
7 trial. I do not permit that because I do not believe that
8 *Smith vs. Tiffany* allows me to do that. I don't allow the
9 pleadings to go back to the jury if the pleadings contain
10 the names of defendants other than Scapa. So, in no direct
11 or indirect way am I going to allow other claims and other
12 potential claimants other than what the teaching of *Machin*
13 *vs. Carus, Inc.*, says in certain situations regarding comp.
14 So, I would deny this request.

15 MR. YOUNG: Judge, I just want to be clear. We're not
16 seeking to introduce the claim. We're just seeking to
17 introduce the section of it.

18 THE COURT: You want to introduce the section that
19 says that Leslie Controls, plaintiff claimed against Leslie
20 Controls and they ---

21 MR. YOUNG: Exposure.

22 THE COURT: --- are part of it. *Smith vs. Tiffany*
23 says no to that.

24 MR. YOUNG: I understand, Your Honor. I just wanted
25 ---

1 MR. EARLY: Your Honor, can I briefly be heard on that
2 briefly?

3 THE COURT: Yes, sir.

4 MR. EARLY: All right, just because -- *Smith vs.*
5 *Tiffany*, Your Honor, just so you know, we, my firm again,
6 settled the case against the codefendant. We didn't even
7 file suit against the codefendant. We had a settling, what
8 was never a party. Then we filed suit against a separate
9 party, and so there was never a, there was never a
10 complaint to show, for us to point the finger -- for the
11 defendant to point the finger at the non-settling defendant
12 because there was never a complaint about that.

13 I think the court's ruling is expected use and the
14 plaintiff chooses rule, which goes back a long way. But
15 *Smith vs. Tiffany*, there was never multiple defendants in
16 that complaint. There was only one defendant in the
17 complaint and one that we had settled with prior to ---

18 THE COURT: The court, the court spoke very broadly in
19 that case about whether or not it was proper to name other
20 claims against other parties who were no any longer or
21 maybe never were parties to this particular piece of
22 litigation.

23 The empty chair defense is a different thing because
24 it is an attempt to introduce direct evidence of the
25 liability of someone else for the injuries that the

1 plaintiff suffered. This is not an attempt to do that.
2 This is a direct attempt to put before the jury the fact
3 that a bankruptcy claim was made on the altar of saying
4 that it's an admission of a party opponent, and I don't
5 regard that as proper under the dictates of *Smith vs.*
6 *Tiffany*.

7 MR. YOUNG: Judge, there's, there's only a couple of
8 them, and I certainly understand your ruling. I just
9 wonder if perhaps we could show you -- I, I don't have it
10 with me -- what we're wanting to use to cross-examine the
11 plaintiff because it doesn't have anything to do with the
12 claim. It just has to do with, you know, Mr. Stewart was
13 exposed to this product. So, I just wanted to ---

14 THE COURT: Well, the trust claim form has been
15 submitted as an exhibit to what we're arguing right now.
16 It is stated that that is what is wanted to be put in front
17 of the jury, and I do not feel I have any discretion in
18 allowing that to go in because I think that is forbidden by
19 the rulings the court made in *Smith vs. Tiffany*.

20 MR. YOUNG: Thank you, Your Honor.

21 THE COURT: Yes, sir.

22 MR. EARLY: Before -- I was just -- if I could -- are
23 we -- are you ruling on the added defendant's motion at
24 this time as well or just on the bankruptcy?

25 THE COURT: I'm not -- when it comes to that, I think

1 you know what my ruling is going to be.

2 MR. EARLY: Okay.

3 THE COURT: It's the very same ruling I made in the
4 Jolly case. I do not regard it as appropriate to get into
5 other litigation in which the plaintiff engaged with other
6 parties. If you have direct evidence of the activities of
7 another defendant or another entity that caused exposure,
8 then that's what's called the empty chair defense and that
9 you can go into, but this is not an attempt to do that.
10 This is an attempt to put in the claim forms from the
11 bankruptcy claim, and I'm not going to allow that.

12 MR. EARLY: Yes, ma'am. Your Honor, can I hand up an
13 order from Judge Young who recently in Hampton County tried
14 a case?

15 THE COURT: You can.

16 MR. EARLY: Okay, and I'll -- just briefly on this
17 issue because you mentioned not showing the complaint. And
18 there was a defense verdict in Hampton County recently. I
19 know that shocks everybody. My buddy Alec Murdaugh tried a
20 trucking case against Mitch Griffith down there where one
21 -- there were two wrongdoers he alleged in the initial
22 complaint, and he settled with one. Went to trial against
23 the other. Well, Mitch Griffith, the defense lawyer,
24 cross-examined the plaintiff on the plaintiff's initial
25 complaint alleging fault against the settling tortfeasor,

1 and Judge Young allowed it. That motion is a JNOV after
2 the trial of Mr. Murdaugh saying it was improper, and Judge
3 Young respectfully disagreed with Your Honor. I just
4 wanted to put that there are other trial courts after *Smith*
5 *vs. Tiffany* decided in a different manner respectfully,
6 Your Honor.

7 THE COURT: I find it interesting that Judge Young's
8 order does not contain any reference at all to *Smith vs.*
9 *Tiffany*. And I'm just saying that I realize that other
10 rulings are made and, in fact, other motions are constantly
11 made to me in all of these cases that don't cite either
12 *Smith vs. Tiffany* or *Machin vs. Carus* because they're
13 recycled things that have been around a long time.

14 But to me, the landscape changed dramatically with
15 those two cases, and until as a trial judge I receive
16 further guidance from the court, I am bound to abide by
17 what the court said, and so that's where I am. I
18 understand that attempts are made to change the law in that
19 regard, and all kinds of things are being done, but I have
20 to go on what the court directly says.

21 MR. EARLY: Thank you, Your Honor.

22 THE COURT: I just -- I think Judge Young was not made
23 aware of *Smith vs. Tiffany* is ---

24 MR. EARLY: Well, I tell you ---

25 THE COURT: --- what it sounds like to me.

1 MR. EARLY: Mitch told me that was raised. I tell you
2 that as an officer of the court. That was raised. I don't
3 know that that's in that. That's a small portion of the
4 order. I just pulled that.

5 THE COURT: That's the whole order, and it doesn't
6 contain one reference to it, but be that as it may.

7 All right, number 8.

8 MR. JEKEL: Is this the motion to compel? Your Honor,
9 we've turned over a -- an authorization signed by the P.R.
10 allowing the defendant access to bankruptcy claim files.
11 If they need additional documents, understanding your
12 court's prior ruling, we're going to work with the
13 defendant to at least give them the materials they
14 requested.

15 MR. YOUNG: And, Your Honor, we just ask that we be
16 allowed to amend our exhibit list when we get those. I
17 know that you said they're not admissible, but we still
18 would like to have them in the record if that's okay with
19 Your Honor. May not get any before the trial, but if we
20 do, we'll notify everybody.

21 THE COURT: All right. That's fine. I'm not going to
22 hold up the trial to try to get these materials, but again
23 -- and, you know, this bankruptcy trust thing has also been
24 the subject of other rulings way yea before *Smith vs.*
25 *Tiffany* there. There are many other courts that have tried

1 these mesothelioma and asbestos cases who do not allow the
2 bankruptcy trust materials to go in in the trial of the
3 case.

4 MR. YOUNG: I agree.

5 THE COURT: They are in setoff issues only.

6 MR. YOUNG: I agree.

7 THE COURT: And so I cannot imagine that their
8 agreement to let you see what's in the bankruptcy trust
9 file is going to change at all what I've ruled about this.

10 MR. YOUNG: Yes, Your Honor. I think one of the
11 problems we had -- you put your finger on it -- is some of
12 these are recycled, and bankruptcy trust claim is probably
13 the wrong title for this motion. I think it should -- the
14 only thing that we believe would be admissible is some
15 sworn allegation of exposure to someone's products, so ---

16 THE COURT: And I'm going to look at with a very
17 jaundiced eye as to whether I'm going to allow proof based
18 on that because the other argument that was made by Mr.
19 Jekel in that regard is that those filings are made in
20 order to preserve their position to make a claim against
21 the bankruptcy trust. I don't know what they filed and
22 what they've said, but I am not going to allow any kind of
23 end run or anything else about any empty chair, allow
24 bankruptcy claim materials to be put before the jury in
25 this trial.

1 MR. YOUNG: Judge, I can tell you one thing with
2 absolute certainty. Mr. Collier and I are not going to do
3 anything that runs afoul of any of your rulings. If we
4 find something in any of this that we think Your Honor
5 might consider admissible, it, it will be discussed with
6 you and Mr. Jekel before one word comes out of our mouth.

7 THE COURT: That's great. That's fine.

8 MR. YOUNG: We're not looking for a mistrial.

9 THE COURT: Okay.

10 MR. YOUNG: Okay?

11 THE COURT: Very good.

12 MR. YOUNG: We've got other stuff to do, too, so.

13 THE COURT: All right, number 9 is motion to strike
14 plaintiff's cause of action predicated on postsale
15 knowledge motion of risk; or in the alternative, motion in
16 *limine* supporting exclusion of evidence or reference to
17 postsale knowledge.

18 MR. COLLIER: Yes, Your Honor, Chris Collier on behalf
19 of Scapa, and we're moving to dismiss the allegations
20 contained in, I believe paragraph 30(e) of plaintiff's
21 second amended complaint concerning the postsale failure to
22 warn. Scapa's last asbestos-containing dryer felt was
23 shipped to Bowater for use on the number one paper machine
24 on May 26, 1976. And so Scapa's position is that any
25 reference to documents, materials, knowledge after that

1 point in time, including this 1977 memo, is, is not, not
2 relevant or permissible.

3 South Carolina doesn't recognize a postsale duty to
4 warn, and paragraph 30(e) should be dismissed on the *Bragg*
5 *vs. High Ranger* case from 1996. The *Bragg* case was
6 reaffirmed in a 2006 federal court case, *Campbell vs. Gala*
7 *Industries*, and, and plaintiffs haven't cited in their
8 opposition to any South Carolina case that holds otherwise.
9 So, so, Scapa's position is that this court could follow
10 the holdings in *Bragg*, *Branham*, and *Campbell* and dismiss
11 the postsale duty to warn claims.

12 Even if the, even if the court were not to dismiss the
13 postsale duty to warn claims, the plaintiffs should be
14 precluded from introducing any evidence or documents
15 relating to the postsale knowledge of risk because it
16 postdates when we last sent an asbestos-containing product
17 to Bowater, which was in May of 1976. And so that should
18 be inadmissible under *Bragg* and also 402 and 403.

19 MR. JEKEL: Yes, Your Honor.

20 THE COURT: Mr. Jekel.

21 MR. JEKEL: Excuse me, Your Honor. I would suggest
22 that South Carolina follows that a, a manufacturer of a
23 product that contains a defect alleged at the time that the
24 product leaves the manufacturer's location -- in this case,
25 the felts contained asbestos; that makes them defective --

1 that the defendant has to use reasonable efforts to
2 discharge their duty to warn, and that that duty remains
3 until the defendant, through the use of reasonable conduct,
4 has discharged that duty. I would suggest it's not a
5 postsale or presale. It's a duty to warn and a continuing
6 duty to warn. Scapa's never warned in this case. So,
7 regardless of what we call it, I do believe the law is that
8 Scapa, because the defect existed at the time of
9 manufacture, they have a continuing duty to use reasonable
10 conduct in warning users.

11 On the date, again they want to use May of 1976 as the
12 date because that's what the limited Master Cards show as
13 the last sale. I would suggest that the '76 date is not at
14 all reasonable because we know that the documents have been
15 destroyed. I cited the testimony, Your Honor, of Mr. Merk
16 and Mr. Fernhead in terms of can they absolutely state that
17 we got all the Master Cards for the sale of asbestos felts
18 to Bowater. They cannot. So, I would suggest that there
19 is a lack of evidence that allows the May of 1976 cutoff
20 date that the defendant has suggested, and that Scapa had a
21 continuing duty to warn based on the alleged defect, and
22 that they have not discharged that duty. And that would be
23 under the restatement, Your Honor, which we have adopted,
24 the restatement of second torts which has been adopted in
25 South Carolina.

1 MR. COLLIER: Your Honor, just briefly? I don't think
2 there's any South Carolina case law that establishes a
3 postsale duty to warn, as I mentioned earlier.

4 But with respect to this, this reference to documents.
5 being destroyed, if you read the testimony of Mr. Merk and
6 Mr. Fernhead, it doesn't relate to sales records, first of
7 all. Second of all, if you, if you could somehow read that
8 to refer to the destruction of sales records, it's talking
9 about things that were destroyed in 1974, and what we're
10 talking about here is a dryer felt that was last shipped in
11 1976, and we have a record that it was shipped in May of
12 1976. So, there wasn't anything related to sales that was
13 destroyed in '74 but if it was, it couldn't have
14 incorporated anything that postdated 1974 because we have
15 records that show sales in '76.

16 MR. JEKEL: Your Honor, I asked Mr. Fernhead under
17 oath directly if he could state with any certainty whether
18 we got a 100 percent of the Master Cards. It was a
19 different facility in that case, and he said no and he said
20 no based on the '74 document retention, and that involved
21 post '74 sales. The fact of the matter is they don't know
22 what happened to a lot of these records, and I would
23 suggest that you can't, based on questionable evidence, set
24 in stone a date like May 1976.

25 THE COURT: All right, one of the cases I think

1 impacts this area is *Lawing vs. Univar*, a 2015 decision of
2 our court, 781 S.E. 548. It deals with issues regarding
3 user, it deals with issues regarding a sophisticated user
4 and a sophisticated intermediary, and it also deals
5 extensively with duty to warn. It does not talk about
6 these issues in the terms that are now being used,
7 postsale. But certainly a reading of the opinion itself
8 and the literature upon which and cases upon which it
9 relies regarding duty to warn, sophisticated intermediary,
10 let's you know that the court is examining what happened
11 after sale and the duties with regard to foreseeability
12 after sale in terms of end user. And when I will look at
13 *Lawing vs. Univar*, I am convinced that there is no hard and
14 fast rule in South Carolina that, quote unquote, postsale
15 is somehow or another the touchstone of analysis as to what
16 can be admitted and what cannot.

17 So, I would not strike the averments of the complaint
18 with respect to conduct postsale because I think our
19 regular old products liability law anticipates that
20 foreseeability will be analyzed in terms of what was done
21 in the manufacture, what was known in the manufacture about
22 potential uses and end users, and what duty the company had
23 to warn in that context, and warn in a way that the warning
24 would be available post the sale.

25 In this sale, the sale was a very complex thing

1 because this material, this was a chemical. This was
2 bromite, and it was manufactured in China and then shipped
3 in containers through Charleston, and then ultimately to
4 Univar's plant in upstate South Carolina, and then stored
5 in a way that tragically allowed it to be ignited while
6 welding was taken -- during a down period in the operation
7 of the plant, unfortunately near this stored bromite.

8 The author is one of my favorite authors. You can
9 imagine who it is, and that's why I can remember this case.
10 And since the opinion in *Lawing* came out in 2015, there's
11 been a good deal of other activity in the South Carolina
12 Supreme Court and in the Court of Appeals on what this all
13 means. And I'm not saying that the *Lawing vs. Univar* that
14 I wrote is the end of the road in terms of pronouncements
15 by appellate courts of South Carolina about this issue of
16 what happens, what your obligation is after the, quote
17 unquote, sale takes place and the material leaves your
18 plant. Normally the sale takes place by the order being
19 made, and it then leaves your plant, and the rest of it is
20 postsale, I suppose in some sense. But that's not the end
21 of the inquiry in the product liability, and particularly
22 in strict liability cases, as I see it.

23 This case, in part, has a claim of strict liability.
24 It has other claims as well, but I'm not prepared to strike
25 this averment based on what has currently been argued. So,

1 I would deny. After y'all look at *Lawing* and some of the
2 other cases, you may think that I'm all wet. If so, I'll
3 revisit it, but my current inclination is to deny.

4 Okay, we get now to 10.

5 MR. JEKEL: Your Honor, with regard to number 10, the
6 witnesses they've identified in there, we don't anticipate
7 calling. So, I believe that that, 10, can be granted.

8 THE COURT: Very good.

9 MR. JEKEL: Without objection.

10 MR. COLLIER: Just, just to confirm.

11 THE COURT: We're going to reargue 9?

12 MR. JEKEL: We just argued 9, Your Honor.

13 THE COURT: Yeah. I think it's already argued. If
14 we're confirming something about 9, I think I've said what
15 I need to say. If we're talking about 10, that's
16 different.

17 MR. COLLIER: I'm talking about 10.

18 THE COURT: Okay. Very good.

19 MR. COLLIER: I just want to confirm something with
20 Mr. Jekel about 10.

21 THE COURT: Okay.

22 MR. COLLIER: With respect to the physicians that are
23 identified in there, you don't intend to call ---

24 MR. JEKEL: I, I don't know. I went over the list
25 with my, my other counsel.

1 MR. COLLIER: With respect to the lay witness, though,
2 I know you had the wrong name and consequently we had the
3 wrong name, but is this the lay witness who's passed away?

4 MR. JEKEL: No. It's Mr. Williams. He was deposed in
5 this case. I thought it was Jerry Williams.

6 MR. HYLAND: It's actually Kneeley. It was listed as
7 Williams.

8 MR. COLLIER: All right.

9 MR. JEKEL: It's Jerry Kneeley.

10 MR. COLLIER: Okay. So, Jerry Kneeley is a lay
11 witness that you do intend to call.

12 THE COURT: And has been deposed?

13 MR. JEKEL: And has been deposed.

14 MR. COLLIER: He has been deposed?

15 MR. JEKEL: Yes.

16 MR. COLLIER: It was just ---

17 MR. JEKEL: Yes.

18 MR. COLLIER: --- he was disclosed with the incorrect
19 name.

20 THE COURT: Okay. So, this is resolved?

21 MR. JEKEL: Yes, Your Honor.

22 MR. COLLIER: So, that cuts down the list from thirty.

23 MR. JEKEL: We're working on it.

24 THE COURT: Is that motion the motion that also has --
25 that raises the issue of these thirty witnesses, Mr.

1 Collier?

2 MR. COLLIER: No, Your Honor. That one was the
3 equitable times one that we kind of started talking about.

4 THE COURT: Okay. Well, I think they know what I'm
5 saying. I'm not thinking about allowing any thirty
6 witnesses.

7 MR. JEKEL: No. Your Honor, I won't allow that
8 either. We'll, we'll get it typed up as best we can.
9 We're working on that later today.

10 THE COURT: Well, we'll talk about deadlines on that
11 here momentarily.

12 MR. JEKEL: Yes, ma'am.

13 THE COURT: All right, number 11.

14 MR. JEKEL: Yes.

15 THE COURT: Plaintiff's expert testimony on specific
16 causation.

17 MR. JEKEL: Yes. This is the -- what I refer to as
18 the each and every exposure motion.

19 MR. YOUNG: Your Honor, if I had a dollar for all the
20 minutes that have spent -- been spent arguing this, I'd be
21 long since retired.

22 THE COURT: Oh, I understand.

23 MR. YOUNG: The last dryer felt case we tried, that
24 was actually a premises case and Mr. Jekel wasn't involved,
25 but it actually went to the Georgia Supreme Court on this

1 each and every exposure, and they reversed and threw out
2 the verdict because like South Carolina, in Georgia you
3 have to prove general causation and specific causation.

4 And we believe, Your Honor -- when I finished law
5 school, I clerked at the Georgia Supreme Court and I was
6 just thinking over there if I had to go try cases in front
7 of Justice Gunner, I would probably have been so
8 intimidated that I wouldn't open my mouth. But, I mean,
9 not to sound like I'm patronizing you, but you obviously
10 have a much higher level of, like, knowledge of the
11 appellate court law than a lot of judges would have since
12 you wrote a lot of it.

13 THE COURT: Yeah. Twenty-seven years of doing it ---

14 MR. YOUNG: Right.

15 THE COURT: --- will do that for you.

16 MR. YOUNG: Yeah. So, I feel kind of silly talking to
17 you about South Carolina law, but this, Judge, is -- the
18 motion is actually pretty simple, and, and, and Will may
19 have to help me with this, or perhaps you can help me with
20 this. But on general causation, without conceding that
21 asbestos-containing dryer felts who were -- that were
22 soaked with water and used and soaked with the resin and
23 used in humid, hot, ventilated areas and rarely touched by
24 anyone, whether they could generally cause asbestos
25 disease, specific causation is really the, the thrust of

1 this motion.

2 And I, I don't want to, you know, waste your time,
3 Judge, but none -- each and every one of the plaintiff's
4 expert witnesses -- the medical witnesses are going to say
5 that they do not have and cannot say that Mr. Stewart had a
6 level of exposure to asbestos from a Scapa dryer felt that
7 was sufficient to cause or contribute to his mesothelioma,
8 and I don't believe that that will be disputed. And they
9 -- none of them have done any what's called dose
10 reconstruction or dose analysis.

11 So, what they say, Judge -- and we'll argue in a
12 minute about whether there is any evidence of any level of
13 exposure to asbestos from a Scapa dryer felt that would be
14 properly admissible. What they say is we're assuming there
15 was some exposure to Scapa above background and all
16 exposures contribute. Well, we have no idea what the exact
17 Scapa exposure was, if there was one. And I am not going
18 to go through the -- all the millions of courts that have
19 rejected the each and every exposure are, are listed in our
20 brief, Your Honor.

21 And I believe, and perhaps Will can help me with this,
22 that though there's no South Carolina law that says -- case
23 law says that you have to prove X amount of exposure from a
24 Scapa asbestos-containing dryer felt to Mr. Stewart at a
25 level that a doctor says is sufficient to cause

1 mesothelioma, but South Carolina law is, is very clear that
2 whatever they say has to be scientifically reliable. And,
3 and, Judge, if it is suggested to you that there is any
4 sort of scientific paper or study or case in South Carolina
5 that says that this each and every exposure is
6 scientifically reliable, I do take issue with that. I do
7 not believe that the -- that's the law in South Carolina or
8 the science in the case.

9 I think that to the contrary, though perhaps not in an
10 asbestos case, South Carolina has made it abundantly clear
11 that what the doctors say has to be scientifically
12 reliable, and there has to be proof of specific causation.
13 And, Judge, the cases that have rejected each and every
14 exposure have said that that is not specific causation.

15 And so not to beat a dead horse and get you mad at me,
16 but I still feel like that if, if there is each and every
17 exposure, it is patently unfair to us to not be able to put
18 on evidence of all the, the, the -- I'll show it to you
19 later, the claims in the bankruptcy form of exposure to
20 this product or that product. Not the claims but just that
21 evidence.

22 So, Chris, Will?

23 Thank you, Your Honor.

24 THE COURT: Mr. Jekel.

25 MR. JEKEL: Yes, Your Honor. Part of the problem is

1 is because we can't do epidemiological studies on asbestos
2 exposure because it would be inhumane on humans, but there
3 have been -- it's funny. Years ago we had animal studies.
4 They'd argue about the animal studies don't create, you
5 know, the inference that asbestos exposure at lose doses
6 causes mesothelioma, and that's what this is all about.
7 It's is the science that low dose asbestos exposure,
8 chrysotile asbestos, can cause mesothelioma? The
9 literature is replete with that. The, the, the appellate
10 courts around the country have allowed this testimony, and
11 it's not -- I want to be clear on something. The experts
12 will say that each and every exposure above background, an
13 occupational exposure, Your Honor, contributes. They don't
14 say each and every is a substantial contributing cause.

15 As I understand it, I have the burden to prove
16 substantial causation or a substantial fact or causation as
17 it relates to the disease, and it's not -- I, I will not
18 get that testimony with each and every exposure above
19 background. I still need to prove it is a substantial
20 occupational exposure. But they will testify is you can't
21 determine, and there are lots of reasons why you can't
22 ferret out these other exposures, Your Honor. It is
23 without -- there is not a doctor that's going to come in
24 here and say asbestos disease is not a cumulative exposure
25 disease. It's like cigarette smoking and lung cancer.

1 There was actually a point in time when the defendants
2 used to try and say the cigarettes had more causative
3 effect in the lung cancer than the asbestos, but there's no
4 way to ferret it out, and, and you take what you take.
5 They knew it was a cumulative asbestos -- a cumulative
6 exposure disease when they were making the products, and
7 you can't ferret out these exposures. But I, I will not
8 win this trial if all my expert says is he an exposure to a
9 dryer felt. I still need to prove it was an occupational
10 exposure, it was substantial, and the exposures from
11 specific Scapa asbestos-containing dryer felts were indeed
12 a substantial factor in the causation of the mesothelioma.

13 All of this is subject to great cross-examination from
14 a fine trial lawyer, which, which will undoubtedly happen.
15 But each and every exposure above ambient causing disease
16 is not the same thing on specific causation. I will need
17 to establish a substantial exposure from those. It's got
18 to be a substantial fact of causation, and that we will
19 establish, but the evidence, the medical evidence and the
20 literature is that you can't ferret out exposures. If you
21 could, great, but that's not the way it is, and there's a
22 reason for that: because the chrysotile asbestos in fibers
23 do different things in the lungs than other asbestos
24 fibers.

25 And I don't want to get into how long chrysotile

1 asbestos stays in your lungs or things like that. That
2 will happen during the trial, but I believe the motion
3 should be denied and that, that it is perfectly -- the
4 literature suggests each and every exposure above
5 background is capable of causing disease, but that's not
6 specific causation, Your Honor. That's not what I'm going
7 to give to the jury, Your Honor.

8 THE COURT: Okay, first thing I want to say is that
9 the assertion by Mr. Young that the rulings that have been
10 made about specific mention of other claims and bankruptcy
11 claims and this kind of thing somehow precludes him from
12 talking about other possible tortfeasors and other possible
13 causes, I'm sorry, but that is not what this ruling means
14 at all.

15 MR. YOUNG: I ---

16 THE COURT: Wait a minute. Wait a minute. The empty
17 chair defense is available. Nothing that I have done by
18 way of ruling precludes the showing that other exposures
19 were suffered by the defendant that caused or that some
20 other wrong conduct caused the injury that defendant
21 suffered. But I am quite certain that part of the proof is
22 going to be the testimony of medical doctors about where in
23 the pleura or elsewhere these fibers are located with
24 respect to this particular plaintiff and what those -- how
25 long they had been there, or what the prediction is about

1 how long it took them to result in the contradiction of
2 mesothelioma. All that is pretty typical in these cases.
3 So, it's not in isolation every little exposure
4 automatically means a full-blow case of mesothelioma. Mr.
5 Jekel is right about that in terms of the other things that
6 will have to be proved, but I am not going to take the
7 position that experts who testify about every exposure and
8 cumulative effect are going to be stricken from being able
9 to testify.

10 This is the battle of experts. On the plaintiff's
11 side, the experts say that low doses can result in the
12 inhaling into the lungs and the respiratory tract of
13 asbestos fibers and that those fibers can travel so that
14 they ultimately reside in places like the pleura that
15 result in the contraction of mesothelioma. The defendant's
16 docs are going to say something completely different, and
17 the jury will have to make the decision as to whether in
18 this particular case the testimony of one is more
19 believable than the testimony of the other. But I'm not
20 going to make the decision in favor of one side or another
21 in the battle of the experts by excluding one whole set of
22 expert testimony.

23 I frankly don't think that's what has happened in
24 Georgia and some of the other places where rulings have
25 been made about each and every exposure. I think they are

1 very pointed toward the specific facts of a specific case,
2 including the entire composition. And they are also an
3 analysis of what specific expert witnesses in a particular
4 case had to say.

5 I don't know what these experts are going to say. I'm
6 sure after they finish, motions may be made to not allow
7 the case to go forward because, considering all their
8 testimony, it's not enough to prove causation as it must be
9 in order for the plaintiff to recover. But on this front
10 side motion *in limine* basis, I am denying the motion.

11 Now, we are at 1:20. We still have 12 through 20 to
12 go on these motions *in limine*, plus the few other things
13 that have to be taken up as well. I am going to adjourn
14 for an hour for lunch, and then we'll come back and see. I
15 intend to get through this today.

16 MR. JEKEL: Yes, Your Honor. On the plaintiff's side,
17 some of our motions *in limine* have already been dealt with
18 by prior ruling.

19 THE COURT: Yes.

20 MR. JEKEL: We'll see if we can't get together.

21 THE COURT: Exactly. Exactly. So, let's see if we
22 can't come back here about, what, 2:30?

23 MR. EARLY: Yes, ma'am.

24 THE COURT: Very good. Thank you so much.

25 (OFF THE RECORD.)

1 MR. JEKEL: We are at number 11, I believe, or 12.

2 THE COURT: Yes. Now with respect to 11, I think
3 we've dealt with that, have we not, cumulative exposure?

4 MR. JEKEL: We did deal with number 11, yes. We're on
5 number 12, Your Honor.

6 THE COURT: Very good.

7 MR. JEKEL: I apologize.

8 THE COURT: And that is motion to exclude the
9 testimony of the expert DePasquale.

10 MR. YOUNG: Judge, it would probably be simpler, if
11 you don't mind, if we just do these together, Depasquale
12 and Millette.

13 THE COURT: Which two?

14 MR. YOUNG: They're basically the same arguments.

15 THE COURT: Which two, Millette and Pasquale? That's
16 13 and 14?

17 MR. YOUNG: Yes.

18 THE COURT: Or 12 and 13?

19 MR. YOUNG: Yes. Judge, I'm not exactly sure how to
20 pronounce his name either, but I call him DePasquale.

21 THE COURT: Okay.

22 MR. YOUNG: But that's probably wrong. And so, Judge,
23 I got to tell you one thing I found out during lunch, so
24 you might have to help me out here. Apparently my oldest
25 son bought a ticket to the game anyway and claims that I'm

1 supposed to pay for -- pay him back, and I'm going to plead
2 to no knowledge on that.

3 THE COURT: If you need an order, I don't know if it's
4 going to be enforceable in Georgia, but I'll give you one.

5 MR. YOUNG: So, Judge, you -- Mr. Jekel and I have had
6 this argument, I don't know, every time we've had a case
7 together. And the -- it's clear to me that Your Honor
8 makes her own rulings. And I will say that the last case
9 we tried, last two we tried, *Barrigon* was this case in
10 Seattle and got reversed because the judge let Millette
11 testify, and the other one got reversed on the all
12 exposures contribute.

13 But this is, this -- Your Honor actually mentioned
14 this earlier, and I thought it was extremely important.
15 They do not to have a test like we did of a dryer felt and
16 the potential for any fiber release from a dryer felt from
17 an actual working paper mill dryer felt making paper.
18 Scapa did a test at Western Michigan University on a pilot
19 paper machine.

20 And, Judge, if you'll just indulge me for a minute --
21 hopefully everybody will feel better. I don't want to bore
22 you, but when you make paper, what happens, the reason it
23 stinks so bad is they chop up the wood, mix it with a bunch
24 of chemicals -- and that's the slurry -- and it goes from
25 this big vat -- the chemicals are what stink. I don't know

1 if you've ever been by a paper mill.

2 THE COURT: Many times.

3 MR. YOUNG: But that's what stinks, and so goes over
4 this sort of metal thing that has holes in it and water
5 drains out, and then the wet felt takes the slurry over to
6 the dryer felts, and the dryer felts go over these big,
7 giant dryer cans. I mean, the paper machine's probably as
8 tall as this courthouse and way longer than this
9 courthouse. And the dryer felts basically just hold the
10 paper in place, and the heat and moisture from the dryer
11 pans, which are really, really hot, dries the paper pulp
12 into paper. Even paper is still 6 percent water, and
13 there's huge ventilation fans above it drying everything
14 out, and there's tons of steam and water and humidity.
15 Your Honor will hear at trial there's hundreds of thousands
16 of gallons of water taken out of the paper pulp every day
17 and more water, and the ventilation sucking the moisture in
18 the air out is extremely strong.

19 And so it is true, Your Honor, that -- I want to see
20 if I can explain it to you -- that the paper pulp -- paper
21 sheet is weak at the beginning and so it does break. It
22 gets stronger as it gets to the end, and when it breaks,
23 they laugh at me, but I tell the jurors it's like when your
24 toilet paper roll doesn't go right and it gets bunched up.
25 So what they do, the paper workers, is they take hook and,

1 and pull the extra parts out, and then they take air and
2 they blow across the paper machine parallel to the felt to
3 blow out any little pieces of loose paper or pulp that are
4 still in there that might bust the sheet again so it can be
5 hooked in and keep going. And it's a very -- I don't know
6 what you'd called it -- quick, it's a quick process because
7 what they want to do is keep making paper because that's
8 how they make money. Most of the paper mills have a big
9 sign. We laugh about this, you know, million rolls of
10 toilet paper made last week or something like that.

11 But so anyway, Mr. DePasquale, what happened, and I
12 guess Mr. Jekel's lucky. Dr. Millette retired, but I guess
13 he's unretired for this case, but he hasn't been coming to
14 our other cases, and Mr. DePasquale took his place. Mr.
15 DePasquale has never done any testing on a dryer felt at
16 all. And, Judge, I want to just focus back again on the
17 science has to be reliable and the method, methodology has
18 to be accepted, able to be reproduced, all the stuff that
19 Your Honor is familiar with, and the testing -- this is
20 important, I think -- needs the same level of intellectual
21 rigor as an expert in the relevant field if there's no
22 litigation going on.

23 And, Judge, this is the crux of our argument. Mr.
24 DePasquale doesn't -- he's never tested a dryer felt for
25 fiber release. He's never been involved in a blow down.

1 He's never done anything. So, he relies on some tests by
2 Mr. Millette and some tests by a fellow by the name of Bill
3 Longo, and this is the problem, Judge. And, you know,
4 they're going to stand up and say, oh, that goes to the
5 weight. Mr. Young, Mr. Collier are great lawyers. They
6 can cross-examine about it. But, Judge, it has to be
7 reliable and it has to pass intellectual scrutiny as if
8 there was no litigation. There's never been an article
9 written that says there, there's any danger to working
10 around an asbestos-containing dryer felt or that it causes
11 mesothelioma. In fact, the studies have shown the exact
12 opposite.

13 But in any event, I don't want to talk on too long
14 because we'll all fall asleep, but what Dr. Millette did,
15 realizing paper mill's twice as big -- I mean, paper mill's
16 twice as long as this courtroom, the dryer felts -- Mr.
17 Jekel is right. They're enormous, 200 and something-feet
18 long and 80 feet wide. He takes a little bitty piece of
19 dryer felt, like 5 inch square, and he puts it in a little
20 box in his lab. No paper being made. Dryer felt's not
21 wet. There's no ventilation. There's no humidity.
22 There's no water. And he takes an air hose and blows it
23 directly on that little piece of dryer felt for five
24 minutes. And yes, lo and behold there is some fiber
25 release, but he is the first to admit, Judge, that nothing

1 in his test, nothing in his test should suggest to anyone
2 true mill conditions. All he's saying is if you blow air
3 right on a dryer felt at 60 PSI for five minutes, that you
4 can get some fiber release from it. He also claims that he
5 got fibers out of the dryer felt by touching them, though
6 we don't have any pictures for that. We don't have any
7 pictures for that, and we really just sort of have to take
8 his word for it, which again, Judge, that's why -- and
9 understanding, Your Honor's ruling, that's why it's so
10 important in this case that none of the witnesses said that
11 Mr. Stewart touched a Scapa asbestos-containing dryer felt
12 and ---

13 THE COURT: Mr. Young, I've just got to interrupt you
14 there. There is abundant testimony that these guys, and he
15 was one of them, that deal with these very big, heavy felts
16 got up in the machines, pulled them out, cut them up,
17 stacked them, did all kinds of things where they directly
18 touched these felts. Are you saying there's no evidence he
19 touched the felts?

20 MR. YOUNG: No, Judge. No. What I'm saying is
21 there's no evidence that that was one of the asbestos
22 felts. I understand ---

23 THE COURT: Well, that gets to whether there is
24 sufficient contributory -- I mean indirect evidence of the
25 volume of Scapa versus non-Scapa and so forth and so on.

1 But in terms of his dealing with these felts, there's
2 plenty of testimony that he dealt with the felts a lot.
3 That dust came up from the felts in a lot of different
4 situations, particularly at the dry end of the process.
5 So, you know, you can cherry pick all you want to, but I
6 think you got to be faithful to all the things that were
7 said. I don't know whether they're going to be believed by
8 the jury, but I'm not at that stage now.

9 You're asking me to exclude this entire line of
10 testimony because it is not scientifically reliable, and
11 we've got a bunch of cases in South Carolina from Donny
12 Counsel to the one I wrote about sudden acceleration in the
13 electromagnetic interference where I did say that that
14 witness, who had never dealt with anything other than big
15 electromagnetic motors in England and naval applications,
16 could testify about sudden acceleration in an automobile if
17 he'd never examined one or done anything. So, we've got
18 plenty of standards about expert witnesses.

19 But you are just kind of doing this general broadside
20 that is, in essence, a disagreement that Mr. DePasquale's
21 testimony is subject to any weight or so forth. It may be
22 generally contradicted by your scientists, but I've got to
23 have a little bit more than just, hey, we disagree
24 completely with what DePasquale says.

25 He has got a bunch of information about what Stewart

1 did over forty years at Bowater and what he did with those
2 felts, and to stand up here and say there is absolutely no
3 evidence he ever touched the felts, that's going a little
4 far.

5 MR. YOUNG: Judge, you've been doing this long enough
6 to know it's the defendants always cherry pick the stuff
7 that helps them.

8 THE COURT: Well, I get that.

9 MR. YOUNG: I don't mean, I don't mean that
10 disrespectfully. Judge, I just, I understand, Your Honor.
11 My only point was that given the nature of what he's
12 going to say, that's an important point. And I understand
13 Your Honor's ruling that that's a -- there is
14 circumstantial evidence to support that. So, I will move
15 on.

16 But I do think it's important, Judge, that the -- none
17 of Dr. Millette's tests have been verified. There were not
18 multiple glove box tests. There was no mathematical model
19 done so that you could verify that the glove box test
20 results were appropriate. There was no field test done,
21 and that -- this is the important part, Judge. Dr.
22 Millette has testified several times that his tests cannot
23 be used to make a quantitative estimate of actual exposure
24 in a paper mill to working with a Scapa felt. So, Judge,
25 at the very least we feel like Mr. DePasquale coming in and

1 saying I've looked at Dr. Millette's tests -- Dr. Longo's
2 tests have all the same fallacies as Dr. Millette's. That,
3 at the very least, the prejudice outweighs the probative
4 value because, Judge, they're going to use that testimony
5 and those tests to suggest to the jury that that is exactly
6 what Mr. Stewart did, and that's just not, that's not
7 correct, Judge. He wasn't working with a dry, little,
8 bitty piece of a dryer felt that wasn't making paper, that
9 didn't have any ventilation, that didn't have any water.
10 It -- and neither one of them have ever seen a dryer felt
11 actually being used at a paper mill. And none of them had
12 ever seen a blow down.

13 And oddly enough in this case, Judge, all the
14 witnesses agreed that when you blew, you blew like this
15 across the dryer felt and the paper to get the things out
16 as opposed to directly at an angle on the, the dryer felt.
17 Remember, Judge, these things are going a, like, 180 feet a
18 minute, and there's no way you can get the air wand in
19 there to blow on it the way Dr. Millette and Dr. Longo
20 said.

21 So, Judge, and the bottom line is we don't think they
22 should be allowed to come in and give a test -- give any
23 testimony, even if it's just a range of potential exposure,
24 based upon a test that they have all admitted has
25 absolutely nothing to do with paper mill conditions. Thank

1 you, Your Honor.

2 MR. JEKEL: Yes, Your Honor, I want to break this ---

3 THE COURT: Mr. Jekel.

4 MR. JEKEL: --- down just a little bit. I, I would
5 suggest first, Your Honor, that both the testimony of
6 DePasquale and Dr. Millette meet the *Watson vs. Ford*
7 criteria and meet the, the evidentiary requirements of our
8 rules of evidence. DePasquale is an industrial hygienist
9 who's coming to talk about the conditions in the plant and
10 talk about some of those things.

11 Dr. Millette, the defendant is going to suggest to you
12 that these asbestos fibers are incapable of coming off a
13 dryer felt. Dr. Millette has tested asbestos-containing
14 dryer felts manufactured by Scapa, some of the same ones
15 that are on the machines at Bowater. What Dr. Millette did
16 was conduct some very simplistic testing designed to
17 suggest that asbestos fibers come off of these dryer felts
18 under a variety of circumstances.

19 Your Honor, the one test that Mr. Young did not tell
20 you about is what I call the Post-it note test, and again
21 this never happened in the paper mill. He takes a Post-it
22 note, takes the sticky part of the Post-it note, puts it on
23 the dryer felt, takes the sticky, puts it under the
24 microscope, and he finds that the glue from the Post-it
25 note is sufficient to remove respirable chrysotile asbestos

1 fibers greater than 5 microns.

2 Now, the testimony of Dr. Millette is designed to give
3 the jury some feel for the fact that these are not -- this
4 is not indestructible asbestos. Mr. Young keeps talking
5 about all this water, water, water. You realize asbestos
6 does not absorb any water. It's waterproof; it is not
7 affected by the water. The ability of the fibers to become
8 airborne may be impacted by all of that. That's what
9 DePasquale is going to talk about. Dr. Millette's tests
10 can be reproduced. They, they could have done it.

11 Interestingly enough, I did want to talk with Your
12 Honor about something as it relates to Dr. Millette's
13 testimony, and it's the felts themselves. Scapa recently
14 sued Dr. Millette and MVA, the company which he used to
15 work for, for return of the felts that he had that he did
16 his study on, and he gave them back because as, as -- Scapa
17 is right. They're Scapa's felts. They weren't Dr.
18 Millette's felts, they weren't MVA's felts, but I wanted to
19 have those samples in the courtroom during Dr. Millette's
20 testimony so that the jury can see I tested a felt that is
21 just like the ones on the Bowater plant.

22 But again I would suggest the testing he did was
23 simplistic. It's not designed to replicate what happens
24 while the machine is running, while it's making paper
25 because that's not the actions that the plaintiff engaged

1 in that caused the asbestos exposures, Your Honor. It's
2 when they're putting them on. It's when they're taking
3 them off, and I just want to read Mr. Stewart's testimony
4 as it relates to the blowing of the air:

5 Blowing with air hoses front and back, sides,
6 towards each other to get the paper out of the
7 dryer section.

8 They were running that hose all different ways, but
9 the point of it is if you, if you spray a dryer felt with
10 high-pressure air, asbestos will be liberated. We aren't
11 seeking to have the evidence admitted for a quantitative, a
12 number, two fibers or what have you on it. It's
13 qualitative. The felts release asbestos. We've done the
14 tests. Dr. Millette is, is -- his testimony is designed to
15 give opinions on the type of activities the plaintiff would
16 have engaged in that would result in a fiber release, and I
17 do believe that those tests meet the rules of evidence
18 requirement and should be admitted, Your Honor.

19 MR. YOUNG: Judge.

20 THE COURT: Yes.

21 MR. YOUNG: I just want to make sure one thing is
22 clear. I'm not sure where we were going with the Scapa
23 sued Dr. Millette to get the felts back, but the felts were
24 given to him a long time ago for a test. When the judge
25 instructed that there be no further testing on the felts

1 without knowledge of all parties -- and another plaintiff's
2 lawyer, not Mr. Jekel, commissioned a test on a dryer felt
3 and didn't tell anybody, and so at that ---

4 THE COURT: Well, we don't need to get into all that.
5 I think it's pretty petty, frankly, if we're talking about
6 an expert, that Scapa would want to get back the felts, but
7 that's just me.

8 MR. JEKEL: No and, Your Honor, I'm not suggesting
9 anything nefarious on Scapa's part here. All I was
10 suggesting is I wanted to see, maybe we could subpoena the
11 samples that he worked with during his testimony. That's
12 what I meant, Your Honor.

13 THE COURT: We don't need to get into all that. The
14 simple thing is he's saying that a little bit of
15 manipulation of the felts is enough to release asbestos.
16 That's what Millette is saying.

17 MR. JEKEL: Yes.

18 THE COURT: As I understand.

19 MR. JEKEL: Yes, Your Honor.

20 THE COURT: And that's one of the many witnesses that
21 will talk about this, but it doesn't take a whole bunch of
22 manipulation of the felt, according to this expert witness,
23 to unleash some of this asbestos and in amounts that are
24 more than just ambient air amounts. As I understand it,
25 that's what his testimony is.

1 MR. JEKEL: Yes.

2 MR. YOUNG: Judge, but, see, we got the cart before
3 the horse. Then they're going to take that and say --
4 DePasquale's going to say I think Mr. Stewart's exposure
5 range was from a way little bit to a bigger amount, and all
6 the things I'm telling you about, they all agree that
7 ventilation would affect the level of exposure, or if there
8 was any exposure. Water would affect the level of exposure
9 if there was any exposure. And so you're really talking
10 about apples and oranges, and that's why it's prejudicial
11 for them to be able to -- if they want to say that that --
12 that those tests show that fibers can come out of the
13 felts, that's fine, but there's no reliable scientific
14 basis for DePasquale to then take that and say, well, this
15 is what I think Mr. Stewart might have been exposed to, and
16 even then he can't give an exact amount. He can only give
17 a range, and that's why, Judge, I said it was important
18 they both agreed that the test did not represent mill
19 conditions and should not be relied upon.

20 THE COURT: Well, now wait a minute. These broad
21 statements, Mr. Young, it may not have mimicked mill
22 conditions. What I think is being contended by plaintiff
23 is mill conditions are a lot more active in terms of
24 manipulating and stirring up the felts on the little test
25 he did. And he's saying, based on what I know about what

1 Mr. Stewart says about work conditions and his colleagues
2 do, that if I could manipulate the felt just a little bit
3 with Post-it or with some air on it and liberate asbestos,
4 then the actual conditions under which the felts were used
5 would certainly at least liberate that at perhaps higher
6 degrees of, (a). (B) he's got mesothelioma.

7 He didn't work in any other atmosphere where asbestos
8 -- where he was exposed to asbestos except for Bowater. A
9 lot of times you have people that work a lot of different
10 places. In this particular thing, he worked in a specific
11 series of tasks in a specific place where the defendants
12 were one of a finite, small group of suppliers. That's
13 what he's saying.

14 You're going to be able to refute it with a lot of
15 your evidence, but we could go on forever and ever about
16 the merits of this testimony, but that's what we're doing
17 is talking about the merits.

18 *Watson vs. Ford Motor Company* and a variety of other
19 cases out of our court set the parameters for what has to
20 be established for legitimate, *Daubert*-based expert
21 testimony and says that the judge should be the gatekeeper.
22 And as the gatekeeper, I cannot find that this testimony is
23 so unreliable that it's not even going to be allowed to be
24 offered. We will see after it is offered and after the
25 other experts testify as to exactly where we stand on this,

1 but I'm being asked in a vacuum with just some broad
2 arguments of cherry picked pieces of testimony to say,
3 ergo, these experts can't testify, and I deny that at this
4 point. This is a motion *in limine*, and based on what's
5 been presented to me, I am not prepared to say that this
6 testimony is so unreliable that it cannot be used.

7 MR. YOUNG: Judge, I do think that is fair and
8 obviously -- but I would like to an opportunity to at least
9 revisit it once we see the foundation.

10 THE COURT: As an experienced attorney like you is
11 well aware, Mr. Young, there are more times to revisit this
12 thing than you can shake a stick at backwards. So, there's
13 going to be plenty more discussion of these issues.

14 MR. YOUNG: Thank you, Your Honor.

15 THE COURT: So, I would deny the motion to exclude
16 DePasquale, and I would deny the motion to exclude Mr.
17 Millette.

18 And now we come to...

19 MR. EARLY: Your Honor, our final motion *in limine*,
20 our Scapa defendants, is number 15 -- For some reason we
21 had a 14 tab and you see that deleted, skip -- is our
22 motion for setoff.

23 THE COURT: I'm going to grant that. Setoff is
24 certainly required by the statute. And in the event that a
25 verdict for the plaintiff is rendered by the jury, why we

1 will certainly proceed to discuss setoff and that, you
2 know, is conditioned by some other things. In that initial
3 round, we not only will ask the jury for a verdict with
4 respect to liability and actual damages, but we will ask a
5 question designed to probe whether the jury would be
6 inclined to consider punitive damages, and that's all we
7 will ask them.

8 If they say no to that, then whatever else they
9 decided ends the matter if they have awarded any actual
10 damages. If they say yes to that, then we'll proceed in a
11 completely outlined way to deal with punitive, and we will
12 wait for our settlement proceed setoff until afterwards.

13 What I did with setoff the last time I did this is to
14 wait until we had concluded the case and dismissed the
15 jury. Then we exchanged information about what the setoff
16 would produce and what they had received by way of funds so
17 far and how they had allocated those funds, and then we
18 applied -- we heard different arguments about what kind of
19 formula ought to be used and made an award. I won't vary
20 from that. You'll have every opportunity for setoff.

21 MR. EARLY: My only comment, that would be, Your
22 Honor, would be the allocations would have been at the time
23 of the settlement, not post verdict, correct?

24 THE COURT: I'm not going to make any rulings on any
25 of that.

1 MR. EARLY: Okay.

2 THE COURT: I haven't seen anything about how they
3 deal with that. So, I wouldn't think about making any
4 rulings about exactly what the methodology is until I look
5 and see exactly what's been done.

6 MR. EARLY: Okay. Their, their omnibus motion we can
7 probably fly through pretty quickly, too.

8 THE COURT: I have plaintiff's omnibus motion -- no,
9 I've got plaintiff's omnibus motion number 1, and this
10 deals with various matters that they ask not be considered
11 by the jury, and the first is collateral source.

12 MR. JEKEL: Your Honor, I'm going to let Mr. Hyland
13 argue this.

14 THE COURT: Is there any argument about this that -- I
15 can't imagine that I could be persuaded that collateral
16 source can be considered.

17 MR. HYLAND: I'm not, Your Honor. The only thing
18 would be if they opened the door for it, saying he couldn't
19 afford to pay, didn't have insurance, we could introduce it
20 at that time.

21 THE COURT: Well, I'm just betting that they're smart
22 enough ---

23 MR. HYLAND: Me, too.

24 THE COURT: --- not to do that. So, the collateral
25 source motion to instruct the defense not mention in the

1 hearing of the jury collateral source, that's granted.

2 Then the next one is whether to mention settlements
3 with other defendants. Is there going to be any big
4 argument about that?

5 MR. EARLY: Just preserving what I said earlier, Your
6 Honor.

7 THE COURT: Well, I'm going to grant that. I've said
8 before that I regard *Smith vs. Tiffany* as definitive on
9 that and, therefore, settlements with other defendants
10 cannot be mentioned to the jury.

11 The American tort system, plaintiffs attorneys in
12 general, tort reform campaigns. You're not planning on
13 doing that, are you, Mr. Early?

14 MR. EARLY: We do not, Your Honor, other than perhaps
15 potential questions in *voir dire*, but ---

16 THE COURT: I'm not going to ask those kind of
17 questions. I've already indicated that I ---

18 MR. EARLY: Okay.

19 THE COURT: --- I don't ask the jury to opine about
20 the America tort system and things of that nature. I don't
21 think that aids us in finding out whether we can get a fair
22 jury.

23 Number 4 is effect of claims on insurance premiums.
24 I'm confident that you wouldn't make any mention of that,
25 would you, Mr. Early?

1 MR. EARLY: No, ma'am. That's correct.

2 THE COURT: I would grant.

3 That any corporation -- this is 5 -- that any
4 corporations which once made, manufactured, mined, or sold,
5 or distributed asbestos, companies are in bankruptcy. Are
6 you contending that you can mention that?

7 MR. EARLY: I'm not contenting I can mention that
8 specifically, Your Honor. We're already argued about
9 bankruptcy trust forms and what may be admissible with
10 them, and I understand Your Honor's ruling.

11 THE COURT: Well, this is a completely different ---

12 MR. EARLY: I understand that.

13 MR. YOUNG: Judge, we're not going to argue that Mr.
14 Jekel's lawsuits have bankrupted other companies if that
15 was the target of that, but.

16 COURT REPORTER: Could you repeat that, please?

17 MR. YOUNG: We're not going to argue that asbestos
18 lawsuits have bankrupted other companies.

19 THE COURT: Well, I wouldn't ---

20 MR. YOUNG: Which I think was the intent of that
21 motion.

22 THE COURT: I would hope you would not mention to the
23 jury anything about the bankruptcy of anybody that made
24 asbestos.

25 MR. YOUNG: Right. Yeah.

1 THE COURT: Very good.

2 MR. YOUNG: Right, Judge.

3 THE COURT: Very good.

4 MR. YOUNG: I'm trying to help.

5 THE COURT: 6 is any reference to any ruling by
6 another court on the scope or admissibility of testimony of
7 any witness. Again, this is talking about the jury. I
8 would certainly grant that.

9 MR. EARLY: On prior rulings?

10 THE COURT: Any reference to the jury. This is -- all
11 these things have to do with what you can say to the jury,
12 and certainly you -- there is not going to be any
13 discussion with the jury about rulings by other courts on
14 the admissibility of the testimony of witnesses. I'm going
15 to rule and when I rule, that's what's going to happen, but
16 -- and you will preserve your positions. But nobody's
17 going to be permitted to talk to the jury about, hey, she
18 may have ruled this way, but other courts have done this.
19 I mean, we don't do that ever, do we?

20 MR. EARLY: Well, Your Honor, I think it could go to
21 the -- certainly the weight and credibility of the witness.
22 What ---

23 THE COURT: Explain to me what you would say to a jury
24 in this regard that you think is appropriate under the
25 rules of the road and the Rules of Civil Procedure.

1 MR. EARLY: Well, if, if another court has ruled that
2 it's not scientifically reliable, then I think the jury
3 should be able to hear that.

4 THE COURT: No, sir. The court is the gatekeeper of
5 those matters; that's a question of law for the court.
6 That's not a question of fact for the jury. So, if there's
7 some, if there's some confusion in anybody's mind about
8 that, then I would certainly grant that asking the jury to
9 weigh what they think the law would be about something,
10 can't do that.

11 7, any questions to experts to define causation. I
12 want to hear y'all on that. I don't exactly understand
13 that.

14 MR. JEKEL: Your Honor, if I might? This just
15 happened. I think this happened in Mr. Young and I's last
16 trial where, where an expert witness was asked in response
17 to a question about substantial contributing factor. The
18 judge *voir dired* the witness and suggested that substantial
19 contributing factor is not something you use in your
20 practice as a doctor, and that's what this motion is
21 driving at, to not allow or to make improper questions
22 about the legal causation standard to an expert witness.

23 MR. YOUNG: Judge, I mean, if he brings a doctor in
24 here and has -- tries to have him testify that X is a
25 substantial contributing factor to Mr. Stewart's

1 mesothelioma, first of all, I think that's an improper
2 opinion. But second of all, surely on cross-examination
3 you could say you don't use substantial contributing factor
4 when you're seeing just a regular old patient. That shows
5 his bias as ---

6 THE COURT: I don't understand at all what you're
7 saying here. I would think that what you ask doctors is
8 within a degree of medical certainty, what is your opinion
9 about the effect of the asbestos on Mr. Stewart or whatever
10 the particular causative question has to be. But, yes, he
11 can be asked questions about that.

12 There are going to be questions that are aimed towards
13 the expert's knowledge of the patient or knowledge of the
14 area but -- and if that happened to affect causation -- but
15 we don't ask them questions about substantial this, that,
16 or the other. We ask them within a degree of certainty as
17 experts can they, and then we ask them a question about the
18 factual matter. And that is certainly -- can be causation
19 questions, but they are not asked with the idea of asking
20 them to define causation. They are asked with the end of
21 trying to get the witness to discuss whether or not they
22 believe that asbestos caused the mesothelioma or whatever
23 it happens to be. You're going to be asking those very
24 same questions of your chrysotile witnesses and all other
25 kind of witnesses.

1 So, I understand that they are not to put forward some
2 independent standard of causation, but they're going to be
3 -- all science experts are going to be doing a lot of
4 testifying about whether they think asbestos caused the
5 mesothelioma. And I do not understand what either side is
6 telling me about that.

7 MR. HYLAND: It's just, just to say, Your Honor, that
8 testimony as to what the law is being admissible, that's
9 Your Honor's responsibility.

10 THE COURT: No question about that.

11 MR. HYLAND: And, and we seek to exclude any sort of
12 testimony to define the legal standard as to causation.

13 THE COURT: Well, I agree with that. They are apply
14 the standards as is enunciated in our case law and to the
15 facts of this case, and if they are expert in a particular
16 area, they're going to give their opinion in that regard.
17 Any confusion?

18 MR. JEKEL: Not from me, Your Honor.

19 THE COURT: Mr. Young?

20 MR. YOUNG: No, Your Honor.

21 THE COURT: Very good. The motion is granted.

22 Any mention -- this is 8. Any mention or reference
23 that other defendants were not present -- other defendants
24 not present were sued by plaintiffs. You want to say
25 something about that? Are we going to plough that ground

1 again?

2 MR. YOUNG: No, Judge. We understand your ruling on
3 that.

4 THE COURT: Yeah. I would not allow that. Granted.

5 MR. YOUNG: Judge, the ruling in G would apply to the
6 plaintiffs as well, right?

7 THE COURT: What's that?

8 MR. YOUNG: The ruling in their immediately preceding
9 motion would apply to the plaintiffs as well?

10 THE COURT: Oh, no. I'm just going to apply it to
11 y'all but not plaintiff. Of course.

12 MR. YOUNG: Okay. I'm sorry.

13 THE COURT: Absolutely.

14 MR. YOUNG: It's my first time before Your Honor.

15 THE COURT: Yes, sir. No, I feed everyone out of the
16 same spoon. All experts will be ---

17 MR. YOUNG: Standard. You already said that.

18 THE COURT: All right, 9, prior bad acts and criminal
19 convictions. Is there some real problem here?

20 MR. HYLAND: There, this is an early -- he got in
21 trouble for domestic violence when he was young, and it may
22 well be related to his getting divorced when he was young,
23 and I believe that's probably what the defendant ---

24 THE COURT: Are y'all planning to go into that, and is
25 it relevant to anything in this case?

1 MR. YOUNG: Judge, it depends on what kind of -- if
2 they put on all this testimony that he's the world's
3 greatest person ---

4 THE COURT: They are. They're going to put on
5 testimony that he is a wonderful father and a wonderful
6 husband and all that kind of thing. Sure, they're going to
7 put all that on.

8 MR. YOUNG: Well, I think that opens the door to the
9 fact that he beat his wife, and his kids got adopted by
10 somebody else, and I, I just, it's hard for me to say,
11 Judge, right now.

12 THE COURT: Well, we're going to say. We're going to
13 solve that right now. Let's assume that they're going to
14 put up testimony that paints him in the most sympathetic
15 light possible as a father, as a husband, et cetera.
16 Before he died, this is what he did.

17 MR. JEKEL: Your Honor, I would challenge Mr. Young.
18 Does he even know that it was a closed fist, open fist? Do
19 you hear what he said? He beat his wife. That's what
20 we're trying to exclude, Your Honor. He doesn't even know
21 anything about the domestic incident.

22 MR. YOUNG: I know, I know ---

23 MR. JEKEL: Yet he's already told the jury ---

24 MR. YOUNG: I know all about it.

25 MR. JEKEL: --- about beating his wife.

1 THE COURT: Wait, wait. Hold it. Counsel, what do
2 you know about this in terms of what the facts are?
3 Anything?

4 MR. HYLAND: Basically when he was young, he dropped
5 out of school, had a kid, got married, okay. The marriage
6 went bad. There was some amount of alleged assault. They
7 were divorced early. His ex-wife remarried and she had the
8 children for most of the time as they were growing up, and
9 so he consented to their adoption. This goes to another
10 motion that we have, but remained a father figure in their
11 lives, and even as they were adults did so as well. The
12 stepfather is deceased. He readopted his children, which
13 allows them to bring this, this action.

14 And the -- so, the closeness of our client to his
15 children in no way is affected by the fact that there was a
16 domestic violence charge forty-five years ago, and it's in
17 no way affected by the fact that he consented to an
18 adoption and readoption. They are his children. They're
19 -- and those are -- the estate is bringing this case.

20 (A PAUSE.)

21 THE COURT: All right, as we know, prior bad acts,
22 there's usually a ten-year limit, but the exception is if
23 it's more prohibitive than prejudicial, it can be used.
24 I've got some real hesitations about letting in a forty
25 year-old domestic violence charge.

1 With respect to the adoption of the children by others
2 and then the readoption by him, I see no problem with that.
3 I think that can be explored for whatever they choose to
4 make of it. They obviously want to make of it that somehow
5 or another he was a bad father if he allowed his children
6 to be adopted by others. Sometimes that's the kindest and
7 more charitable thing you can do, but that is something
8 counsel for the estate of Mr. Stewart can argue. I don't
9 think the fact of the adoption and then re -- the adoption
10 and the readoption of his own children, that is not
11 something that I would just exclude right off the bat.

12 But I am very hesitant to put before the jury
13 something that's forty-five years old or however old it is.
14 So, y'all find out a little bit more about this charge in
15 terms of its actual age and what is upon the public record
16 about it. If it's not upon the public record, that is
17 another thing that would concern me about whether or not it
18 could qualify as prior bad acts of the kind of character
19 evidence that we would admit.

20 There's been very little argument in this thing about
21 the intricacies of our rule about prior bad acts. It's
22 just kind of been slapped up there for my consideration.
23 So, I would say my -- hesitant to allow it at this time,
24 but it's subject to y'all briefing me further on what you
25 think our evidence law is about a charge this long ago.

1 MR. COLLIER: Your Honor, Your Honor, Chris Collier
2 again. Just to clarify. I believe there are some
3 additional issues that are more recent in time than forty
4 years, but I don't want to get into those right now.

5 THE COURT: What? Domestic violence issues?

6 MR. COLLIER: Yes, Your Honor, with a, with a second
7 wife, but my question for clarification is ---

8 THE COURT: And tell me what relevance they have other
9 than to make him look like he's a jerk.

10 MR. COLLIER: No, Your Honor, I wasn't even -- I'm not
11 planning to go into that. I was just clarifying that I
12 think there are some more recent issues, and I think we do
13 need to look into that further.

14 THE COURT: Yes.

15 MR. COLLIER: My, my point of clarification was with
16 respect to your discussion about the relationship with the
17 children, if that -- because that's a separate motion *in*
18 *limine* number 3, and I just wanted to confirm.

19 THE COURT: Right, and I was trying to move this
20 along, but obviously I didn't succeed.

21 MR. COLLIER: And all I was trying to do was to see if
22 we could get to the ruling on motion *in limine* number 3 so
23 I can sit down and stop talking.

24 THE COURT: Well, I think I did it but ---

25 MR. JEKEL: I viewed what Her Honor said as denying

1 our motion *in limine*.

2 THE COURT: That's correct.

3 MR. COLLIER: Thank you.

4 THE COURT: And with regard to the motion *in limine* on
5 the prior convictions or bad acts, I am not inclined on the
6 basis of what I know now to allow it. So, that means I
7 would grant the motion *in limine*, but I will reserve it
8 until y'all can supply me with some more information (a)
9 about the nature of the prior bad acts that you would
10 intend to offer and (b) how you think our evidence law
11 impacts that.

12 MR. YOUNG: Judge, it takes a brave defense lawyer to
13 put on that evidence.

14 THE COURT: It sure does with a dead man.

15 MR. YOUNG: Right, and so we'll just leave it that if
16 we have any intention of going into that, we will take it
17 up with Your Honor before we head down that path.

18 THE COURT: That'd be good. That'd be good. That's
19 fair.

20 MR. YOUNG: Because I can hear Mr. Jekel now. So he
21 did this, this, and this, so that means Scapa says it's all
22 right that he's dead, and I really don't want to listen to
23 that because I don't think that helps us.

24 THE COURT: I agree with that.

25 MR. YOUNG: And you would probably overrule my

1 objection because I opened the door.

2 THE COURT: All right, past alcohol or drug use. Is
3 there, is there anything here that is a predicate for that?

4 MR. HYLAND: Not that I'm aware of.

5 MR. EARLY: And, Your Honor, again I don't know trial
6 strategy yet, but he was divorced three times, twice for
7 physical cruelty, once for habitual drunkenness. I think
8 one of -- if quality of life, all that stuff, comes out as
9 a component of damages, I think Dr. Oury at least, our
10 medical expert, will testify that, you know, it kind of
11 goes -- dovetails with tobacco, too, that habitual alcohol
12 and tobacco use diminish life expectancy, all that stuff.
13 So, it would be relevant in terms of damages in that
14 regard. Other than that...

15 THE COURT: And it might be. It might be. It might
16 be. I don't know that I would -- so, well, I understand
17 where you're going now, and I understand that you have a
18 medical expert will say it's pertinent to life expectancy.
19 So, I don't know. Let's see what happens. I'm not right
20 now willing to exclude it if there is a medical expert
21 that's going to testify as to what it may mean in terms of
22 life expectancy.

23 MR. EARLY: And number 12 goes along with it. That
24 would be our only thing with that.

25 THE COURT: Well, wait a minute. We haven't really --

1 was he a heavy smoker and user of tobacco?

2 MR. EARLY: Yes, ma'am.

3 MR. HYLAND: He did smoke up until 2002.

4 THE COURT: And I suppose that you're going to use
5 that as a kind of a general life expectancy thing for how
6 much the mesothelioma as opposed to other habits reduced
7 his life expectancy. They are going to say the
8 mesothelioma and its damage to the pleural lining and
9 whatever, wherever -- I don't know all the details about
10 where it was in this particular plaintiff, but they're
11 going to say that that in and of itself hastens death and
12 was not going to be much affected by the smoking. So, I
13 think that's probably just a clash of life expectancy
14 things.

15 I think that is probably going to end up coming in,
16 Mr. Jekel.

17 MR. JEKEL: Fair enough.

18 THE COURT: Other nonlife-threatening medical
19 conditions. What is that?

20 MR. HYLAND: Well, Your Honor, it's really more so, it
21 goes to the fact that they have an expert that's attempting
22 to or has testified in deposition that essentially looking
23 at his co-morbidities, he estimates that he would have died
24 within two years even if he didn't have mesothelioma
25 because he had COPD and a couple other things like most

1 people of his age probably have.

2 THE COURT: Well, most ---

3 MR. HYLAND: So, again ---

4 THE COURT: Most people. He is exactly -- or he was
5 born at exactly the same time almost to the month that I
6 was born, and some of us don't have COPD and some of the
7 other things he had. So, he had some things, and it's not
8 a judgment on him as a bad person, but certainly people
9 with COPD and some of the other conditions, that does have
10 an impact on their life expectancy.

11 MR. HYLAND: It, it can but it's not the -- in
12 specific, the expert that looked at this looked at the
13 medical records, and basically with no investigation into
14 it just said it off the cuff and ---

15 THE COURT: Well, you'd be able to jump on that in
16 cross-examination, would you not? I mean, it's a fact that
17 he had these things, right?

18 MR. HYLAND: Yes.

19 THE COURT: And presumably they will -- I wouldn't let
20 them offer it unless they are going to say to a degree of
21 medical certainty that this kind of condition impacts
22 mortality. If they say that, and then you're going to be
23 able to cross-examine and say, you know, specifically what
24 and so forth and so on.

25 MR. HYLAND: Now, also with that comes with -- I mean,

1 for instance COPD is something that affects life but it's
2 not life -- immediately life-threatening, but there are
3 other conditions as well and if you ---

4 THE COURT: What other conditions?

5 MR. HYLAND: --- listed a laundry list of anything
6 that anybody ever went to the doctor for, it could be
7 prejudicial.

8 THE COURT: What? What other conditions?

9 MR. HYLAND: I believe he, he had a some issues.
10 Actually, I can't even remember, Your Honor.

11 MR. YOUNG: Your Honor, we will not go into anything
12 that we do not have a doctor -- I believe their doctors
13 will agree that heavy drinking and heavy smoking shortens
14 your life expectancy. We will not go into anything that we
15 don't have a medical doctor who will say to a reasonable
16 degree of medical certainty this non-asbestos-related
17 condition shortened his life expectancy.

18 THE COURT: Well, I think that's fair and ---

19 MR. YOUNG: So, I don't know what the other lists are,
20 but ---

21 THE COURT: Well.

22 MR. YOUNG: But we won't go into one that doesn't fit
23 into that box.

24 THE COURT: Well, that's, that's fair and so, counsel,
25 I think the bottom line is I'm not going to grant these,

1 but I am certainly going to insist that they not prejudice
2 the jury by offering testimony that would not carry with it
3 an expert opinion to a reasonable degree of medical
4 certainty, and they're saying they're going to do that.
5 So, I think your problem is solved there. I mean, he is
6 what he is and he was what he was, and life expectancy is
7 one of the things that's going to be talked about, and
8 they've got the right to talk about any other things that
9 impacted his life expectancy.

10 It happens to be that the things we are talking about
11 right now have a certain pejorative cast to them, but there
12 might have been other things that don't have a particular
13 pejorative cast to them but are physical conditions or
14 other conditions that would also affect his mortality, and
15 I think they've got the right to explore those things. So,
16 that's kind of where I would leave it.

17 Asbestos generally is the cause of Mr. Stewart's
18 mesothelioma. Defendant should be precluded from stating
19 or indicating in the presence of the jury that Mr.
20 Stewart's mesothelioma is caused by anything other than
21 asbestos exposure.

22 MR. YOUNG: Judge we're not going to do that.

23 THE COURT: You're not going to do that? Very good.
24 Well, it's granted.

25 All right, then that comes to plaintiff's motion in

1 *limine* number 2, asbestos bankruptcy trust and plaintiff's
2 claims to the same. I think we've ploughed this ground.

3 MR. YOUNG: Yes, Your Honor, that's -- this would be
4 granted, as I understand it.

5 THE COURT: That's right.

6 MR. JEKEL: Yes.

7 THE COURT: Then next is...

8 MR. JEKEL: 18, the children, Your Honor.

9 THE COURT: 18, decedent's legal relationship with his
10 children. I have -- I want to hear y'all one more time.
11 You say that it's not relevant.

12 MR. HYLAND: Correct, Your Honor. What is relevant is
13 the closeness of a family unit. What -- the legal status
14 of whether or not he consented to an adoption at one point
15 or readopted his children, the only real consequence that
16 has is whether or not they can -- his children can exercise
17 this action for wrongful death. And, and here he had a
18 relationship with them. There will be evidence about that.

19 To the extent that he may have consented to an
20 adoption or readopted them later, we believe that it's
21 confusing. It could be potentially confusing to the jury,
22 could mislead them, could be prejudicial, and especially to
23 the degree that they may say that -- or infer that he just
24 readopted them for -- in order so that they may recover in
25 an action after he died.

1 THE COURT: Well, I think that would go a little far
2 afield. Do you seriously challenge the ability of these,
3 the legality of these beneficiaries being entitled to bring
4 a wrongful death action?

5 MR. YOUNG: No, Your Honor, but I think your earlier
6 ---

7 THE COURT: Well, then what's the relevance of this
8 stuff?

9 MR. YOUNG: Your earlier ruling is correct. It has
10 -- Mr. Collier is going to argue this, but the fact that
11 he had a, you know, decades long period of time when he
12 was uninvolved with them at all is clearly relevant to
13 what they're just saying, the family relationship. I think
14 it ---

15 THE COURT: Well, now, he says that, counsel says that
16 though he allowed them to be adopted by their mother's then
17 husband, that he maintained a relationship with them.

18 MR. YOUNG: We don't ---

19 THE COURT: And that would not be the first time in my
20 experience as a lawyer or as a judge that that very thing
21 happens. That for reasons best explained by the parties,
22 that a noncustodial parent will think that it is and
23 determine in their own heart that it's in the best interest
24 of the child for them to be adopted by the spouse of the
25 custodial parent and do that and nevertheless maintain a

1 relationship with the children and maybe even readopt them.
2 In fact, I did three readoptions of their own children
3 during my time as a lawyer. So, you know, I don't know.

4 MR. YOUNG: Judge, that's not the evidence. So, we're
5 on a false premise here.

6 MR. COLLIER: Right, Your Honor. I don't think that's
7 the evidence in the case. I mean, the children, once they
8 were adopted by Mr. Edwards and both of their -- the named
9 plaintiff in the case, his last name is Edwards as the
10 personal representative. They were adopted by Mr. Edwards.
11 They moved to Texas and lived in Texas for the rest of
12 their years growing up. And it wasn't until they were
13 adults and moved back to South Carolina that there was any
14 sort of regular, what you would consider to be even pseudo
15 normal ---

16 THE COURT: And what is that relevant to in this case?

17 MR. COLLIER: Well, Your Honor, it goes to the
18 relationship between ---

19 THE COURT: Why is the relationship between the
20 children and the decedent relevant?

21 MR. COLLIER: Well, Your Honor, I think it leads to
22 the damages in the case.

23 THE COURT: Why are the damages in the case at all
24 impacted by the relationship with these children?

25 MR. COLLIER: Because the father was absent for thirty

1 to forty years of their life.

2 THE COURT: So what? I mean, what, what I think you
3 ought to be saying and what I haven't heard you say yet is
4 that it goes to loss of companionship or something else of
5 that nature. You know, it's got to go to something that
6 they are seeking in this suit, and they are seeking damages
7 for the wrongful death of their decedent. That doesn't
8 depend on their relationship at all. That depends on
9 whether your asbestos was the cause of the mesothelioma
10 from which he ultimately expired.

11 Tell me what the relationship with the children has to
12 do with anything that is present in this law suit. What we
13 talked about before was other considerations. Now I'm on
14 what is really the key evidence question about this, which
15 is relevance, and I want to understand what this
16 relationship has to do with anything. It doesn't have
17 anything to do with his life expectancy, his mortality.
18 Some of these other things have to do with that. But this
19 is just his relationship with his children and they are
20 entitled.

21 You agree that they're entitled as beneficiaries to
22 bring the action that's being brought and benefit from the
23 verdict. So, what is the relevance of all this other stuff
24 other than to make him look bad?

25 MR. COLLIER: Well, when you said -- when, when I was

1 saying damages, I was referring to a loss of companionship
2 in that sense.

3 THE COURT: Are the children suing for loss of
4 companionship, Mr. Jekel?

5 MR. JEKEL: It's a wrongful death action, Your Honor.
6 So, I think that would include ---

7 THE COURT: Loss of companionship.

8 MR. JEKEL: --- loss of companionship.

9 THE COURT: Okay.

10 MR. JEKEL: And society.

11 THE COURT: All right.

12 MR. EARLY: Your Honor, there is a survival cause of
13 action, as I understand it, for his conscious pain and
14 suffering during the time after diagnosis before he passed
15 away, and there's also a wrongful death that -- benefit to
16 the, benefit to the children which would go to what their
17 father meant to them.

18 THE COURT: Okay.

19 MR. EARLY: And I think that clearly is ---

20 THE COURT: Well, that's what he should have argued to
21 ---

22 MR. EARLY: Okay. Sorry.

23 THE COURT: --- begin with. Loss of companionship is
24 -- the relationship is very relevant to that. That's all I
25 was asking is to have something on the record that

1 indicates what it's relevant to.

2 MR. HYLAND: Your Honor, I don't, I don't disagree
3 that the relationship is relevant, but the legal label that
4 we place on it is confusing to the extent that it, it
5 somehow says there's a diminished right or some diminished
6 companionship just because of these -- this adoption and
7 readoption.

8 THE COURT: We can solve that by charges to the jury
9 if it comes to that; let's see how it goes. If there's a
10 need to explain to the jury what the impact of a readoption
11 is on their rights, we can do that.

12 MR. HYLAND: All right, Your Honor.

13 THE COURT: So, I would deny that.

14 Now we got health condition of relatives, history of
15 disease in the plaintiff's family, including
16 cardiopulmonary, the health conditions, and causes of death
17 of relatives. I got to -- I tend to agree with you. I
18 can't understand what relevance that has got.

19 How about it, defense. Y'all explain to me what
20 relevance, or if you don't intend to offer it, that seems
21 to solves the problem.

22 MR. EARLY: Well, Your Honor, I don't know that. I
23 guess it depends on what the evidence is, but the medical
24 doctors, and I think their -- it's cited in literature,
25 says if somebody is predisposed to a cancer -- a cancer is

1 essentially a genetic mutation where bad cells form. If
2 they're predisposed ---

3 THE COURT: This is not an ordinary cancer.

4 MR. EARLY: I understand that.

5 THE COURT: This is a cancer that cannot be caused by
6 predisposition or anything else. It can be caused by one
7 thing and one thing only: asbestos.

8 MR. EARLY: That was my argument, Your Honor. So, if
9 that -- you're shooting down that argument, I've got
10 nothing else. That was my argument.

11 THE COURT: Okay.

12 MR. EARLY: It's relevant because predisposed to
13 cancer in general.

14 THE COURT: I mean, again the rulings I've made with
15 other conditions he suffered have to do with mortality, but
16 in terms of this thing which is predisposition to cancer, I
17 don't think that's going to have anything to do with what
18 we're talking about here. So, I would grant.

19 20.

20 MR. JEKEL: Your Honor, I think at this stage we're
21 going to withdraw the last motion *in limine*. I think that
22 we'll have ample opportunity to ---

23 THE COURT: Oh, that's your attack on their witnesses?

24 MR. JEKEL: Yes. Unduly speculative and unreliable.

25 THE COURT: This is all this chrysotile versus

1 amphibole and all that kind of thing?

2 MR. JEKEL: That and, and some of what Dr. Carlson or
3 Mr. Carlson may say.

4 THE COURT: Yes. I read that.

5 MR. JEKEL: We can raise that.

6 THE COURT: I read all of it. Thank you for
7 withdrawing that. It's a good thing.

8 Now, what else we got?

9 MR. JEKEL: The last, the last motion we filed is on
10 the late witness, Your Honor. I didn't know if you wanted
11 to take that up.

12 THE COURT: Yes. Let's go on and take that up now.
13 Let me see if I can find it.

14 MR. COLLIER: Can I get a copy of the motion because I
15 don't know that we even need to ---

16 MR. JEKEL: Well, if y'all aren't really going to call
17 him.

18 MR. GRAHAM: Your Honor, may I approach? May I
19 approach, Your Honor?

20 THE COURT: Certainly.

21 MR. COLLIER: Your Honor, may we have just a second to
22 discuss?

23 THE COURT: Thank you, Mr. Graham. Oh, I haven't seen
24 this.

25 MR. GRAHAM: You have or have not?

1 THE COURT: I have not.

2 MR. GRAHAM: Okay.

3 MR. COLLIER: Your Honor, may we have a couple minutes
4 to look at it as well because ---

5 THE COURT: Why certainly.

6 MR. COLLIER: --- this is the first time ---

7 MR. JEKEL: Your Honor, just for the record, it was
8 Friday, January 5th that we got identification of this
9 witness.

10 THE COURT: Oh, don't -- I'm not saying this is in a
11 critical way ---

12 MR. JEKEL: All right.

13 THE COURT: --- at all, Mr. Jekel.

14 MR. JEKEL: All right.

15 THE COURT: No. Don't feel like you're being
16 criticized, no.

17 We've got two things. This is the late-disclosed
18 witness, and then they've got contentions about
19 late-disclosed witnesses on the part of plaintiff, or has
20 that been resolved now?

21 MR. EARLY: Resolved.

22 THE COURT: Okay. So, in terms of late-disclosed
23 witness, what we've got is this one here. Okay, shall we
24 take about five minutes and let both sides look at this
25 material, and then we'll come back on the record.

1 MR. YOUNG: Yes, Your Honor, but, but we are deciding
2 what we are going to do, which could short-circuit that,
3 but we can do it when you come back.

4 THE COURT: All right. Well, this needs to be dealt
5 with, doesn't it?

6 MR. YOUNG: Well, not exactly. We -- Judge, given the
7 ruling you made on the bankruptcy trust, we don't need Mr.
8 Scarcella. I would just simply ask that if in the event
9 that something happens and you change your mind, that we be
10 able to -- this guy just talks about bankruptcy trust
11 claims, and he obviously wouldn't be testifying based upon
12 your rulings today.

13 THE COURT: Okay. Well, that solves that problem
14 then.

15 MR. JEKEL: Certainly. Okay.

16 THE COURT: I would certainly -- at least my present
17 intent is to stay with my ruling. So, that means that you
18 are withdrawing.

19 MR. YOUNG: Right.

20 THE COURT: Under duress and because I've made a
21 ruling you think is wrong.

22 MR. YOUNG: Well, I'm not going to say that. I don't
23 want to go to jail, but we're, we're withdrawing the
24 witness based upon your prior rulings today.

25 THE COURT: And reserving all your rights and so

1 forth, and that is certainly completely proper. Very good.

2 All right, now, that's all we've got. So, what we
3 have left, then, is to develop a script for how this case
4 will be tried, for lack of a better term. That is a
5 listing of all the witnesses, a listing of all the
6 exhibits, listing of all the testimony that's going to be
7 used from depositions or from video depositions, and I need
8 to know when -- the biggest thing is to get this list of
9 witnesses.

10 MR. JEKEL: Yeah.

11 THE COURT: That script, and I wonder because today is
12 the 9th. Can I have this by the next Friday?

13 MR. GRAHAM: Yes, Your Honor.

14 THE COURT: Not this coming Friday that we're looking
15 down the barrel of but the following Friday. Could both
16 sides ---

17 MR. GRAHAM: Yes, we can.

18 THE COURT: --- send me what they intend, and then we
19 can start having reaction from the other side, and I can at
20 the same time be looking at what is being said that is
21 going to be used.

22 MR. YOUNG: Judge, it would be extremely helpful if
23 they could give us their list, and then we give them our
24 list because our list is ---

25 THE COURT: I agree.

1 MR. YOUNG: --- is totally based upon their list.

2 THE COURT: I think that's reasonable. Today is
3 Tuesday. How about next Tuesday? By next Tuesday, Mr.
4 Jekel, how about you give me and your opposing counsel
5 y'all's list?

6 MR. JEKEL: The will-call list, Your Honor,
7 absolutely.

8 THE COURT: And then by -- could you as soon as next
9 Friday give me your list?

10 MR. YOUNG: Absolutely.

11 MR. COLLIER: Yes, Your Honor.

12 THE COURT: If it becomes a huge difficulty, you let
13 me know, but let's see if we can't at least have that
14 initial exchange, them saying who they want to use and you
15 saying who you're going to see, and then we'll know whether
16 there's any adjusting or comment back and forth about it
17 that we need to deal with. And then if that is done, I
18 would want pretty quickly to know how much video deposition
19 and so forth is going to be used so we can -- I want to get
20 some broad sense of how long this thing is going to take.

21 MR. GRAHAM: Your Honor, when I was a prosecutor,
22 often I would be in front of the judge and we'd have some
23 kind of a matter. I'd have five witnesses and they'd hold
24 up fifty less two. I feel like I'm sort of in that bucket
25 right here. I don't want to trot out, you know, all the

1 witnesses we have. You know, one's deceased. So, we're
2 going to pick, you know, maybe our best few.

3 THE COURT: Okay. Well, let's see what you come up
4 with. I'm trying to avoid just absolutely putting the
5 hammer down on exactly how many, but at the same time I
6 want us to come to some understanding about that before.
7 So, why don't you take a cut at it and let me see how
8 lengthy it is, and then we can decide where we're going
9 from there.

10 MR. JEKEL: Your Honor, in terms of videos, I do know
11 that we have the plaintiff's video testimony.

12 THE COURT: Okay, you got the plaintiff's video
13 deposition, and you're going to make those designations and
14 share them with the other side.

15 MR. JEKEL: We've already made them.

16 THE COURT: Great.

17 MR. JEKEL: And exchanged them.

18 THE COURT: So, you got that part designated. Then
19 you've got the day in the life, and you've going to cut
20 that down to something short. They may not agree with it,
21 but at least they're going to have some input on what it
22 will be, and we're going to try to do it in a way that
23 doesn't unfairly dramatize the situation. But you all will
24 take care of exchanging something with them as to what you
25 intend to use.

1 MR. JEKEL: Yes.

2 THE COURT: Now, how about ---

3 MR. JEKEL: There's, there's only one witness that may
4 appear as an expert witness that we did a *de bene esse*, Dr.
5 Arthur Frank.

6 THE COURT: Yes. I'm familiar ---

7 MR. JEKEL: That would be ---

8 THE COURT: --- with Dr. Frank.

9 MR. JEKEL: That would be the only one but as we go
10 over this list, Your Honor, if we would be -- if we feel we
11 don't need it, we may not use. So, we are definitely
12 taking Your Honor's advice to get to the nitty-gritty, get
13 the case in. So, we'll -- but that would be the extent of
14 it.

15 THE COURT: Okay and then, Will, you and your
16 colleagues will do the same thing.

17 MR. EARLY: Yes, ma'am.

18 THE COURT: And I'll just be honest with you. You
19 know, I'm talking to some extremely experienced trial
20 lawyers, and so y'all know probably better than I do, being
21 on the front lines every day now, but I sure did a lot of
22 trial work before I went to the bench, and I've done a fair
23 amount of it since I have come back to circuit service.
24 And it's my experience that targeting the jury with
25 something that they can manage and get their arms around

1 and understand leads to a lot more persuasive case on each
2 side than putting them through the agony and the ecstasy of
3 a very lengthy trial.

4 MR. JEKEL: I hear it from every juror I've ever
5 talked to.

6 MR. YOUNG: Your Honor.

7 MR. JEKEL: Shorter, shorter, shorter.

8 MR. YOUNG: Our two main experts, we have lined them
9 up luckily for Wednesday and Thursday of the second week.

10 THE COURT: Wonderful.

11 MR. YOUNG: So, I ---

12 THE COURT: And I think that's achievable. I think
13 all that's achievable.

14 MR. YOUNG: I just, I wanted Your Honor to know that
15 if we end up that Friday and it's our case and we're a
16 little short, if you cut us some slack.

17 THE COURT: Yes.

18 MR. YOUNG: Okay.

19 THE COURT: I'm sensitive to all that, and absolutely,
20 Mr. Young.

21 MR. YOUNG: Thank you, Your Honor.

22 THE COURT: Now, let me do some housekeeping here.
23 Jamie Rutkoski, my law clerk, do you have her information?

24 Jamie, speak and give them your email address, your
25 cell phone, and tell them you'll email them your phone

1 number in Judge Cooper's office.

2 MS. RUTKOSKI: Okay, my email is
3 GCooperLC@sccourts.org.

4 THE COURT: That is GCooperLC is G. Cooper, the other
5 trial judge she works for, law clerk. We did it a little
6 different in appellate circumstance about how law clerks
7 were designated, but that's what that means, @sccourts.org.
8 Cell phone.

9 MS. RUTKOSKI: 727-946-0804.

10 THE COURT: In terms of mailing, if there were any
11 need to mail anything, our P.O. Box 12456, 29211. In terms
12 of delivering stuff, it can either be delivered here to the
13 courthouse marked for suite or room 323. Or if you're
14 pressed for time and just want to drop it off at the
15 Calhoun Building where my office used to be, you can go
16 park on the circle and go right in there and drop it at the
17 guard's office or at the file window for the Court of
18 Appeals. I still get a lot of mail over there, and I check
19 with Mary every day just about for mail. So, either way
20 depending on -- because I know there are going to be things
21 you'll want to deliver or notebooks or this kind of thing.
22 So, any of that works.

23 MR. YOUNG: Your Honor, could I ask a couple of
24 questions?

25 THE COURT: Sure.

1 MR. YOUNG: Mr. Jekel has designated a lot of
2 testimony from Scapa corporate witnesses from other cases,
3 and we -- obviously it's an agent of an adverse party, so
4 assuming it's relevant, it would go in, but I think there
5 will be some objections to that and I -- and also it's been
6 a long time since we've tried a Scapa case and I ---

7 THE COURT: I know. I don't understand why you don't
8 settle it, but ---

9 MR. YOUNG: Well, we've never settled a case, Judge,
10 so we -- I just -- our problem -- but it looked to me like
11 there were some exhibits on an exhibit list that I hadn't
12 seen before, but it may just be that I've forgotten them.
13 But I anticipate we're going to have some document
14 objections and some objections to his page lines from the
15 Scapa rep. And I'm just wondering how Your Honor would
16 like us to ---

17 THE COURT: I want to know about that as quickly as
18 possible with ---

19 MR. JEKEL: Your Honor, if I might? The objections to
20 the page and lines were due January 22nd. They're in the,
21 they're in the order. We have worked well together in our
22 cases. We'll look at their objections. If a designation
23 -- those are generally -- rarely do we need the court
24 involvement on those.

25 THE COURT: Well, that, that's what I have found is

1 that most of the time, you end up working those things out.

2 MR. JEKEL: But there -- in this case, there may be a
3 few that we do require Your Honor's ruling on, but those
4 were due January 22nd or 26th? I can't remember. January
5 22nd.

6 THE COURT: Are due, right.

7 MR. JEKEL: The objections.

8 THE COURT: Well, again, the sooner y'all can work out
9 with each other what's happening -- and use me if you've
10 got to -- the better off we'll be. Well, let's just see
11 what you need.

12 My thinking, my thinking would be this. How I
13 generally handle this in trial, these things, is go on and
14 get started. You know, get up to York and begin the
15 selection of the jury. I don't know who will qualify the
16 jury. I've got to check with the other judges up if there
17 is -- there are some cases that are taking place in the
18 Moss Center, as well as in the historic courthouse, which
19 is where we're going to be. I've got to find out how
20 they're going to qualify the jury. I generally defer to
21 the local judges and let them qualify, although I've
22 qualified some down here in Richland, but if I'm in another
23 county, I generally defer to them and let them do that if
24 they've got more than one trial.

25 The venire is much bigger this time. Lynn Strait is

1 summonsing 300 people, so I'm confident that we will get a
2 yield sufficient to have all the jurors and alternates we
3 need. But my preference would be get the jury qualified as
4 quickly as possible, and I will send you what I know about
5 how that's going to take place, and you'll know where jury
6 qualification is taking place so you can have somebody
7 there to see what they answer. Then we would go into jury
8 selection as quick as we could that morning, and then begin
9 opening statements right after lunch is generally the way
10 I've done it. And then after that first day, we try to be
11 sensitive enough to dismiss the jury at some reasonable
12 hour and maybe take another little bit of time ourselves
13 with the jury gone to deal with some of these page
14 designations and things of that matter, and that would be
15 something we would continue every day. If we had some
16 things that needed to be dealt with, we'd try to do them so
17 as not to hold up the jury. That's the ideal. Sometimes
18 it can't work like that.

19 MR. YOUNG: Is there a limit on opening timewise?

20 THE COURT: Doesn't Gary have some kind of limitations
21 in his order?

22 MR. YOUNG: Is that the same as Judge Hill?

23 THE COURT: Judge Hill, doesn't Judge Hill have an
24 order that ---

25 MR. YOUNG: I think it's thirty minutes.

1 MR. EARLY: I think that's right, Your Honor. It's on
2 that exhibit.

3 THE COURT: It's thirty minutes a side? Is that what
4 he did?

5 MR. COLLIER: I think that's correct.

6 THE COURT: If y'all, if y'all feel constrained by
7 that and want to propose something different, just let me
8 know.

9 MR. JEKEL: Your Honor, I had proposed forty-five
10 minutes.. I would never -- I don't think I'd use all
11 forty-five minutes in an opening, but, but thirty minutes
12 is a little tight.

13 THE COURT: All right, will forty-five suit both
14 sides?

15 MR. YOUNG: Yes, Your Honor.

16 THE COURT: All right.

17 MR. YOUNG: He wouldn't give me handicap because I
18 talk so slow.

19 THE COURT: Okay, forty-five minutes a side, and y'all
20 can decide if you're going to reserve, plaintiff.

21 MR. YOUNG: Judge, we -- 9:00, is that when we
22 should...

23 THE COURT: Well, let me find out from Lynn Strait
24 when she has the jury there, and that will dictate when you
25 all want to be there and where that's going to take place,

1 whether that's going to be in the historic courthouse or in
2 York -- I mean, in the Moss Center..

3 MR. YOUNG: All right.

4 THE COURT: So, I'm going to get out all that detail
5 for you, either Jamie will. One of the two of us will let
6 you know about all that.

7 MR. GRAHAM: Your Honor, my last conversation with Ms.
8 Strait was it was at the historic courthouse.

9 THE COURT: Good. Well, that's much simpler for us.

10 MR. EARLY: That's where the trial will be. She's
11 talking about jury qualifications.

12 MR. GRAHAM: Oh, jury qualification.

13 THE COURT: I know where the trial is, but it's where
14 the jury qualification is, and I don't know that, but Jamie
15 and I are going to go up there sometime fairly soon and
16 kind of get the lay of the land, see what all the scoop is
17 about everything, and we'll let you all know what we find
18 out.

19 Anything else for the good of the order?

20 MR. GRAHAM: No, Your Honor. Thank you.

21 THE COURT: I just want to say right now it is such a
22 pleasure to deal with such professionals. In the most --
23 in the main, I've just been so lucky to have people just
24 like the six of you that are very professional, know what
25 they're doing, and try to do the best job they can. Very

1 few clinkers but when you have a clinker, it tends to
2 underline how nice it is to have y'all in the courtroom
3 treating each other with respect and civility. I
4 appreciate it so much, and if there's anything I've said
5 that leads you to believe I'm frustrated, mad with you, or
6 anything else, just chalk it up to old age and a little bit
7 of tiredness. I respect all of you very much.

8 **--- END OF TRANSCRIPT OF RECORD ---**

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR YORK COUNTY, SOUTH CAROLINA, ON THE
9TH DAY OF JANUARY, 2018.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/s/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JANUARY 20TH, 2018