

The State of South Carolina  
In the Court of Appeals

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Appeal from York County  
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

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Appellate Case No. 2019-000649  
Case No. 2013-CP-46-00368

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SC Court of Appeals

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

v.

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

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Final Reply Brief of Appellant

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TABLE OF CONTENTS

Table of Authorities.....ii

Argument.....1

1. Scapa’s challenge to the admissibility of the Plaintiff’s experts’ causation testimony is not waived.....1

2. The scientifically-unreliable cumulative exposure testimony given by Plaintiff’s experts amounts to no evidence of specific causation.....2

    A. Plaintiff’s experts offered “any exposure” testimony under a different name—“cumulative exposure.”.....3

3. The trial court abused its discretion in granting Plaintiff’s motion for a new trial nisi additur.....10

4. The trial court abused its discretion in allocating settlement proceeds.....13

5. The trial court abused its discretion when it denied admission of Mr. Stewart’s bankruptcy claims against other manufacturers of asbestos-containing products.....14

    A. Scapa properly proffered the excluded evidence and preserved the issue for appeal.....15

    B. The trial court’s exclusion of the bankruptcy claim forms and testimony of Scarcella was prejudicial.....17

    C. The trial court erred by excluding Plaintiff’s bankruptcy claim forms and the testimony of Scarcella.....19

Conclusion.....22

TABLE OF AUTHORITIES

CASES

*Adams v. Leamon*,  
No. E2012-01520-COA-R3-CV, 2013 WL 6198306 (Tenn. Ct. App. Nov. 25,  
2013).....12

*Butler v. Union Carbide Corp.*,  
310 Ga.App. 21, 712 S.E.2d 537 (2011).....6

*Church v. McGee*,  
391 S.C. 334, 705 S.E.2d 481 (Ct. App.2011).....17

*ClearOne Commc’n, Inc. v. Biamp Sys.*,  
653 F.3d 1163 (10<sup>th</sup> Cir. 2011).....11, 12

*Dimick v. Schiedt*,  
293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935).....12

*Fisher v. Pelstring*,  
817 F. Supp.2d 791 (D.S.C. 2011).....8

*Green v. Fritz*,  
356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003).....11

*Harper v. Bolton*,  
239 S.C. 541, 124 S.E.2d 54 (1962).....12

*Haskins v. 3M Co.*,  
No. 2:15-CV-02086-DCN, 2017 WL 3118017 (D.S.C. July 21, 2017).....5

*Henderson v. Allied-Signal, Inc.*,  
373 S.C. 179, 644 S.E.2d 724 (2007).....3, 8

*In re Toyota Moto, U.S.A., Inc.*,  
56 Tex. Sup. Ct. J. 1007, 407 S.W.3d 746 (Tex. 2013).....1

*Krik v. Owens-Illinois, Inc.*,  
No. 10-CV-07435, 2015 WL 5050143 (N.D. Ill. Aug. 25, 2015).....4

*Machin v. Carus Corp.*,  
419 S.C. 527, 799 S.E.2d 468 (2017).....14, 20

<i>Maritime Overseas Corp. v. Ellis</i> , 41 Tex. Sup. Ct. J. 683, 971 S.W.2d 402 (Tex. 1998).....	1
<i>Moeller v. Garlock Sealing Techs., LLC</i> , 660 F.3d 950 (6th Cir. 2011).....	4
<i>Nestler v. Field</i> , 426 S.C. 34, 824 S.E.2d 461 (Ct. App.2019).....	10
<i>Rawlinson Rd. Homeowners Ass'n, Inc. v. Jackson</i> , 395 S.C. 25, 716 S.E.2d 337 (Ct. App.2011).....	16
<i>Riley v. Ford Motor Co.</i> , 414 S.C. 185, 777 S.E.2d 824 (2015).....	13
<i>Rost v. Ford Motor Co.</i> , 637 Pa. 625, 151 A.3d 1032 (2016).....	8
<i>Smith v. Ford Motor Co.</i> , No. 2:08-CV-630, 2013 WL 214378 (D. Utah Jan. 18, 2013).....	4
<i>Smith v. Tiffany</i> , 419 S.C. 548, 799 S.E.2d 479 (2017).....	14, 16, 19
<i>State v. Hill</i> , 331 S.C. 94, 501 S.E.2d 122 (1998).....	1
<i>State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.</i> , 414 S.C. 33, 777 S.E.2d 176 (2015).....	16
<i>Suoja v. Owens-Illinois, Inc.</i> , 211 F. Supp. 3d 1196 (W.D. Wis. 2016).....	6
<i>Waring v. Johnson</i> , 341 S.C. 248, 533 S.E.2d 906 (Ct. App.2000).....	10
<i>Welch v. Epstein</i> , 342 S.C. 279, 536 S.E.2d 408 (Ct. App.2000).....	13, 14
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 497 S.E.2d 731 (1998).....	17
<i>Yates v. Ford Motor Co.</i> , 113 F. Supp. 3d 841 (M.D. Fla. 2016).....	6

**STATUTES AND RULES**

S.C. Code § 15-38-15(D).....14, 19

Rule 50, SCRCP.....17

Rule 401, SCRE.....22

Rule 402, SCRE.....22

Rule 403, SCRE.....2, 6, 8

## ARGUMENT

### 1. **Scapa's challenge to the admissibility of the Plaintiff's experts' causation testimony is not waived.**

Plaintiff's waiver argument is without merit. The reason South Carolina courts have held that a pre-trial ruling on admissibility of evidence does not to preserve error is that it is a preliminary ruling "and is subject to change based on developments at trial." *State v. Hill*, 331 S.C. 94, 100, 501 S.E.2d 122, 125 (1998). Here, the absence of a reliable scientific basis for Plaintiff's experts' causation testimony was not subject to change based on developments at trial. Their cumulative exposure testimony was either scientifically reliable, or it was not—no matter what developed at trial.

Like South Carolina, Texas courts hold that a ruling on a motion in limine does not preserve error; a party must object again, at trial, to the challenged testimony to preserve error. *In re Toyota Motor, U.S.A., Inc.*, 56 Tex. Sup. Ct. J. 1007, 407 S.W.3d 746, 760 (Tex. 2013). But the Texas Supreme Court has held that when it comes to a complaint "that scientific evidence is unreliable, and thus, no evidence, a party must object to the evidence *before trial or when the evidence is offered.*" *Maritime Overseas Corp. v. Ellis*, 41 Tex. Sup. Ct. J. 683, 971 S.W.2d 402, 409 (Tex. 1998). A pre-trial objection suffices because, unlike testimony that might later become admissible based on developments at trial, scientifically unreliable testimony can never become admissible. Thus, an objection and ruling before trial is sufficient to preserve error. *Id.*

The law does not require a pointless, vain act, such as renewing a challenge to the scientific reliability of expert testimony at trial after the trial court has already ruled that it will admit the testimony. Scapa's motions to exclude the causation testimony of Plaintiff's experts raised the same challenges Scapa is now raising on appeal—that Plaintiff did not introduce legally sufficient evidence of causation. Those motions, and the trial court's ruling denying those motions (01/09/18 Tr. at 117), preserved the trial court's error in denying Scapa's motion for judgment n.o.v. despite the legally insufficient evidence of causation.

**2. The scientifically-unreliable cumulative exposure testimony given by Plaintiff's experts amounts to no evidence of specific causation.**

Dr. Frank and Mr. DePasquale relied on the cumulative exposure theory for their opinions that alleged exposure to asbestos from Scapa dryer felts caused Mr. Stewart's mesothelioma. These opinions are inadmissible under Rule 403 of the South Carolina Rules of Evidence. Further, Plaintiff's arguments fail to resolve two important deficiencies in his experts' opinions—first, the opinions were not connected to evidence of Mr. Stewart's actual exposure to asbestos from Scapa's products, and second, the opinions conflict with the legal standard for asbestos exposure cases in South Carolina.

At its simplest level, Plaintiff's expert testimony went as follows: (i) elicit testimony that there is no safe level of asbestos exposure, and that every exposure contributes to the development of mesothelioma; and (ii) ask whether Scapa was part of a cumulative dose that caused the disease. This expert testimony conflicts with the controlling legal standard. Plaintiff was required to prove that Scapa's

product was a *substantial* factor in Mr. Stewart's development of mesothelioma, not merely a factor. See *Henderson v. Allied-Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). Thus, this Court should hold that the trial court improperly admitted the specific causation testimony of Plaintiff's experts. Without the expert opinions, Plaintiff failed to prove causation, and Scapa was entitled to JNOV.

**A. Plaintiff's experts offered "any exposure" testimony under a different name—"cumulative exposure."**

Plaintiff insists that that his experts did not espouse an "each and every exposure" theory of causation under the moniker of a "cumulative exposure" theory. Not so. Mr. DePasquale testified that Scapa's dryer felts were a cause of Mr. Stewart's disease even though he admitted that he had "not calculated what I would expect his dose of asbestos would be from Scapa dryer felts." (Tr. 478, l. 15-23, R.p.885). Dr. Frank likewise relied on an "each and every exposure" theory while referring to it in terms of a cumulative dose:

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.

(4/9/15 Dr. Arthur Frank Depo., p. 35, l. 22 – p. 36, l. 1, R. pp. 2210-2211; p. 52, l. 1-4, R. p.2212; p. 52, l. 11 – p. 53, l. 11, R. pp. 2212-2213).

In other words, because Plaintiff's experts cannot rule out any exposure, they choose to rule every exposure *in—thus, every* exposure contributes to causing mesothelioma. This is directly at odds with *Henderson*—which requires proof of regular, frequent, and proximate exposure to a specific defendant's products for that defendant to be liable. 373 S.C. at 185, 644 S.E.2d at 727. Further, Plaintiff's experts' views have been thoroughly rejected in numerous courts. *See, e.g., Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950,955 (6th Cir. 2011); *Krik v. Owens-Illinois, Inc.*, No. 10-CV-07435, 2015 WL 5050143, at \*1 (N.D. Ill. 2015);

*Smith v. Ford Motor Co.*, No.2:08-CV-630, 2013, WL 214378, at \*2 (D. Utah Jan. 18, 2013).

Plaintiff argues that a foundational scientific principle is that every exposure to asbestos contributes to a person's cumulative dose, and that cumulative dose becomes a substantial factor in his development of mesothelioma. (Resp. Br. at 16). He insists this supposed scientific fact must be considered in determining causation. This supposed scientific fact, however, cannot be used to usurp the operative legal standard for causation. Plaintiff's approach is wrong as a matter of law because it focuses on the cumulative cause, not the responsibility of the individual defendant. Courts in South Carolina and elsewhere have repeatedly rejected attempts by plaintiffs to rely upon the "each and every exposure" opinion in a case.

In *Haskins v. 3M Co.*, No. 2:15-CV-02086-DCN, 2017 WL 3118017 (D.S.C. July 21, 2017), Judge Norton rejected this very argument about the scientific fundamentals of the "every exposure" theory. Judge Norton noted that the scientific theories that "mesothelioma may result from very small exposures" and that "there is no safe level of asbestos exposure" is "fairly uncontroversial." *Id.* at \*5. He explained "the court is convinced that these basic principles find enough support in the scientific literature that any attempt to challenge them would not disturb their reliability." *Id.* Even if those statements are scientifically valid, however, that is not sufficient to establish the admissibility of an expert's opinion.

*Id.* at \*6 (“Regardless of whether this is sound science, it is inconsistent with the law.”).

Judge Norton emphasized that causation must be analyzed on a defendant-specific basis and that “the basic assertion that ... exposure was significantly above ambient asbestos levels \* \* \* did not speak to the severity of [the plaintiffs’] exposure to [the defendant’s product].” *Id.* (alterations in original). Because the expert’s opinions evaluated causation in a manner inconsistent with the legal standard, the opinions were “essentially irrelevant, and any probative value they may have is easily outweighed by their tendency to confuse or mislead the jury.”<sup>6</sup> *Id.* Therefore, the expert’s opinions were inadmissible under Rule 403. *Id.* at \*8; *see also Butler v. Union Carbide Corp.*, 310 Ga.App. 21, 29, 712 S.E.2d 537, 544 (2011) (excluding “cumulative dose” opinion for its lack of scientific validity and other factors); *Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196, 1207 (W.D. Wis. 2016) (refusing to rely on Dr. Frank’s testimony, citing its numerous methodological shortcomings). This Court should likewise reject this effort to circumvent the proper legal causation standard.

Plaintiff contends that Scapa wants the Court to adopt a standard requiring a plaintiff to prove the exact dose of exposure. (Resp. Br. 16). This is a misrepresentation of Scapa’s arguments. Scapa is not arguing that Plaintiff had to exactly quantify Mr. Stewart’s exposure to asbestos. Plaintiff was, however, required to show—in accordance with the proper legal standard for causation—the connection between the amount of Mr. Stewart’s exposure *from Scapa dryer felts*

and Mr. Stewart's development of mesothelioma. *See Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 850 (M.D. Fla. 2016) ("To prove that a given injury was caused by exposure to a specified substance, a plaintiff must demonstrate the levels of exposure that are hazardous to human beings generally, *and* the plaintiffs' actual level of exposure.") (emphasis added). Thus, Plaintiff was required to prove that Mr. Stewart's exposure to asbestos from Scapa dryer felts was within a range sufficient to cause his mesothelioma. *Id.* ("[T]here must be a showing that the plaintiffs' level of exposure is comparable to the levels of exposure that are hazardous as a general matter.").

The court in *Yates* explained that an exact quantification of a plaintiff's exposure is not required; instead, "qualitative' evaluations of asbestos exposures may also be used to establish the appropriate levels which science has shown to be hazardous, and which plaintiff has experienced." *Id.* at 851. The caselaw provides that plaintiffs have flexibility in establishing the "levels of exposure that are hazardous to human beings generally" and drawing comparisons with the levels of exposure experienced by the plaintiff. Yet the flexibility afforded to plaintiffs does not relieve them of the burden to establish these levels and comparisons through application of methodologies meeting the standards for reliable testimony." *Id.* at 852. Thus, Plaintiff had to prove a range of exposures that cause mesothelioma and prove that Mr. Stewart's exposure to Scapa dryer felts fell within that range. He did not do so.

Plaintiff is attempting to make an end run around this requirement by showing every exposure causes mesothelioma and, therefore, whatever exposure Mr. Stewart had to asbestos from Scapa dryer felts caused his mesothelioma. Plaintiff makes this attempted end run because he did not satisfy the proper causation standard. Plaintiff's experts' opinions are unreliable and inadmissible under Rule 403 of the South Carolina Rules of Evidence and should have been excluded. Without expert testimony, Plaintiff cannot meet his burden to prove causation, and Scapa was entitled to JNOV.

Plaintiff also attempts to collapse his experts' causation opinions into the *Henderson* standard. Expert causation and the *Henderson* standard, however, are separate standards. *Henderson* does not address expert testimony. The expert testimony requirement instead comes from the general and specific causation requirements in toxic tort cases generally. *Fisher v. Pelstring*, 817 F. Supp. 2d 791, 814 (D.S.C. 2011). Thus, two separate requirements exist. A plaintiff must prove: (i) regular, frequent, and proximate exposure, and (ii) general and specific causation.

In *Rost v. Ford Motor Co.*, a 3-2 decision that Plaintiff relies on as supporting the admissibility of his experts' opinions (Resp. Br. at 19), the majority found Dr. Frank's opinion admissible because—although he testified that every exposure contributes to a plaintiff's cumulative dose—he did not testify that every exposure is a “substantial factor” in causing the plaintiff's mesothelioma. 637 Pa. 625, 151 A.3d 1032, 1045-46 (2016). Two dissenting justices disputed the majority's

reasoning, explaining Dr. Frank's theory "is fundamentally inconsistent with the legal requirement of substantial-factor causation." *Id.* at 1058 (Saylor, C.J., dissenting). The dissenting justices explained that Dr. Frank's theory collapses the legal standard and the general and specific causation requirement into a confusing and speculative opinion that the defendant substantially caused the plaintiff's mesothelioma. *Id.* at 1059-63.

The *Rost* case demonstrates the confusing and misleading nature of the "cumulative dose" theory espoused by Dr. Frank. The experts explain to the jury that "every exposure counts" and "all exposures make up the cumulative dose" while carefully avoiding any statement that every exposure is the *legal* cause of a plaintiff's mesothelioma. *Id.* at 1060. However, the experts never explain how they determine whether a specific exposure is "substantial," and often—similar to this case—never attempt to calculate the amount of the plaintiff's exposure. *Id.* at 1060, 1062.

Instead, the experts simply respond to a general hypothetical question by asserting their belief that any exposure related to the defendant was substantially causative. *Id.* at 1060. The expert's hypothetical answer is, in the words of Chief Justice Saylor, a "reaffirmation[] of his other opinions on general and specific causation, i.e., that 'all [exposures] contributed.'" *Id.* (second alteration in original). Thus, "the basis for Dr. Frank's opinion concerning substantial-factor causation is not materially distinguishable from his other opinions concerning general and specific causation, i.e., that every exposure counts." *Id.* at 1063.

Here, Plaintiff's experts testified that every exposure contributes to a person's cumulative dose and is therefore a cause of his mesothelioma. The experts did not explain how they arrived at the decision that Mr. Stewart's exposure to asbestos from Scapa dryer felts was sufficient to be a substantial cause of his mesothelioma. Thus, they never materially distinguished their legal or specific causation opinions from their general causation opinions. The jury heard what Plaintiff wanted it to hear—every exposure to asbestos causes mesothelioma; therefore, any exposure Mr. Stewart had to Scapa's dryer felts caused his mesothelioma. This testimony is insufficient as a matter of law to affix liability. Thus, Scapa was entitled to JNOV.

**3. The trial court abused its discretion in granting Plaintiff's motion for a new trial nisi additur.**

Had the jury's award of survival damages been less than Mr. Stewart's medical expenses or failed to account for pain and suffering at all, then the trial court would have been justified in granting additur. *Nestler v. Field*, 426 S.C. 34, 41, 824 S.E.2d 461, 465 (Ct. App. 2019). For example, in *Waring v. Johnson*, this Court held that the trial court properly granted additur for a plaintiff injured in a car wreck where the jury's damage award was in the exact amount of the plaintiff's medical bills and there was evidence she suffered pain and her lifestyle was changed by the accident. 341 S.C. 248, 261, 533 S.E.2d 906, 913 (Ct. App. 2000). But when, as here, the original damage award exceeds the medical expenses by nearly three times, there is no compelling reason for a trial court to "impose its will on the parties and invade the jury's domain." *Nestler*, at 41.

Further, “if inapplicable grounds are given for granting additur, the order fails by error of law.” *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003). Here, at the hearing on the motion for new trial nisi additur, the trial court speculated that the jury’s damage awards may have been affected by the “empty chair” evidence presented at trial:

Ladies and gentlemen, I have struggled mightily with this issue of additur. This was a very discerning jury, and I stand by the observations that were made at the time. I haven’t seen a more attentive jury in my very lengthy time in practice, both as a trial practitioner as well as an appellate judge and now a trial judge.

But one thing that presents some difficulty in this case is the empty chair, which was argued very, very heavily in this case. And, really, the empty chair, and I charged the jury this way, is not a doctrine that has any impact on the award of damages. The empty chair is a focus on who is responsible—what entity or who is responsible for the injury suffered by plaintiff. It’s a liability doctrine.

And the defendant, even when both parties are no longer in the case or never were in the case may argue it, if the evidence supports it, that entities mentioned the during the course of the trial or discussed during the trial or evidence presented during the trial were responsible for the injury and not the defendant who is before the jury.

And that was argued, but the jury asked a lot of questions about this issue. And, again, I attempted to make a distinction between the empty chair as a function of liability and damages. And I tried to stick very close to what our court has said in that regard, and the charges that I gave are charges that reflect the language that the court has given us to use as trial judges.

(July 11, 2018 Post-Trial Motions Tr. p. 23, l. 15 – p. 24, l.21, R. pp. 1669-1670)

Speculation that a jury’s damage award may have been higher in the absence of a defendant invoking an “empty chair” defense is not a compelling reason for invading the jury’s province. *See ClearOne Commc’n, Inc. v. Biamp Sys.*, 653 F.3d 1163,

1179 (10th Cir. 2011) (observing that courts have refused to indulge speculation that jury improperly apportioned damages).

The trial court's discretion to grant additur here was not so broad as to permit a 67% increase in the jury's award for unliquidated survival damages. As courts elsewhere have concluded with respect to additur and remittitur, an adjustment of 70 percent is "so large as to destroy the jury's verdict." *Adams v. Leamon*, No. E2012-01520-COA-R3-CV, 2013 WL 6198306 (Tenn. Ct. App. 2013). The jury's award for 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 trial court should have left the amount of damages to be awarded for pain and suffering to the judgment of the jury. *See Harper v. Bolton*, 239 S.C. 541, 548, 124 S.E.2d 54, 57 (1962).

Finally, the Court should bear in mind that "[w]here the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence." *Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603 (1935). On the other hand, "where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict." *Id.* As such, a court-imposed increase of damages encroaches on the defendant's right to a jury trial. *ClearOne*

*Comm'n*, 653 F.3d at 1179. For that reason, a trial court's decision to invade the jury's province and grant additur should be rare and must be supported by extremely compelling reasons. The trial court's additur here was a clear and palpable abuse of discretion.

**4. The trial court abused its discretion in allocating settlement proceeds.**

The allocation of settlement proceeds between survival and wrongful death claims in this case does not reflect "fairness and justice." *Welch v. Epstein*, 342 S.C. 279, 313, 536 S.E.2d 408, 425 (Ct. App. 2000). Plaintiff contends that Scapa's argument that the allocation must be reasonable under the facts is a "standard for which there is no legal authority." (Resp. Br. at 33). On the contrary, however, the court in *Riley* affirmed the allocation because it was "unquestionably reasonable under the facts." *Riley v. Ford Motor Co.*, 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015). The allocation here is not reasonable under the facts.

Scapa is not, as Plaintiff contends, relying on a pure "percentage analysis." Rather, Scapa's analysis is based on the facts of the case. The trial court found no reason to increase the jury's award of \$100,000 for the wrongful death damages, given Stewart's limited relationship with his wrongful death beneficiaries. But the court concluded that the evidence concerning Mr. Stewart's pain and suffering warranted a 67% increase in the amount of survival damages the jury awarded—from \$600,000 to \$1,000,000. Thus, the court was of the view that the evidence supported a finding that it was reasonable and appropriate for a fraction of the total damages to be awarded for the wrongful death claim and reasonable and appropriate for the vast majority of the total damages to be awarded for Mr. Stewart's medical bills and pain

and suffering.

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. After all, in *Riley*, the Supreme Court held that allocating 75% of the settlement to the plaintiff's survival claim was appropriate due to "the evidence in the record of Riley's conscious pain and suffering." *Id.* at 196. Here, too, given the trial court's own view of the evidence of Mr. Stewart's pain and suffering, a substantial majority of the settlement amount should be allocated to the survival claim, just as it was in *Riley*.

If the requirement that a settlement allocation reflect "fairness and justice"—as this Court stated in *Welch v. Epstein*—means anything, the allocation here must be adjusted. Courts should not wash their hands of reviewing settlement allocations with the rationalization that it is perfectly fine for a party to allocate in a manner that best serves their interests even when the evidence demands a different allocation.

**5. The trial court abused its discretion when it denied admission of Mr. Stewart's bankruptcy claims against other manufacturers of asbestos-containing products.**

As noted in Scapa's initial brief, the trial court ignored South Carolina statutory law, S.C. Code § 15-38-15(D), and the Supreme Court's rulings in *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017), and *Machin v. Carus Corp.*, 419 S.C. 527, 799 S.E.2d 468 (2017), when the court broadly disallowed all evidence proffered by

Scapa in support of the “empty chair” defense. . . (1/9/18 Pretrial Hearing Transcript, pp. 93, l. 21 – 99, l. 6, R. pp. 325-331).

**A. Scapa properly proffered the excluded evidence and preserved the issue for appeal.**

Plaintiff’s first argument on this issue is that Scapa somehow failed to preserve the issue for appeal. Plaintiff’s Brief, Pages 34-35. In fact, Scapa did all that was required to preserve this issue for appeal and did so in every phase of the trial. Scapa filed a pretrial motion *in limine* to admit all of the bankruptcy claim forms. (Defendant SCAPA Waycross, Inc.’s Motion *in Limine* to Admit Bankruptcy Claim Forms as Admissions of a Party-Opponent.) The motion *in limine* argued that the evidence should be allowed as an admission of a party-opponent under South Carolina Rule of Evidence 803(d)(2). At the pretrial hearing, counsel for Scapa argued that the bankruptcy forms should be allowed as an admission against interest. (1/9/18 Pretrial Hearing Transcript, pp. 90, l. 13 – 92, l. 7, R. pp. 322-324).

In response, the trial court broadly excluded all evidence supporting Scapa’s “empty chair” defense, including bankruptcy forms filed by Plaintiff and expert testimony by Marc Scarcella explaining the meaning of the forms. (1/9/18 Pretrial Hearing Transcript, pp. 93, l. 21 – 99, l. 6, R. pp. 325-331). The trial judge also refused to compel Plaintiff to produce complete claim forms submitted to other bankruptcy trusts. (1/9/18 Pretrial Hearing Transcript, pp. 99, l. 8 – 100, l. 25, R. pp. 331-332).

The judge reiterated the exclusion of the bankruptcy claim forms both before trial and during Scapa’s case. (1 Tr. 109-111, R. pp. 516-518; 1 Tr. 113-114, R. pp. 520-521; 2 Tr. 318-324, R. pp. 1470-1476; Defendant’s Exhibits No. 1, 2, 5, and 12, R.

pp. 1710-1714, 1715-1716, 1717-2020, 2021-2030). During Plaintiff's case, the court ruled that the bankruptcy claim forms could not come in under the "empty chair" defense and also held "nor would [the claim forms] meet the test of admission of a party component [sic] sufficient to allow its admission into evidence to prove the empty chair as to Leslie or A.P. Green." (1 Tr. pp. 109, l. 24 – 110, l. 1, R. pp. 516-517). The forms and testimony were allowed as a proffer and offer of proof both during Plaintiff's case, (1 Tr. p. 113, l. 10 – 25, R. p. 520), and at the end of trial. . . (2 Tr. p. 318-324, R. pp. 1470-1476).

Similarly, at the end of the trial, the trial judge made clear that her exclusion of the bankruptcy trust forms was based on a broad array of law and legal issues as she understood them:

I excluded the witness on the motion in limine phase primarily because the bankruptcy trust information as I think precluded from introduction by *Smith v. Tiffany* and by other rulings that have been made about the propriety of the use of bankruptcy trust information even beyond *Smith v. Tiffany* in asbestos and mesothelioma litigation. It's not been viewed as proper, just as the information about worker's comp or insurance or other payments to other defendants is not appropriate because of a combination of our rulings by South Carolina Supreme Court and general rulings about the use of bankruptcy trust information all around the country.

(2 Tr. p. 320, l. 16 – 321, l. 2, R. pp. 1472-1473).

In order to preserve for appeal the trial court's exclusion of evidence, a party need only present the evidence and make a proffer of the excluded evidence. *See, e.g., State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 414 S.C. 33, 66, 777 S.E.2d 176, 193 (2015); *Rawlinson Rd. Homeowners Ass'n, Inc. v. Jackson*, 395 S.C. 25, 37, 716 S.E.2d 337, 344 (Ct. App. 2011). Contrary to Plaintiff's contention,

there is no need to re-raise evidentiary issues in a post-trial motion when the court has already ruled on the issue. “Post-trial motions are not necessary to preserve issues that have already been ruled on; they are used to preserve those that have been raised to the trial court but not yet ruled on by it.” *Church v. McGee*, 391 S.C. 334, 347, 705 S.E.2d 481, 488 (Ct. App. 2011) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998)).

In any event, Scapa did, in fact, argue in favor of the admission of the bankruptcy trust forms and make the proffer at the end of the trial. . . In addition, counsel for Scapa moved for a directed verdict and JNOV under Rule 50, SCRPC:

MR. EARLY: Thank you, Your Honor. If the Court will remember, we broke Friday afternoon. And under Rule 50, you summarily denied our directed verdict motion at that time, both myself and Mr. Jekell's directed motions we hastily made at that time for scheduling. So, again, I'm not waiving anything that could have been done Friday. We're here to close both of our cases now. Under Rule 50, I'm renewing that, renewing all objections we made for preservation and also making my full motion under Rule 50 at this time.

(2 Tr. p. 327, l. 15-24, R. p. 1479). This summary was followed by extensive argument concerning the elements of each cause of action Plaintiff had to prove, including causation. (2 Tr. pp. 327-333, R. p. 1479-1485). In short, Scapa adequately preserved this issue for review.

**B. The trial court's exclusion of the bankruptcy claim forms and testimony of Scarcella was prejudicial.**

Despite the trial court's clear ruling that “in no direct or indirect way am I going to allow other claims and other potential claimants,” Plaintiff contends that the trial court did in fact allow evidence of Decedent's exposure. This is not the case.

Plaintiff cites to portions of the trial transcript where Scapa's counsel and various witnesses referenced Mr. Stewart's exposure to a multitude of asbestos-containing products, including insulation, but at no point was Scapa allowed to actually introduce documentary evidence of that exposure.

The transcript and arguments cited above amply demonstrate the trial court's position and ruling on this issue. Scapa was not allowed to present any documentary evidence of Mr. Stewart's exposure to other asbestos-containing products. Scapa was allowed to question witnesses about the presence of other products, but that was all.

The importance of the excluded documents, and in particular the bankruptcy claim forms, cannot be understated. The claim forms were filed by Plaintiff himself and admitted exposure to many other asbestos-containing products, including insulation products.<sup>1</sup> Scapa's excluded expert, Marc Scarcella, was Scapa's primary witness regarding Mr. Stewart's exposure to other asbestos-containing products and Plaintiff's 38 proof of claim forms submitted to a variety of bankruptcy trusts for recovery. Scarcella would have explained to the jury precisely what these claim forms meant, including testimony that Plaintiff had admitted exposure to asbestos-containing products manufactured by A.P. Green and Leslie Controls. (Scarcella Report, Page 6, Exhibit No. 12, R. 2021-2030 (proffered)). None of this evidence or testimony was allowed.

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<sup>1</sup> It bears repeating that Scapa was not attempting to introduce evidence of the claim amounts made by Plaintiff, only that the claims were made. . . Thus, the evidence did not invade set-off issues to be handled by the trial judge following the verdict.

In addition, Plaintiff's argument that the exclusion of this evidence was not prejudicial ignores the fact that Scapa's primary defense in this matter was the causation of Mr. Stewart's illness and death. Evidence of exposure to other products, most of which contained vastly greater amounts of asbestos and amphibole forms of asbestos, is clearly relevant to the issue of causation. This is especially true in light of the minimal evidence of Mr. Stewart's exposure to Scapa's products in contrast to his massive and regular exposure to the other entities' products.

So, even though Scapa's counsel was allowed to reference other manufacturers, Scapa was not allowed to present documentary evidence of Mr. Stewart's admitted exposure to other products and was not allowed to present Scapa's expert witness on Mr. Stewart's exposure to other products. . . Given the central issue of causation in this trial, such exclusion of evidence was clearly prejudicial to Scapa, entitling Scapa to a new trial.

**C. The trial court erred by excluding Plaintiff's bankruptcy claim forms and the testimony of Scarcella.**

Both South Carolina law, S.C. Code § 15-38-15(D), and the Supreme Court's rulings in *Tiffany* and *Machin*, allow the admission of documents and expert testimony in support of the "empty chair" defense. The trial court's exclusion of all documentary evidence of Mr. Stewart's regular exposure to asbestos-containing products

manufactured by other entities and the exclusion of Scapa's expert on the issue<sup>2</sup> resulted in tremendous prejudice to Scapa, which was denied a key defense that is explicitly guaranteed under South Carolina law. S.C. Code § 15-38-15(D).

Like the trial court, Plaintiff's argument fundamentally misinterprets the South Carolina Supreme Court's rulings in *Tiffany* and *Machin*. Plaintiff argues that the two opinions allow the assertion of the empty chair defense, but somehow do not allow a party to present evidence in support of this defense. Needless to say, a right with a remedy is no right at all. The Supreme Court's allowance of the empty chair defense means nothing if it is not accompanied by the allowance of evidence in support of that defense. As much as Plaintiff would like to remove the evidentiary teeth of the empty chair defense, that is clearly not what the Supreme Court intended.

The South Carolina legislature has made clear that a defendant is allowed to present the empty chair defense. S.C. Code Ann. § 15-38-15(D) ("A defendant shall retain the right to assert that *another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.*") (emphasis added). Likewise, the South Carolina Supreme Court made clear that defendants are allowed to present the empty chair defense. *Smith*, 419 S.C. at 557, 799 S.E2d at 484.

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<sup>2</sup> Plaintiff does not even attempt to justify the exclusion of Marc Scarcella's testimony in his Brief. . . Plaintiff's Appellate Brief, Pages 38-41.

More to the point, the Supreme Court in *Machin* explicitly rejects Plaintiff's argument that Scapa only has a right to "assert" the empty chair defense, but not present evidence in support of same:

*A defendant may introduce relevant evidence regarding the claim(s) asserted in the Complaint, including any viable defense included in the Answer. If no defense seeks to assign fault to the plaintiff's employer, there shall be no reference, discussion, evidence, or legal argument relating in any manner to the matter of workers' compensation. If, however, a defendant asserts a defense that assigns fault for the plaintiff's injuries to the plaintiff's employer, the defendant shall, under the well-established "empty chair" defense, have the right to present such evidence and require the fact-finder to consider whether the employer's actions were the cause of the plaintiff's injuries.*

\* \* \*

*A defense that the product was not defective or unreasonably dangerous when it left the defendants' control would not be credible unless the defendants were permitted to introduce evidence as to what actually happened to the product leading up to the incident that injured the plaintiff. Excising the employer from that discussion would be tantamount to drawing a line which would make discussion of the case to be tried difficult, if not impossible.*

*Machin*, 419 S.C. at 542-43, 799 S.E.2d at 476 (emphasis added).

By the same token, the trial court has excised Plaintiff's own admissions of exposure to other entities' asbestos-containing products, as well as Scapa's expert on the issue. In doing so, the trial court ignored the plain language of *Machin* which acknowledges that the empty chair defense is not "credible" unless the defendant is allowed to present evidence supporting the defense.

Plaintiff claims that the empty chair defense and the language in *Tiffany* and *Machin* "do not mandate that all supporting documentation of that defense is automatically admissible." Plaintiff's Brief, Page 40. . . But this argument ignores South

Carolina's Rules of Evidence. . . Rule 401 adopts a broad definition of relevancy, dictating that "any 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. . . Thus, any evidence tending to show Mr. Stewart's exposure to other asbestos-containing products is clearly "relevant" to the issue of causation.

More to the point, any such evidence bearing on any fact of consequence, such as causation, is admissible under Rule 402, SCRE, which states that "[a]ll relevant evidence is admissible." In other words, Scapa is certainly entitled to present all evidence that bears on the causation of Mr. Stewart's injuries, including evidence that a third party caused those injuries. . . When the trial court excluded that evidence, it committed reversible error.

#### CONCLUSION

The Court should reverse the trial court's judgment and render judgment that Plaintiff take nothing. Alternatively, the Court should reverse the trial court's additur ruling and reinstate the jury's damage awards. In the further alternative, the Court should remand the case for a reallocation of the settlement proceeds.

Respectfully submitted,

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