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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2016-002611
Case No. 2016-CP-42-1592

Beverly Dale Jolly and Brenda Rice Jolly, ... Respondents,

v.

General Electric Company, et al., ... Defendants,

Of whom Fisher Controls International LLC and Crosby Valve, LLC are the... Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

(1) Whether the trial court erred in denying Fisher Controls International LLC and Crosby Valve, LLC's motions for directed verdict and judgment notwithstanding the verdict;

(2) Whether the trial court abused its discretion in granting Plaintiffs' motion for a new trial nisi additur and increasing Plaintiffs' compensatory damages award by $1.57 million;

(3) Whether the trial court erred in approving Plaintiffs' purported internal allocation of one-third of their settlement amounts to "future wrongful death claims" and not applying that portion of the settlements in its setoff calculation when any wrongful death claims are barred as a matter of law;

(4) Whether the trial court erred in denying Fisher Controls International LLC and Crosby Valve, LLC's motion to quash Plaintiffs' trial subpoenas of Fisher and Crosby's out-of-state corporate representatives.

STATEMENT OF THE CASE

Plaintiffs Beverly Dale Jolly ("Mr. Jolly") and Brenda Rice Jolly ("Mrs. Jolly") (together, "Plaintiffs"), filed a complaint on April 5, 2017, against sixty-three defendants, including Appellants Fisher Controls International LLC ("Fisher") and Crosby Valve, LLC ("Crosby"). (R. 55). Plaintiffs asserted claims for negligence, strict liability, breach of implied warranty, fraudulent misrepresentation, and loss of consortium based on Mr. Jolly's alleged exposure to asbestos while working for Duke Power Company ("Duke"). (*Id.*).

Prior to trial, Plaintiffs settled with various defendants for a total of $2,270,000. Although the settlement agreements did not include any allocation of the settlement amounts, Plaintiffs claimed that they "internally" allocated one-third of the settlements to Mr. Jolly's personal injury claim, one-third to Mrs. Jolly's loss of consortium claim, and one-third to "future wrongful death claims." None of the settlements were approved by the Court or made available to Defendants for review.

Prior to trial, on July 11, 2017, Plaintiffs sent subpoenas to Fisher and Crosby's trial counsel in an effort to compel corporate representatives of Fisher and Crosby to appear at trial and

testify during Plaintiffs' case-in-chief. (R. 4626, 4639). Fisher and Crosby moved to quash the subpoenas, but the trial court orally denied their motions after a telephone hearing on July 17, 2017. (R. 333–34, 4619, 4631).

Trial began on July 24, 2017, before Judge Jean H. Toal. (R. 336). During trial, Fisher and Crosby filed a motion to reconsider the trial court's subpoena ruling. (R. 4652). At the conclusion of Plaintiffs' case-in-chief, Fisher and Crosby submitted a motion for directed verdict. (R. 4659). The trial court dismissed Plaintiffs' fraudulent misrepresentation claim but denied the motion on all remaining grounds. (R. 1588–1619). At the conclusion of the trial, the jury rendered a verdict in favor of Plaintiffs on their negligence and breach of warranty claims and awarded $200,000 in damages to Mr. Jolly and $100,000 in damages to Mrs. Jolly. (R. 52). The jury found in favor of Fisher and Crosby as to Plaintiffs' strict liability claim. (*Id.*).

On August 11, 2017, Plaintiffs filed a motion for new trial *nisi additur*. (R. 4696). Fisher and Crosby moved for judgment notwithstanding the verdict ("JNOV") on August 14, 2017. (R. 4770, 4773). Fisher and Crosby also filed a motion to set off Plaintiffs' pretrial settlement proceeds against the judgment amount. (R. 4758). The trial court denied Fisher and Crosby's motion for JNOV on all grounds, granted Plaintiffs' motion for new trial *nisi additur*, and granted Fisher and Crosby's motion for setoff, but only as to the portions of the settlements that Plaintiffs allocated to Mr. Jolly's personal injury claims and Mrs. Jolly's loss of consortium claims. (R. 11). The trial court also issued a written order on the subpoena issue. (R. 3). Fisher and Crosby appealed.

STATEMENT OF FACTS

I. Background

Mr. Jolly worked for Duke from 1979 to 2003 at facilities in South Carolina and North Carolina. (R. 64). Between 1980 and 1984, Mr. Jolly worked as a mechanical inspector at the

Oconee, McGuire, and Catawba Nuclear Stations, as well as other facilities. (R. 497–508, 533–34). Mr. Jolly worked around other tradesmen tearing out asbestos insulation and gaskets, which released asbestos fibers into the air. (*Id.*). Mr. Jolly was diagnosed with mesothelioma in late 2015. (R. 471).

Fisher, which has its headquarters in Marshalltown, Iowa, manufactures and sells process control valves used in industrial facilities, including nuclear power plants like Oconee, McGuire, and Catawba. (R. 1300–01). During the time period at issue, Fisher built its valves to Duke's specifications, incorporated the type of internal gaskets and packing specified by Duke, and shipped the valves to Duke. (R. 1302–05). Although some Fisher valves had flange connections that required gaskets when connected to a pipe, Fisher did not manufacture or sell flange gaskets and did not incorporate flange gaskets into its valves. (R. 1123, 1312–13, 1343–44).

Crosby manufactured safety-related valves for industrial facilities, including nuclear power plants. (R. 1379–80). Like Fisher, Crosby built safety valves pursuant to Duke's specifications—including Duke's specifications for the internal components—and shipped those valves to Duke. (R. 1483–85). Crosby, like Fisher, did not manufacture, sell, or otherwise provide external gaskets to Duke or its other customers. (R. 1428).

II. Pretrial Issues

Prior to trial, Plaintiffs purported to serve trial subpoenas on Fisher and Crosby to compel corporate representatives to testify during Plaintiffs' case-in-chief. (R. 4626, 4639). Plaintiffs sent the subpoenas by FedEx on Fisher and Crosby's counsel in South Carolina, who signed for the FedEx packages without knowing their contents. (R. 332, 4626, 4639). Fisher and Crosby moved to quash the subpoenas due to improper service, but the trial court ruled that Rule 45, SCRCP,

gave the court the power to compel out-of-state parties who have submitted to the jurisdiction of the court to appear and testify at trial, even without personal service. (R. 333–34).

Fisher and Crosby also moved to exclude the testimony of Plaintiffs' three expert witnesses—Dr. Arthur L. Frank, Dr. Arnold R. Brody, and Dr. John Maddox—on the grounds that the experts intended to present opinions that "each and every exposure" to asbestos causes mesothelioma. *See* (R. 4371, 4390). Fisher and Crosby argued that no published or peer reviewed literature supports the theory that "each and every exposure" to asbestos causes mesothelioma, and that the theory was at odds with substantial factor causation requirements. (R. 282). The trial court denied the motion without explanation. (R. 286).

Prior to trial, Plaintiffs settled with various defendants for $2,270,000. None of the settlements were approved by the Court or made available to Fisher or Crosby for review.

III. The Evidence at Trial

At trial, Plaintiffs focused their exposure evidence on Mr. Jolly's work at Oconee, McGuire, and Catawba from 1980 through 1984. (R. 485–86). Mr. Jolly's only testimony alleging exposure to asbestos in connection with Fisher or Crosby valves related to flange gaskets, not internal components. (R. 490, 517–18). Mr. Jolly claimed that he stood near other tradesmen who used tools to grind gasket material from valve flanges. (R. 497–500). Mr. Jolly did not testify as to how many of those valves were Fisher or Crosby valves. (R. 503–04).

Mr. Jolly's former coworker David Taylor testified that although he worked with Mr. Jolly at Oconee and worked on Fisher and Crosby valves, he did not know if the internal components of Crosby valves contained asbestos, did not know how many times the valves may have been previously maintained, and did not know who made replacement flange gaskets used next to Crosby valves. (R. 889, 1038–39, 1048–50). Mr. Taylor did not know what kind of valves Crosby

manufactured. (R. 1033–34). He also did not recall how often he worked on Fisher valves; he only estimated it was more than once every four months. (R. 911). Both Mr. Jolly and Mr. Taylor testified that they received warnings from Duke about the hazards of asbestos in the early 1980s. (R. 507–08, 1025–31).

Tracy Pavlish—Mr. and Mrs. Jolly's daughter—and Mrs. Jolly each testified briefly about their relationships with Mr. Jolly and their experiences since Mr. Jolly was diagnosed with mesothelioma. (R. 567–93). Mrs. Jolly and Ms. Pavlish testified that Mrs. Jolly suffered a heart attack a few weeks before trial and speculated, without any medical evidence, that it may have been related to Mr. Jolly's illness. (R. 575, 580–81).

Two of Plaintiffs' experts—Dr. Frank and Dr. Brody—testified at trial, and Plaintiffs read deposition testimony of Dr. Maddox. None of the experts had examined Mr. Jolly or analyzed the extent of his exposure to asbestos. They testified generally that all exposures to asbestos cause mesothelioma and answered lengthy hypotheticals posited by Plaintiffs' counsel that asked them to assume certain amounts of asbestos exposure and inevitably ended with the experts opining that, in those hypothetical scenarios not directly based on actual exposure evidence, Fisher and Crosby caused Mr. Jolly's mesothelioma. *See* (R. 719–22, 1014–15, 1546–48). Counsel for Fisher and Crosby objected to these questions. *See* (R. 722, 731–33, 769). Plaintiffs did not present any testimony from an industrial hygienist or other expert who could demonstrate the actual dose of asbestos to which Mr. Jolly was exposed to while working for Duke. Fisher and Crosby, however, presented specific testimony from an industrial hygienist that Mr. Jolly's cumulative asbestos exposure from Fisher and Crosby valves was well below the OSHA permissible exposure limits. (R. 1855–56).

Plaintiffs did not introduce *any* of Mr. Jolly's medical bills or medical records into the record. Plaintiffs also failed to elicit testimony from Mr. Jolly's treating doctors or family members about the amount of his medical expenses. Instead, the only evidence of Plaintiffs' economic damages was an expert's (Dr. Frank's) testimony that he had seen "some of the medical bills" related to Mr. Jolly's treatment, totaling $142,000. (R. 759, 845). Over Defendants' objection, Dr. Frank also gave his opinion "as to what would be the cost of medical care for Mr. Jolly for the care and treatment of his mesothelioma through the time that he might pass away," testifying that Mr. Jolly could incur hundreds of thousands of dollars in treatment. (R. 760–61). Dr. Frank then testified, "Cases even go to a million dollars or more." (R. 761). Dr. Frank later clarified his testimony:

> Q: . . . You were asked about the cost of Mr. Jolly's treatment?
> A: Yes, sir.
> Q: And you said about a million dollars?
> A: I said it would not be unreasonable to be a million dollars.

(R. 845). Dr. Frank had no explanation for the $900,000 gap between his estimated medical expenses and the bills he reviewed. (*Id.*)

Finally, as a result of the improperly served subpoenas, Fisher and Crosby's corporate representatives, Ronald Duimstra (Fisher) and Robert James Martin (Crosby) testified in Plaintiffs' case-in-chief. *See* (R. 1068, 1362). Plaintiffs' counsel asked numerous leading questions about Fisher and Crosby's alleged failure to take asbestos safeguards at their own plants, where Mr. Jolly never worked. *See* (R. 1078–81, 1372–76). Plaintiffs' counsel also asked Mr. Duimstra and Mr. Martin about Fisher and Crosby's alleged failure to warn Duke employees about the hazards of asbestos-containing gaskets, even though Mr. Jolly and Mr. Taylor both admitted Duke warned them about the hazards of asbestos. Mr. Duimstra and Mr. Martin testified at length about the sophisticated and detailed manner in which Duke controlled the specifications of the valves Fisher

and Crosby manufactured. (R. 1103, 1110–11, 1328, 1334–35). They further testified that neither company ever manufactured or sold *any* flange gaskets. (R. 1123, 1312–13, 1343–44, 1428, 1487, 1490).

IV. Presentation of Documentary Evidence

During trial, the trial court allowed Plaintiffs to enter numerous documents into evidence, over Fisher and Crosby's objection, by simply reading them to the jury. *See* (R. 461–69, 640–49). The majority of the documents were purchase orders from Duke to Fisher or Crosby in the early 1990s—nearly a decade after Mr. Jolly's alleged exposure to asbestos. *See* (*Id.*). Plaintiffs offered no witnesses to lay a foundation for the admissibility or relevancy of the documents; instead, they relied solely on an affidavit used in a prior asbestos case, which they did not seek to admit as evidence. (*Id.*). Without a witness on the stand to discuss the documents, Fisher and Crosby did not have any opportunity for relevant cross-examination.

V. The Verdict and Post-Trial Issues

After deliberating for five hours, the jury returned a verdict in favor of Plaintiffs on their negligence and breach of implied warranty claims. (R. 52). The jury awarded $200,000 in damages for Mr. Jolly and $100,000 for Mrs. Jolly on her loss of consortium claim. (*Id.*). Plaintiffs did not request a special verdict form, and therefore the jury did not allocate the damages awards between medical bills or pain and suffering. (*Id.*).. The jury found in favor of Fisher and Crosby on Plaintiffs' strict liability claim and did not award punitive damages. (*Id.*).

Fisher and Crosby moved for JNOV and, in the alternative, to set off Plaintiffs' pretrial settlements against the verdict amount. (R. 4770; R. 4758). In support of their motion for JNOV, Fisher and Crosby argued Plaintiffs failed to prove each of their claims as a matter of law. (R. 4773). The trial court denied Fisher and Crosby's motion for JNOV on all grounds. (R. 11).

Plaintiffs moved for new trial *nisi additur*, arguing that the jury's verdict was inadequate and asking the trial court to increase the damages award. (R. 4696). The trial court granted Plaintiffs' motion for new trial *nisi additur*. (R. 11). Despite the lack of a special verdict form, the trial court guessed the jury's $200,000 verdict for Mr. Jolly consisted of $142,000 in medical expenses—because Dr. Frank testified that he had seen $142,000 in medical bills—and $58,000 in damages for pain and suffering. (R. 11). The trial court then stated that Dr. Frank's testimony that "cases like this" can incur medical bills of "a million dollars or more" was 'undisputed," and increased Mr. Jolly's damages for medical expenses to $1,000,000. (R. 18; R. 755, 759–62). The trial court also assumed the jury failed to award Mr. Jolly damages for loss of enjoyment of life, mental anguish, and "future damages" and increased Mr. Jolly's noneconomic damages to $580,000, or ten times the $58,000 the trial court assumed that the jury awarded for those damages. (R. 18). The trial court then awarded $290,000 to Mrs. Jolly as damages for loss of consortium. (R. 19–20).

The trial court granted, in part, Fisher and Crosby's motion for setoff. The court accepted Plaintiffs' counsels' argument that they had "internally" allocated the $2,270,000 in settlement funds one-third to personal injury claims, one-third to loss of consortium claims, and one-third to "future wrongful death claims." (R. 44–47). The trial court refused to compel Plaintiffs to produce the settlement agreements, instead reviewing the agreements *in camera* and informing Fisher and Crosby only that Plaintiffs had received $2,270,000 in settlements. (*Id.*). Based on Plaintiffs' "internal" allocation, the trial court offset Mr. Jolly's personal injury claims and Mrs. Jolly's loss of consortium claims by $756,666.67 each, which resulted in an award of $823,333.33 for Mr. Jolly and a complete offset for Mrs. Jolly. (*Id.*). The trial court refused to set off any of the

$756,666.67 Plaintiffs allocated to "future wrongful death claims" because those claims had not been tried. (*Id.*).

Fisher and Crosby appealed the denial of their motions for directed verdict and JNOV, the trial court's evidentiary rulings before and during trial, the trial court's granting of new trial *nisi additur*, and the trial court's setoff and allocation ruling.

ARGUMENT

I. The trial court erred in denying Fisher and Crosby's motion for judgment notwithstanding the verdict.

The trial court should have directed verdict for Crosby and Fisher, or granted their motion JNOV, for several independent reasons. First, Plaintiffs failed to prove causation in compliance with South Carolina law. Second, Plaintiffs failed to meet their burden of proof on their failure to warn claims. Third, Plaintiffs failed to meet their burden of proving a design defect under negligence and implied warranty theories. Finally, Plaintiffs' negligence claims fail because they did not show Fisher or Crosby deviated from the requisite standard of care.

On a motion for a directed verdict or JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012). However, "if no reasonable jury could have reached the challenged verdict," the court must grant a motion for JNOV. *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). On appeal, this court applies the same standard. *RFT Mgmt. Co.*, 399 S.C. at 331–32, 732 S.E.2d at 171.

A. Plaintiffs failed to show Mr. Jolly's exposure to asbestos from Fisher and Crosby's products was a proximate cause of his mesothelioma.

Plaintiffs attempted to establish causation by eliciting expert testimony that Mr. Jolly was exposed to asbestos from flange gaskets "associated with" Crosby and Fisher valves that were part

of a "cumulative dose" which caused his mesothelioma. However, the "cumulative dose" theory does not comply with South Carolina law on causation and could not sustain Plaintiffs' claims. Plaintiffs failed to satisfy the causation standard adopted by the South Carolina Supreme Court in *Henderson v. Allied-Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007). The trial court should have granted JNOV for Fisher and Crosby on the issue of causation.

i. In an asbestos personal injury case, South Carolina law requires proof that asbestos-containing products of the particular defendant in question were a substantial cause of the plaintiff's injuries; that "each and every" exposure was part of a cumulative dose causing injury is insufficient as a matter of law.

A plaintiff seeking damages for injuries caused by asbestos exposure must prove he had "actionable exposure" to the specific defendant's product that was a substantial cause of the injuries. *See Henderson*, 373 S.C. at 185, 644 S.E.2d at 727. To prove actionable exposure, a plaintiff must meet the "frequency, regularity, and proximity" standard (the "*Henderson/Lohrmann* standard") articulated in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986). *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727; *see also Pace v. Air & Liquid Sys. Corp.*, 642 Fed. App'x 244 (4th Cir. 2016) (claimant must prove that he or she was (1) exposed with frequency, regularity, and proximity to (2) asbestos-containing products (3) that were placed into the stream of commerce by defendant). Where medical causation is at issue and is not within common knowledge—such as the relationship between a particular asbestos exposure and mesothelioma—a plaintiff must prove both general and specific causation through expert testimony. *See Fisher v. Pelstring*, 817 F. Supp. 2d 791, 814 (D.S.C. 2011). "General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury." *Id.* Furthermore, if an expert's testimony is scientific in nature, then the trial court must determine its

reliability pursuant to the factors set forth in *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). *Graves v. CAS Med. Sys.*, 401 S.C. 63, 79, 735 S.E.2d 650, 658 (2012). To determine reliability, the court must look to the following factors: (1) the publications and peer view 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. *Id.*; *Council*, 335 S.C. at 19, 515 S.E.2d at 517.

In a toxic tort case, since "the main tenet of toxicology is the 'dose-response' relationship" and "most chemically induced adverse health effects clearly demonstrate 'thresholds,' there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of 'causation' can be inferred." David L. Eaton, *Scientific Judgment and Toxic Torts–A Primer in Toxicology for Judges and Lawyers,* 12 J.L. & POL'Y 5, 39 (2003). More specifically, in mesothelioma cases:

> 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 plaintiff's actual level of exposure." *Westberry,* 178 F.3d at 263 (quotations omitted). Moreover, there must be a showing that the plaintiff's level of exposure is comparable to the levels of exposure that are hazardous as a general matter. *See id.* ("[S]cientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to *such quantities,* are minimal facts necessary to sustain the plaintiffs' burden in a toxic tort case.") (emphasis added) (quoting *Allen v. Pa. Eng'g Corp.*, 102 F.3d 194, 199 (5th Cir. 1996)); *see also Zellars v. NexTech Northeast, LLC*, 895 F. Supp. 2d 734, 742 (E.D. Va. 2012) ("'Ruling in' exposure to a particular substance as a possible cause of a patient's medical condition requires (1) a reliable determination of the level of exposure necessary to cause the condition and (2) a reliable determination that the patient was exposed to the substance at this level.").

Yates v. Ford Motor Co., 113 F. Supp. 3d 841, 850 (E.D.N.C. 2015).

As will be detailed below, at trial Plaintiffs employed the "each and every exposure" or "cumulative dose" theory of causation—a theory rejected by most courts that have addressed it. As the court in *Yates* explained:

> The theory that "each and every exposure to asbestos products results in injury to the person so exposed" has made repeat appearances in the realm of asbestos litigation. *Krik v. Crane Co.,* 76 F. Supp. 3d 747, 749–50 (N.D. Ill. 2014); *see* William L. Anderson, "The 'Any Exposure' Theory Round II—Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008," 22 KAN. J.L. & PUB. POL'Y 1 (2012). Also referred to as "any exposure" theory, or "single fiber" theory, it represents the viewpoint that, because science has failed to establish that any specific dosage of asbestos causes injury, every exposure to asbestos should be considered a cause of injury. *See Krik,* 76 F. Supp. 3d at 749–50; *Anderson v. Ford Motor Co.*, 950 F. Supp. 2d 1217, 1225 (D. Utah 2013). Numerous courts have excluded expert testimony or evidence grounded in this theory, reasoning that it lacks sufficient support in facts and data. *E.g.*, *Comardelle v. Pa. Gen. Ins. Co.,* 76 F. Supp. 3d 628, 632–33 (E.D. La. 2015); *Krik,* 76 F. Supp. 3d at 752–53, *Anderson,* 950 F. Supp. 2d at 1225; *Sclafani v. Air & Liquid Sys. Corp.*, No. 2:12–CV–3013, 2013 WL 2477077, at *5 (C.D. Cal. May 9, 2013); *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1166 (E.D. Wash. 2009).

113 F. Supp. 3d at 846. Courts reject the "every exposure" or "cumulative dose" theory (by whatever name) because it is irreconcilable with the "substantial factor" causation rule long used in South Carolina and almost all other jurisdictions. *See Schwartz v. Honeywell Int'l Inc.*, No. 2016-1372, 2018 WL 793606, at *3 (Ohio Jan. 24, 2018) (finding it "impossible" to reconcile a requirement of "an individualized finding of substantial causation for each defendant with a theory that says every defendant that contributed to the overall exposure is a substantial cause."); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443; *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 493 (6th Cir. 2005). The theory would impose "precisely the sort of unbounded liability that the substantial factor test was developed to limit." *McIndoe v. Huntington Ingalls, Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016). It is also irreconcilable with the requirement that a plaintiff prove the amount, duration, and frequency of exposure. *In re New York City Asbestos Litigation*, 48 N.Y.S.3d 365 (N.Y. App. Div. 2017). Thus, the "cumulative dose" theory is inconsistent with the *Henderson/Lohrmann* standard.

ii. Plaintiffs failed to establish specific causation through relevant, reliable expert testimony that would assist the jury in reaching a verdict.

Plaintiffs failed the *Henderson/Lohrmann* standard. Their experts employed the misguided "cumulative dose" theory. Further, they did not provide scientifically reliable evidence of either the amount of asbestos to which Mr. Jolly was exposed from Crosby or Fisher products or the threshold exposure to asbestos above which he had an increased risk of developing mesothelioma.

Plaintiffs presented their causation case through three expert witnesses. The first, Arthur Frank, initially testified in general terms, stating that there is "no safe level" of asbestos exposure and "for mesothelioma, one day (of exposure) has done it." (R. 699–700). He did not identify any supporting science or identify what fiber type of asbestos "has done it." Dr. Frank espoused the "cumulative dose" theory, stating, "What we have to say at the end of the day, if someone gets a mesothelioma, is that the cumulative exposure they have had to asbestos from whatever products over whatever time is what gave it to them." (R. 715). He then gave an analogy, saying that even one cigarette among a million brands smoked by someone with lung cancer is not "inconsequential," concluding that, "The same thing applies to asbestos. Some products contribute more; some contribute less, *but you can't leave any of them out because it is a cumulative exposure, the totality of what people were exposed to that gave them disease. So all of them have to be included.*" (R. 715–16) (emphasis added).

Asked if a single exposure "to asbestos from the removal of asbestos-containing gaskets on a valve flange face" would be a substantial contributing factor to mesothelioma, Dr. Frank said that "since there is no exposure that can be left out for reasons we discussed a bit earlier, that would be a substantial contributing factor. It is part of one's cumulative exposure." (R. 723–24). He claimed that this would be true even if it were the only exposure, while at the same time admitting "I have not ever seen such a case(.)" (R. 724–25). He also admitted that he had never seen a study

in which the relative risk from exposure to gaskets with chrysotile asbestos resulted in a relative risk over 2.0. (R. 843).

Plaintiffs elicited opinions from Dr. Frank specific to Mr. Jolly that were limited to Jolly's work from 1980 to 1984 and inquired about the removal of gaskets from the flange faces of valves ranging from 4 inches in diameter "to valves that had a diameter so big that it would require 66, but maybe only 49, stud bolts." (R. 719–21). He said such exposure "would put somebody at risk for developing disease," more so with each exposure. (R. 723). Asked if "Jolly's mesothelioma was substantially contributed to by exposure to asbestos liberated from asbestos gaskets on the flange face of valves during removal using" particular work processes," Dr. Frank said they would. (R. 726).

Frank reported his understanding that, from 1980-84, Jolly was regularly within 10 feet of, and exposed to asbestos from, flange gaskets *associated with valves generally.* (R. 730–31). He said this exposure would be a significant contributing cause of Jolly's mesothelioma. (R. 731). Asked to assume that Crosby was one of the valves "and that the asbestos-containing gaskets were supplied or specified by Crosby with its valve," Frank said "*to the extent that Mr. Jolly was exposed to asbestos*, that it was *connected in some way with a Crosby valve*, that would have been a substantial contributing cause to his mesothelioma." (R. 732). He gave the same answer as to Fisher based on the same assumptions. (R. 733). Consistent with that "every fiber/no threshold" opinion, he said that either the Crosby or Fisher exposure alone would have been sufficient for causation. (R. 734).

Plaintiffs' second expert, biologist Arnold Brody, addressed only general, not specific, causation.[1] He acknowledged mesothelioma is a dose-response disease, yet said "there is no threshold" for causing mesothelioma and that "once you get above background, there is no level that we know is safe or will not cause mesothelioma." (R. 1001–02).

Plaintiffs' third expert was pathologist John Maddox. He also testified that Mr. Jolly's disease was "caused by his cumulative asbestos exposure . . . ." (R. 1544). Dr. Maddox admitted that mesothelioma is a dose-response disease, and that a small exposure carries a small risk. (R. 1543).

Dr. Maddox was asked to assume that Jolly had exposures over a three to four year period (1980–84) "from asbestos-containing gaskets and packing[2] used in some but not all of the valves at a power plant during outages and shutdowns at several plants which happened as a regular part of his job," and that the exposures "were in the hundreds or in the thousands to hundreds of thousands to millions of times above background." (R. 1546–47). He first characterized this as significant and said that if "that" were the only known exposure, it alone would be sufficient to cause mesothelioma. (R. 1547–48). He was then asked whether, if "Mr. Jolly had multiple exposures like that . . . from Fisher valves and Crosby valves, *in addition to several other companies' equipment*," and "where the exposure to Fisher valves as I've described above is one of several exposures, can you tell me if that exposure, given the facts about dose, frequency, proximity and intensity was a substantial contributing cause in Mr. Jolly's development of mesothelioma?"; he answered yes. (R. 1548).

[1] Dr. Brody had not examined Mr. Jolly or reviewed any medical records, and did not know what type of mesothelioma Mr. Jolly had or the details of his symptoms. (R. 1012).
[2] Mr. Jolly never claimed exposure to packing related in any way to any Fisher or Crosby valve.

Plaintiffs' attempt to prove causation through the "cumulative dose" theory requires reversal for several reasons. First, the *Henderson/Lohrmann* standard requires defendant-specific opinions. The substantial causation test (a requirement of *Henderson* that is a bedrock principle of South Carolina case tort law) is contradicted by "a theory that says every defendant that contributed to the overall exposure is a substantial cause." *Schwartz,* 2018 WL 793606, at *3. Whether or not Crosby or Fisher contributed to an overall "dose" of exposure—either generally or from valves alone[3]—liability is not imposed unless the product or conduct of the particular defendant under consideration is itself a substantial contributing factor.

As the cases cited in Part I.A.i of this brief make clear, courts presented with the identical approach Plaintiffs used here have rejected it. *See also Krik v. Owens-Illinois, Inc.*, 2015 WL 5050143, at *1 (N.D. Ill. 2015) (barring Dr. Frank's testimony because "To find a defendant liable, plaintiff must prove causation attributable to that defendant. It would be misleading and confusing for an expert to opine—particularly using the legal terminology of 'substantial contributing factor'—that (plaintiff's) cancer was caused by defendants and the foundation for the opinion was that every exposure (without regard to dosage) contributes to cause cancer."); *Moeller v. Garlock Sealing Techs., LLC,* 660 F.3d 950, 955 (6th Cir. 2011) (if Dr. Frank's opinion that every exposure is substantial was "sufficient for plaintiff to meet his burden, the Sixth Circuit's 'substantial factor' test would be meaningless" (citing *Lindstrom,* 424 F.3d at 493). The "cumulative dose" theory makes a mockery of the word "substantial." Plaintiffs seek, in effect, to create a new standard of causation: that *any contribution whatsoever* to a dose of asbestos exposure subjects one to liability. This is simply not the law in South Carolina.

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[3] Plaintiffs' own proof revealed that Crosby and Fisher were two of at least twelve makers of valves present at the Duke sites, in roughly the same amount as at least eight of the other ten. (R. 530, 877, 1062–63).

Second, this theory of causation has not only been rejected by other courts, each of Plaintiffs' experts' opinions have been excluded in other cases as either unreliable or contrary to the plaintiffs' burden of proof. The "cumulative dose" theory is not reliable scientific evidence as required by South Carolina law. As set forth above, the court in *Yates, supra,* cited numerous authorities for the proposition the theory "lacks sufficient support in facts and data" and rejected Dr. Brody's opinion that exposure at levels "above background" contribute to the development of mesothelioma. 113 F. Supp. 3d at 846–47. It further found the "no safe level/every exposure/cumulative exposure" opinion of Dr. Frank did not satisfy the types of factors required by *Council*; there are no quality control procedures or other methods used to ensure its reliability; it is wholly inconsistent with recognized scientific laws and procedures; and it "cannot be tested, has not been published in peer-reviewed works, and has no known error rate." 113 F. Supp. 3d at 846. Similarly, the court in *Rockman v. Union Carbide Corp.*, 266 F. Supp. 3d 839, 849, 850 (D. Md. 2017), noting that "Dr. Frank's ultimate opinion is not tied to any specific quantum of exposure that is attributable to defendant," concluded it was not based on reliable principles and methods. *See also Haskins v. 3M Company*, 2017 WL 3118017 (D.S.C. 2017) (excluding the "each and every exposure" opinion under Rule 403 because it was directly at odds with substantial causation requirements); *Butler v. Union Carbide Corp.*, 712 S.E.2d 537, 544 (Ga. Ct. App. 2011) (excluding Dr. Maddox's "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 Frank's testimony, citing its numerous methodological shortcomings).[4]

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[4] More courts have rejected the every exposure theory under Rule 702. *See Crane Co. v. DeLisle*, 206 So. 3d 94, 105–06 (Fla. App. 2016); *Anderson v. Ford Motor Co.*, 950 F. Supp. 2d 1217, 1225 (D. Utah 2013); *Lindstrom v. A-C Prod. Liab. Trust,* 424 F.3d 488 (6th Cir. 2005); *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 40, 53 (2d Cir. 2004); *Bostic v. Georgia-Pac. Corp.*, 439 S.W.3d 332, 340–42 (Tex. 2014); *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 774 (Tex. 2007).

The only time Plaintiffs even attempted to offer scientific support for their theories was when they elicited Dr. Maddox's opinion that low-dose exposure "more than double(s) the risk of the general population" to contract mesothelioma—a critical concept because, when relative risk is greater than 2.0, there is a greater than 50% chance that the injury was caused by the toxin in question, *see, e.g.*, *Merrell Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706, 712–13 (Tex. 1997), and only at that level of risk "can it be said that (the toxin) is more likely than not the source of (one's) injury" and thus is evidence that will "assist the trier of fact to . . . determine a fact in issue" under Rule 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1320 (9th Cir. 1995). Maddox based his opinion on four articles by Iwatsubo, Rodelsperger, Roland and LaCourt. (R. 1550). He said these studies identified greater than doubling of the risk at 0.5 fiber years,[5] 0.15 fiber years, 0.07 fiber years and 0.1 fiber years, respectively. (R. 1550–51). This effort by the Plaintiffs was insufficient as a matter of law because they failed to make an effort to show Mr. Jolly was similarly situated to the subjects of any of the studies Maddox cited—that, as described in *Yates*, his exposure was "comparable" to a demonstrated hazardous level of exposure. 113 F. Supp. 3d at 850. Plaintiffs made no effort to introduce industrial hygiene evidence to make the case that Jolly was exposed to asbestos from Crosby or Fisher that was comparable to any epidemiology or other relevant study (they named an industrial hygiene expert, Ken Garza, in their witness disclosures, but inexplicably never called him at trial). Further, Plaintiffs did not even try to demonstrate Jolly was similarly situated to the subjects of any of the studies Maddox cited. Indeed, the Iwatsubo and Rodelsperger studies do not "differentiate[] among fiber types" and do

[5] "Epidemiologic studies of groups of asbestos-exposed workers commonly express exposure in cumulative exposure units of fiber-year/mL. This exposure measure is calculated by multiplying a worker's duration of exposure (measured in years) by the average air concentration during the period of exposure (measured in number of fibers/mL of air)." *Yates*, 113 F. Supp. 3d at 855 n.9.

"not support a minimum threshold dose for chrysotile only exposure that would increase one's risk of developing mesothelioma." *Smith v. Kelly-Moore Paint Co., Inc.*, 307 S.W. 3d 829, 839 (Tex. Ct. App. 2010) (ruling that Dr. Maddox's testimony relying on same studies was insufficient to raise a fact question because it lacked scientific foundation); *see also Butler,* 712 S.E.2d at 542 n.20 (quoting Iwatsubo to effect it "could not examine mesothelioma risk according to fiber types"). The LaCourt article "likewise failed to distinguish chrysotile asbestos from other forms." *Yates* 113 F. Supp. 3d at 857.[6]

Third, an aspect of the "cumulative dose" theory that is particularly unfounded is that there is "no safe level" of exposure—the opinion expressly put forth by Plaintiffs' experts. (R. 699, 1001–02). This contradicts the fundamental principle of science, often expressed as "the dose makes the poison," that there is a "dose-response" relationship between exposures and disease, and thresholds needed to produce disease. *Eaton*, *supra*. The concept that there is "no safe level" of asbestos exposure is based on the purported absence of evidence of a "threshold" level of exposure necessary to cause disease, rather than affirmative evidence of a particular hazardous level of exposures. *Yates*, 113 F. Supp. 3d at 857 (rejecting expert's "no safe level" opinions).

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[6] Plaintiffs may argue that Mr. Jolly was exposed to the most potent form of asbestos, crocidolite, but in fact there was no evidence whatsoever he ever encountered any crocidolite placed in the stream of commerce by Crosby or Fisher or that was in any way, shape or form associated with any Crosby or Fisher valve present at Duke. Plaintiffs did not even make an effort to link Crosby to crocidolite. Despite this, and over Crosby's objection, Plaintiffs' counsel drafted and the trial court signed the Order Denying Defendants' Post-Trial Motions stating that "at least some of the gaskets and packing sold by Defendants contained crocidolite," citing exhibits that had to do with Fisher, *not Crosby*. While Plaintiffs demonstrated that Fisher had documents referring to crocidolite gaskets, they made no showing whatsoever that any crocidolite-containing gasket was present in any Fisher product at Duke or, more specifically, which Mr. Jolly encountered. It was uncontroverted at trial that chrysotile is the predominant form of commercial asbestos. (R. 962–63). Moreover, Mr. Jolly never claimed to work with packing at all in the 1980–84 period. Nevertheless, over the objections of Crosby and Fisher, the trial court signed the Plaintiffs' Proposed Order suggesting he had.

However, "just because we cannot rule anything out does not mean we can rule everything in." *Haskins v. 3M Company*, 2017 WL 3118017, at *8. As the South Carolina federal court ruled in Haskins, the notion that any exposure that carries any chance of causing mesothelioma constitutes a "substantial cause" of injury is "bizarre." *Id.* at *7.

Fourth, the cumulative dose approach is also at odds with the requirement that a claimant account for other potential exposures. *Martin*, 561 F.3d at 443 (explaining that defendant's liability for mesothelioma must be evaluated in the context of other exposures); *Schwartz*, 2018 WL 793606, at *4 (citing 2 Restatement (Second) of the Law of Torts § 433, at 432 (1965)). Because of their adherence to the belief that *any* exposure constituted a "substantial" one, Plaintiffs' experts made no effort whatsoever to address the role played by Mr. Jolly's exposures to other products. Dr. Maddox, for example, acknowledged that Mr. Jolly claimed exposure to many asbestos-containing products and agreed that insulation[7] produces an extremely high risk of mesothelioma, but he did not attempt to compare exposures from the different products. (R. 1557–58).

Fifth, even if Plaintiffs had offered sufficient expert testimony addressing causation, there was an insufficient factual predicate for expert causation testimony. Mr. Jolly testified that, during Nuclear Regulatory Commission-mandated unit outages, Duke crews would annually work on one-tenth of the valves at the facilities. (R. 485–86). This included Crosby and Fisher valves that had flanges that allowed them to be connected to piping, with gaskets between the piping and equipment. (R. 487–89). Mr. Jolly said he was "regularly and consistently" in areas where the flange gaskets were removed from the valves. (R. 506–07). However, he could offer no estimate of how many Crosby or Fisher valves he saw being worked on while he was nearby. (R. 503–04).

[7] Crosby and Fisher's experts blamed Mr. Jolly's mesothelioma on exposure to amosite insulation exposures. (R. 1674).

Plaintiffs presented the testimony of Mr. Jolly's co-worker, David Taylor, but he did not know who made replacement flange gaskets used next to Crosby valves, did not know if the internal components of Crosby valves contained asbestos and did not know how many times the valves had been previously maintained.[8] (R. 1038–39, 1048–50). Mr. Taylor could not even testify as to what kind of valves Crosby manufactured. (R. 1033–34).[9]

In *Lohrmann*, the court held exposure to an asbestos-containing product on ten to fifteen occasions of between one and eight hours duration was insufficient to satisfy the "frequency, regularity, and proximity" standard. 782 F.2d at 1163. In this case, the only evidence of exposure to Fisher or Crosby valves was Mr. Jolly's conclusory testimony that he was "regularly and consistently" in the vicinity of Fisher or Crosby valves. (R. 506–07). That testimony was insufficient to establish that he was frequently and regularly exposed to asbestos dust from Fisher or Crosby valves while in close proximity to those valves. *See In re Asbestos Prod. Liab. Litig. (No. VI)*, 574 F. App'x 203, 206 (3d Cir. 2014) (applying South Carolina law and granting summary judgment despite speculative evidence of asbestos exposure because "[s]peculation does not create a genuine issue of fact"); *Quirin v. Lorillard Tobacco Co.*, 23 F. Supp. 3d 914, 920 (N.D. Ill. 2014) ("A plaintiff's argument that a particular exposure to asbestos constituted a substantial factor in his illness cannot be purely conclusory."); *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 337 (Tex. 2014) (proof that the plaintiff was exposed to "some" respirable fibers traceable to the defendant was insufficient to prove substantial factor causation).

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[8] Crosby had no role in determining what flange gaskets would be used to connect its valves to other equipment at Duke. (R. 1490, 1484–87). Likewise, Fisher did not sell flange (or "line") gaskets. (R. 1302–04, 1312–15).

[9] At another point, Taylor said he recalled Crosby *gate* valves, (R. 877–78), but Crosby had not made gate valves in the 40 years before Mr. Jolly worked at the nuclear plants, (R. 1473).

Finally, the Plaintiffs' experts' opinions were also inadmissible under Rule 403 of the South Carolina Rules of Evidence, which mandates that testimony be excluded if its probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues. The opinions were rooted in the idea that any miniscule exposure to asbestos in association with Fisher or Crosby's products contributed to the cumulative result of Mr. Jolly contracting mesothelioma and, therefore, the exposure was a cause of Mr. Jolly's injury. These opinions are inconsistent with the *Henderson/Lohrmann* legal standard because they effectively shifted the burden to Fisher and Crosby to prove that they did not expose Mr. Jolly to any asbestos. Thus, the opinions served merely to confuse or mislead the jury as to the standard it should apply to Mr. Jolly's claims by implying that any exposure was sufficient to render Fisher and Crosby liable to Mr. Jolly for causing his mesothelioma and should have been excluded.

B. Plaintiffs failed to meet their burden of proof on their claims based on a failure to warn.

A plaintiff must prove four elements to recover on a failure to warn claim: (1) the manufacturer knows or has reason to know the product is likely to be dangerous for its intended use; (2) the manufacturer has no reason to believe the user will realize the potential danger; and (3) the manufacturer failed to exercise reasonable care to inform of its dangerous condition or of the facts which make it likely to be dangerous. *Livingston v. Noland Corp.*, 293 S.C. 521, 525, 362 S.E.2d 16, 18 (1987).

i. Fisher and Crosby are protected by the sophisticated intermediary doctrine as a matter of law because they reasonably relied on Mr. Jolly's employer—Duke—to warn its employees and Duke warned its employees of the hazards of asbestos.

Fisher and Crosby argued in their directed verdict and JNOV motions that, under the sophisticated intermediary doctrine, they could not be liable as a matter of law because they

reasonably relied upon Duke to warn the end users of Fisher and Crosby's products—Duke's employees. (R. 4664–69, 4778–81). The trial court rejected Fisher and Crosby's argument, finding "[t]he evidence was that Duke distinguished asbestos gaskets as non-hazardous" and "[t]here was no evidence that Fisher and Crosby were relying on Duke to inform its employees of" the alleged hazards of asbestos-containing gaskets. (R. 23). The trial court improperly applied the sophisticated intermediary doctrine.

<u>Background of Sophisticated Intermediary Doctrine</u>

When there is no effective way for a manufacturer to convey a product warning to the ultimate consumer or user, the manufacturer should be permitted to rely on downstream suppliers to provide the warning. *See, e.g.*, *Webb v. Special Elec. Co.*, 370 P.3d 1022, 1034 (Cal. 2016). The sophisticated intermediary doctrine—also called the sophisticated user doctrine—allows a seller to "discharge its duty to warn end users about known or knowable risks in the use of its product" if it (1) "provides adequate warnings to the product's immediate purchaser, *or* sells to a sophisticated purchaser that it knows is aware or should be aware of the specific danger," *and* (2) "reasonably relies on the purchaser to convey appropriate warnings to downstream users who will encounter the product." *Id.*

A manufacturer can satisfy the first prong by warning the intermediary of the hazard, but it is not required to warn the intermediary if the intermediary is "so knowledgeable about the material supplied that it knew or should have known about the particular danger." *Id.* As to the second prong, courts generally consider three factors: (1) the gravity of the risk posed by the product, (2) the likelihood that the intermediary will warn those downstream, and (3) the feasibility or effectiveness of the manufacturer giving a warning directly to the user. *Id.* at 1036. The first factor weighs the reasonableness of the manufacturer's conduct against the potential severity of

the harm. *Id.* at 1037. The second factor focuses on the reliability of the intermediary, and it is significant if "the intermediary *itself* had a legal duty to warn end users about the hazard." *Id.*

<u>The Sophisticated Intermediary Doctrine Applies in South Carolina</u>

This court affirmed a trial court's application of the sophisticated intermediary doctrine in *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 550, 462 S.E.2d 321, 332 (Ct. App. 1995), and *Lawing v. Trinity Mfg., Inc.*, 406 S.C. 13, 23, 462 S.E.2d 126, 131 (Ct. App. 2013) (*Lawing I*). Despite this court's adoption of the sophisticated intermediary doctrine, the Supreme Court held in 2015 that no South Carolina appellate court had adopted the doctrine. *Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 226, 781 S.E.2d 548, 557 (2015) (*Lawing II*). The Supreme Court then declined to expressly adopt or reject the doctrine in *Lawing II*. *Id.* Instead, the court explained it "need not formally adopt the doctrine at this time because . . . the facts of this case do not implicate the sophisticated user defense." *Lawing II* is distinguishable from this case. The issue in *Lawing II* concerned the labeling of bags containing a flammable product to allow employees to identify the product—not the use of the product itself—and it therefore did not require a sophisticated intermediary doctrine analysis. *Id.* at 227, 781 S.E.2d at 548. The court held the employer's knowledge of the dangers of the product did not affect the supplier's duty to label the chemical in a manner that would allow an employee to identify it as a hazardous and flammable product, "because the knowledge of [the chemical's] inherent qualities [is] useless to a person who comes into contact with the chemical but cannot identify it." *Id.*

The court explained, "there is a critical distinction between an intermediary's knowledge of the dangerous qualities and nature of a product, and the ability of the third party user to identify and recognize that product on its face. When considering only [the employer's] use of [the chemical] in its manufacturing process, it follows that [the employer] is a 'sophisticated user.'" *Id.*

at 227–28, 781 S.E.2d at 558. When labeling is the underlying issue, however, the adequacy of the labeling does not require a sophisticated user analysis. *Id.* Thus, in *Lawing*, the employer's knowledge of the dangers of the chemical was irrelevant. Instead, the critical issue was whether the product's labeling allowed employees to recognize the chemical as a product that needed to be moved out of range of an oxyacetylene torch before using the torch. *Id.*

Lawing II therefore does not preclude the application of the sophisticated intermediary doctrine and does not govern whether the doctrine should be applied in this case. To the contrary, this Court should hold the trial court erred in failing to apply the sophisticated intermediary, reverse the trial court, and grant JNOV on Plaintiffs' failure to warn claims.

Duke is a Sophisticated Intermediary that was Required to Warn Its Employees

The trial court ruled Fisher and Crosby did not prove that they warned Duke and that they knew Duke was aware or should have been aware of the danger from asbestos gaskets. (R. 23). The trial court erred in denying JNOV on those grounds.

First, Duke is a sophisticated purchaser that was aware or should have been aware of the specific danger allegedly posed by asbestos. Mr. Jolly admitted this fact during his testimony.[10] (R. 542) (admitting Duke was knowledgeable about the hazards of asbestos, warned its employees about asbestos, and was a very sophisticated company). Crosby's corporate representative testified that Duke was a highly sophisticated entity: "The big firms building nuclear plants and the big suppliers to the nuclear plants . . . had very, very good engineering firms. I mean, they had to. These are very critical nuclear power plants." (R. 1488–89). Moreover, Duke was required to comply with OSHA regulations in effect at the time of Mr. Jolly's alleged exposure. *See* (R. 825–

[10] It cannot be reasonably disputed that Duke Power Company is a sophisticated entity.

26, 4363). It was reasonable for Fisher and Crosby to rely on Duke to comply with legal requirements.

Second, Duke in fact warned its employees about the hazards of asbestos. Mr. Jolly admitted during his trial testimony that Duke warned its employees of the hazards of asbestos, *see* (R. 507–08, 534–36, 538–42), and Plaintiffs' own expert, Dr. Frank, agreed that Duke documents indicated Duke was warning its employees about the hazards of asbestos prior to and during the time Jolly worked for Duke, *see* (R. 830–39). Further, the trial court admitted into evidence multiple Duke safety documents warning Duke employees that asbestos is hazardous—both before and during Mr. Jolly's employment—and providing safe practices for handling asbestos, thus demonstrating Duke's knowledge of the hazards. *See* (R. 4328) ("Duke Power Steam Production Department: Safe Working Practices When Working With Asbestos," dated July 1, 1977); (R. 4335) (revising safe working practices in 1982 and warning Duke employees that asbestos causes cancer and requiring caution labels to be placed on all materials and products containing asbestos); (R. 4347) ("Asbestos: How to Protect Yourself," dated September 1984). Accordingly, it was reasonable as a matter of law for Fisher and Crosby to rely on Duke to warn its employees.

Third, Fisher and Crosby could not have reasonably warned Duke's employees about the hazards of asbestos. Mr. Jolly claims he was exposed to asbestos when co-workers scraped old gasket material off of valves. (R. 497–98, 518). It would be impossible for Fisher and Crosby to place some kind of warning on the gaskets—notwithstanding that Fisher and Crosby did not supply flange gaskets—that Mr. Jolly would have seen when his co-workers broke a flange connection and began scraping off old gasket material.

Finally, the trial court erred in relying on Fisher and Crosby's failure to show that they warned Duke about the hazards of asbestos in denying JNOV. Contrary to the trial court's ruling,

Fisher and Crosby had no obligation to prove that they warned Duke. Rather, the sophisticated intermediary doctrine protects the seller of a product if the seller provides adequate warnings to the product's immediate purchaser _or_ sells the product to a sophisticated purchaser that it knows is aware or should be aware of the specific danger. *Webb*, 370 P.3d at 1034. Thus, a manufacturer is not required to warn an intermediary that is "so knowledgeable about the material supplied that it knew or should have known about the particular danger." *Id.* Duke is a sophisticated entity that *should* have known about the alleged dangers of asbestos gaskets—and in fact *did* know about the dangers of asbestos in general—and Fisher and Crosby reasonably relied upon Duke to warn its employees. Hence, Fisher and Crosby are entitled to JNOV on the failure to warn claims.

ii. Plaintiffs failed to show Fisher or Crosby's failure to warn was the proximate cause of their injuries because the danger was open and obvious and there is no evidence Mr. Jolly would have heeded a warning.

Fisher and Crosby moved for directed verdict and JNOV on the grounds that the alleged danger posed by asbestos exposure was open and obvious and that Mr. Jolly would not have heeded a warning; therefore, they cannot be liable for failure to warn. (R. 4662–64, 4670–72, 4776–78, 4783–84).

There is no presumption in South Carolina that a plaintiff would have heeded a warning if it had been given. If the plaintiff would not have heeded a warning, the failure to warn cannot be the proximate cause of the plaintiff's injuries. *See Owings v. Moneynick Oil Mill*, 55 S.C. 483, 33 S.E. 511, 513 (1899) ("Any warning which might have been given would have been entirely useless, and therefore the defendant neglected no duty in failing to give such a warning.").

Similarly, a manufacturer has no duty to warn of an "open and obvious" danger created by its products or one that the product's users generally recognize, *Moore v. Barony House Rest., LLC*, 382 S.C. 35, 41–42, 674 S.E.2d 500, 504 (Ct. App. 2009), and the failure to provide a warning

is inconsequential where a plaintiff admits he knew of the dangers. *See Rife v. Hitachi Const. Mach. Co.*, 363 S.C. 209, 220, 609 S.E.2d 565, 571 (Ct. App. 2005) (citing *Marchant v. Mitchell Distrib. Co.*, 270 S.C. 29, 37, 240 S.E.2d 511, 514 (1977)); *Owings*, 33 S.E. at 512–13.

Plaintiffs presented no evidence regarding what information a warning should have contained, how that warning could have been effectively communicated to Duke's employees, or whether a warning would have prevented Mr. Jolly from contracting mesothelioma. Mr. Jolly also did not testify that he would have heeded a warning had he received one from Fisher and Crosby. *See generally* (R. 470–562). To the contrary, Mr. Jolly made clear during his testimony that he knew about the hazards of asbestos, (R. 534–36) ("Well -- well, [Duke] warned us. . . . I mean, we knew . . . asbestos was bad for you, but I didn't know how bad it was for me at the time."), that Duke warned its employees of the hazards of asbestos in 1977—before the 1980–1984 period in which Mr. Jolly alleges he was exposed to asbestos—and several times during Mr. Jolly's employment at Duke, *see* Part I.D, *supra*, and that he in fact did not heed warnings from Duke and continued to work around Fisher and Crosby valves despite his knowledge of the alleged hazards, *see* (R. 534–35).

The only reasonable inferences from the evidence in the record are that the dangers of asbestos were open and obvious to Mr. Jolly and that Mr. Jolly did not heed warnings about asbestos and, therefore, would not have heeded warnings from Fisher and Crosby. *See Owings*, 33 S.E. at 512–13 (finding the defendant was entitled to presume the plaintiff was fully informed of the danger based on "the explicit admission of the plaintiff, while on the stand as a witness, that he knew of the danger."). Accordingly, the trial court erred in denying Fisher and Crosby's motions for directed verdict and JNOV as to Plaintiffs' failure to warn claims.

C. Plaintiffs failed to meet their burden of proving a design defect under both negligence and implied warranty theories.

For a plaintiff to succeed on a design defect claim, "he must show that the design of the product caused it to be 'unreasonably dangerous.'" *Branham v. Ford Motor Co.*, 390 S.C. 203, 218, 701 S.E.2d 5, 13 (2010). South Carolina courts apply the risk-utility test in analyzing design defect claims. *Id.* at 220, 701 S.E.2d at 14. The risk-utility test requires a plaintiff asserting design defect claims to prove the availability of a reasonable alternative design. *Id.*; *Holland*, 407 S.C. at 237, 754 S.E.2d at 720. A plaintiff must "point[] to a design flaw in the product and show[] how his alternative design would have prevented the product from being unreasonably dangerous." *Graves*, 401 S.C. at 79, 735 S.E.2d at 658.

Plaintiffs did not present any evidence that a reasonable alternative design existed during the time that Mr. Jolly allegedly worked around Fisher and Crosby's valves. Plaintiffs—and the trial court in its order—focused solely on testimony from Fisher and Crosby's corporate representatives that gaskets can be made out of materials other than asbestos. *See* (R. 27) ("The record showed that there were multiple non-asbestos materials that were available to Fisher and Crosby and that they could have sold gaskets and packing to Duke that were made exclusively out of graphite, metal, or Teflon.").

A defendant cannot be held liable for a design defect based on the mere existence of some other design. The risk-utility test requires Plaintiffs to prove the availability of a *reasonable* alternative design that would have prevented the product from being unreasonably dangerous. *Branham*, 390 S.C. at 218, 701 S.E.2d at 13; *Graves*, 401 S.C. at 79, 735 S.E.2d at 658. Importantly, the trial court ignored the nature of Duke's use of the valves at issue in this case. Fisher and Crosby manufactured safety valves that Duke opted to use for high-pressure and high-heat applications. *See, e.g.*, (R. 502, 1379–80). If safety valves do not work properly, those high-

pressure and high-heat lines may explode, endangering everybody in the facility. (R. 559, 1472). In fact, Mr. Jolly testified—for example—that rubber, cork, or vegetable fiber gaskets cannot be used in a line built for 1,000 to 1,200 degree and 1,200 PSI substances because "[i]t would melt" and "it would leak."[11] (R. 497, 502–03). In addition, Plaintiffs' own expert, Dr. Frank, admitted that asbestos was the only insulating option available in the hot settings in which Duke used Fisher and Crosby valves. (R. 811). Accordingly, although Fisher and Crosby's valves were compatible with other types of gaskets, no reasonable alternative to asbestos existed for the manner in which Duke used Fisher and Crosby's valves, and the trial court erred in denying Fisher and Crosby's motion for JNOV as to Plaintiffs' design defect and failure to warn claims.[12] *See Holland*, 407 S.C. at 239, 754 S.E.2d at 721 (explaining "[a]ll products liability claims share common elements;" therefore, a party's "failure to establish a reasonable alternative design in his design defect claim prevents [him] from succeeding on his failure to warn claim as a matter of law").

D. Plaintiffs' negligence claims fail because they did not show Fisher or Crosby deviated from the requisite standard of care.

To prevail on their negligence claims, Plaintiffs had to present evidence showing the applicable standard of care and that Fisher and Crosby deviated from the standard of care. *See Allen*, 332 S.C. at 426–27, 505 S.E.2d 356. Plaintiffs did not present *any* evidence of the applicable standard of care at the time of Mr. Jolly's alleged exposure to asbestos in connection with Fisher and Crosby's valves. *See Bragg*, 319 S.C. at 548–49, 462 S.E.2d at 331. Therefore, Plaintiffs failed

[11] Mr. Jolly also testified that he received training in the types of gaskets that can be used in certain temperature and pressure settings. (R. 496–97).

[12] Further, the evidence at trial showed that Duke ordered the particular products it needed for its nuclear power plant. It was Duke, not Fisher and Crosby, who ordered and deployed asbestos products. (R. 1302–04). Therefore, it is Duke, not Fisher or Crosby, that is responsible for the alleged unreasonably dangerous design.

to prove a necessary element of their negligence claims. The trial court's citation to a variety of government regulations, many of which—i.e., the Walsh-Healey Act—are irrelevant to this case, is not sufficient evidence. (R. 29–32). The trial court thus erred in holding that Plaintiffs had met their burden in this regard.

Further, the mere existence in the law of a standard of care does not satisfy Plaintiffs' burden of proof. Plaintiffs were required to prove that Fisher and Crosby *deviated* from the standard of care. To prove a deviation, they must prove what the standard of care requires and show that Fisher and Crosby deviated from that standard—and for both their design defect and failure to warn claims, they must prove the existence of a reasonable or feasible alternative design. *See Holland*, 407 S.C. at 239, 754 S.E.2d at 721. As explained herein, Plaintiffs presented no evidence of a reasonable alternative design, and the trial court therefore erred in denying Fisher and Crosby's motion for JNOV as to Plaintiffs' design defect and failure to warn claims.

II. The trial court abused its discretion in granting Plaintiffs' motion for a new trial nisi additur.

After five hours of deliberation, the jury—which the trial court repeatedly praised for its close attention—awarded Mr. Jolly $200,000, and Mrs. Jolly $100,000. The Plaintiffs did not request, and the trial court did not provide, a verdict form seeking separate awards for Mr. Jolly's medical bills and pain and suffering. The jury's awards were in line with other verdicts rendered in similar cases, both in South Carolina and nationwide. (R. 4815–17). Nonetheless, the trial court granted Plaintiffs' post-trial motion for a new trial *nisi additur*, and increased the verdict to $1,580,000 for Mr. Jolly and $290,000 for Mrs. Jolly. (R. 20). The trial court abused its discretion in so ruling.

"South Carolina law requires the jury to be the sole judge of issues of fact, including the issue of damages." *Vinson v. Hartley,* 324 S.C. 389, 408, 477 S.E.2d 715, 725 (Ct. App. 1996).

Accordingly, "[t]he jury's determination of damages…is entitled to ***substantial deference***." *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109 (2003) (emphasis added); *Luchok v. Vena*, 391 S.C. 262, 264, 705 S.E.2d 71, 72 (Ct. App. 2010). Only when a jury was unduly liberal or conservative in its assessment of the damages may the trial court alter the verdict by granting a new trial *nisi*. *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015). In doing so, the trial court must identify "compelling reasons" to justify invading the jury's province. *Id.* at 193, 777 S.E.2d at 829. Awards of non-economic damages are particularly within the province of the jury to determine because they are indeterminate. *See Kalchthaler v. Workman*, 316 S.C. 499, 503, 450 S.E.2d 621, 623 (Ct. App. 1994) ("We particularly note her claim for pain and suffering was one that peculiarly fell within the province of the jury to weigh and determine."). The trial court is not empowered to simply substitute its judgment for that of the jury. *Graham v. Whitaker*, 282 S.C. 393, 402, 321 S.E.2d 40, 45 (1984).

On appeal, this court "must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party," or Defendants. *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 298 (Ct. App. 1989). This court will reverse the trial court's granting of new trial *nisi additur* for an abuse of discretion, or if the trial court's decision is "wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Id.*; *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). "Similarly, if inapplicable grounds are given for granting *additur*, the order fails by error of law." *Green*, 356 S.C. at 570, 590 S.E.2d at 41.

A. The trial court abused its discretion because it failed to articulate compelling reasons for granting additur.

The trial court granted Plaintiffs' motion for additur in three areas—Mr. Jolly's medical expenses, his pain and suffering, and Mrs. Jolly's loss of consortium—but failed to explain how

the verdict was unduly conservative or otherwise articulate any "compelling reasons" for increasing it by over $1.5 million, as required by law. *See Green*, 356 S.C. at 570, 590 S.E.2d at 41; *Riley*, 414 S.C. at 193, 777 S.E.2d at 829; *Luchok*, 391 S.C. at 264, 705 S.E.2d at 73. Rather, viewing the evidence in the light most favorable to Defendants, it is clear that the jury's verdict was not unduly conservative. The trial court abused its discretion by substituting its own judgment for that of the jury without any compelling reason to do so.

i. Mr. Jolly's medical expenses.

First, the trial court lacked any basis—let alone a "compelling" one—to grant additur as to economic damages because Plaintiffs failed to present reliable evidence of Mr. Jolly's medical expenses, the only item of economic damages at issue. Plaintiffs chose not to offer any medical bills into evidence or call any of Mr. Jolly's treating physicians.

Instead, the sole evidence of economic damages came from Plaintiffs' expert Dr. Frank. He stated that he reviewed "some of the medical bills" and that they "all seem to be in line with what, you know, typical medical costs are." (R. 759). Plaintiffs did not even ask Dr. Frank the amount of the bills during direct, but instead asked, over objection, for his opinion about the cost of future care. (R. 760–61). He testified, "Cases like his with the kind of extensive treatment and surgery he's had, clearly hundreds of thousands. Cases even go to a million dollars or more." (*Id.*). When Defendants challenged that testimony on cross-examination, Dr. Frank clarified his testimony:

> Q. And you said about a million dollars?
> A. I said it would not be unreasonable to be a million dollars.
> . . . .
> Q. You said you had not seen many or all of the bills, correct?
> A. I have not seen what I understand are all of the bills. I have seen some of them.
> Q. How much have you seen?
> A. $142,000.

Q. Is there any reason that [$]900,000, in your estimation, is missing?
A. I don't know why they were or were not available to show me, but I was asked questions about what, for example, a surgical procedure might cost.
Q. But the best opinion on that would be . . . the medical bills, right?
A. That would be the best data.

(R. 845–46). In summary, no medical bills were in evidence and the only evidence of economic damages was Dr. Frank's testimony he had seen $142,000 of bills and his guess that the overall expenses may be "hundreds of thousands" of dollars or "a million dollars or more."

Defendants emphasized the lack of evidence in closing argument, stating, "There are no medical records. No medical bills. . . . You have to wonder why." (R. 2306). Shortly thereafter, the trial court properly instructed the jury that:

> The plaintiff is never entitled to recover speculative damages, that is, damages you arrive at by guesswork. The plaintiff has the burden of proving the existence and the causation and the amount of damages which he does not have to prove to a mathematical certainty. Instead, the plaintiff must present evidence that's sufficient to allow you to make a reasonable approximation of damages, and the plaintiff must prove their damages to a reasonable degree of certainty.

(R. 2367). After five hours of deliberation, the jury awarded Mr. Jolly $200,000 and Mrs. Jolly $100,000, without specifying the amounts awarded for any type of damages.

The trial court's conclusion that the jury was unduly conservative in awarding economic damages was an abuse of discretion. Its analysis started from a faulty premise—that "The jury only awarded Mr. Jolly medical expenses in the amount of $142,000, plus $58,000 for pain and suffering." (R. 18). It is impossible to know how much of the $200,000 award was for medical expenses because Plaintiffs did not request separate questions on the verdict form. (R. 52). *See, e.g.*, *Moore v. Moore*, 360 S.C. 241, 257, 599 S.E.2d 467, 475 (Ct. App. 2004) ("Appellant did not request . . . a special verdict form to determine whether the actual damages were for lost profit or some other measure. Without a special verdict form, we cannot speculate as to what portion of the award the jury attributed to lost profit as opposed to other tort damages."). It is also impossible

to know whether the award to Mrs. Jolly included any medical expenses, because the loss of consortium jury instruction informed the jury that Mrs. Jolly was entitled to recover "for any expenses for the care and treatment to her spouse." (R. 2368). Thus, the trial court's conclusion that the jury awarded $142,000 for medical expenses and $58,000 for pain and suffering—and did not award any damages for loss of enjoyment of life, mental anguish, and "future damages"—is pure speculation that cannot constitute a compelling reason to ignore the jury's verdict. *See Umhoefer*, 298 S.C. at 224, 379 S.E.2d at 298 (appellate court will reverse the trial court's decision if it is "wholly unsupported by the evidence"); *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) ("An abuse of discretion occurs when the conclusions of the circuit court . . . are based on unsupported factual conclusions.").

The trial court compounded its error by increasing the economic damages award to $1 million on the basis that "Dr. Frank testified, *without dispute*, that the total cost of Mr. Jolly's past and future medical care . . . would reasonably be $1,000,000." (R. 18). Dr. Frank did not say that Mr. Jolly's total medical care *would* be $1,000,000, only that "*it would not be unreasonable* to be a million dollars." (R. 845). Consistent with the jury instructions that Plaintiffs were "not entitled to recover speculative damages," the jury was well within its rights to reject Dr. Frank's speculation. (R. 2367). The trial court's conclusion that the medical expenses would be $1 million, and that the jury erred in concluding otherwise, is therefore unsupported by the evidence and an abuse of discretion.

It was also erroneous. The trial court was required to view the evidence in the light most favorable to the Defendants. *See Umhoefer*, 298 S.C. at 224, 379 S.E.2d at 298. By crediting Frank's speculation about medical costs as undisputed evidence that the jury had to believe, the trial court violated this rule. A jury is never required to accept one party's damages evidence, even

if the other side presents no evidence. *Steele v. Dillard*, 327 S.C. 340, 343–44, 486 S.E.2d 278 (Ct. App. 1997); *Black v. Hodge*, 306 S.C. 196, 410 S.E.2d 595 (Ct. App. 1991) ("Stated in the larger sense, the question is simply this: must a trier of fact always believe uncontradicted testimony? The answer to the question is, plainly, no."). To the contrary, if there is an "utter lack of documentation to support" an economic damage award, it "is not subject to challenge." *See Tarrants v. Owens-Corning Fiberglass Corp.*, No. 97-6043, 2000 WL 977375, at *4 (6th Cir. 2000). In *Tarrants*, a mesothelioma case, the court upheld a trial court's refusal to increase a jury award that was less than the plaintiff's expert's estimate of $52,000 in medical costs because plaintiff "failed to produce any written documentation to support her claims for out-of-pocket medical and funeral expenses," and thus "failed to present sufficient credible evidence of out-of-pocket damages to require the district court to set aside the jury's assessment of damages." *Id.*

Similarly here, the trial court had no compelling reason to invade the jury's province and award $1,000,000 for medical expenses when Plaintiffs failed to introduce a single bill, and offered only speculation as to the total medical costs. *See Luchok*, 391 S.C. at 265, 705 S.E.2d at 73 (finding the trial court's rationale that a verdict "did not cover all the chiropractic bills," in the face of conflicting evidence as to their amount, was not a compelling reason to invade the province of the jury and grant *additur*). Although the trial court may have reached a different conclusion than the jury, it cannot merely substitute its judgment for that of the jury without compelling reasons to do so, and it did not offer a single one. *Graham*, 282 S.C. at 402, 321 S.E.2d at 45.

ii. Mr. Jolly's noneconomic damages.

The trial court similarly failed to provide compelling reasons to increase Mr. Jolly's noneconomic damage award. Building on the faulty initial premise that the award consisted of $142,000 in economic and $58,000 in non-economic damages, it increased the award for Mr.

Jolly's noneconomic damages by a factor of 10, to $580,000. In doing so, the trial court merely recited the evidence of pain and suffering and indicated it disagreed with the jury. *See* (R. 18–19). However, a mere recitation of the evidence is not a "compelling reason" for ignoring the jury's conclusion. *See Green*, 356 S.C. at 571, 590 S.E.2d at 41 ("the mere listing of [the plaintiff's] claimed damages . . . does not constitute compelling reasons for invading the jury's province. The order offers no reasons upon which we can review the appropriateness of usurping the jury's decision on damages.").

The jury heard all of the evidence that the trial court cited as compelling, and neither the trial court nor the Plaintiffs cited any reason that the jury failed in its duty. To the contrary, the trial court repeatedly praised the jury for its attentiveness and dedication throughout the trial.[13] Yet, when the jury reached a different verdict than the trial court would have reached, the trial court found the jury failed to do its job, refused to give it any deference, and then substituted its own opinion as a new verdict. That is the opposite of the substantial deference to which a jury's damages awards are entitled. *Harrison*, 354 S.C. at 140, 580 S.E.2d at 115. This is particularly true for non-economic damages, which "peculiarly [fall] within the province of the jury to weigh and determine." *Kalchthaler*, 316 S.C. at 503, 450 S.E.2d at 623.

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[13] *See* (R. 923–24) ("I just cannot thank y'all enough. I've been in this business for almost 50 years, 49 years as a lawyer and as a judge. . . . *I don't believe I've ever seen a jury that is this attentive about what is a very technical and sometimes tedious case*." (emphasis added)); (R. 1170) ("And, again, I am just amazed at the attention that's being paid and the seriousness with which you are undertaking your undertaking."); (R. 1355) ("I am, again, and I had a number of judges calling me . . . and I have told them the thing I am most impressed with, . . . I am so impressed with you."); (R. 1577) ("I just continue to be really so awed at the attention that you are paying to this matter of great importance to the parties who are bringing it to you."); (R. 2082) ("I continue to just be amazed at the kind of seriousness and attention that you have paid and consideration you have given to both sides and to all parties in this controversy.").

The *Riley* case does not compel a different result. The trial court in *Riley* decided it had compelling reasons to increase a non-economic damages award because the extensive testimony of numerous witnesses "showed that this family of beneficiaries, perhaps more than most wrongful death beneficiaries, suffered great loss under this element of wrongful death damages." 414 S.C. at 193–94, 777 S.E.2d at 829. The Supreme Court noted that the evidence "was so compelling and pervasive that the trial judge eventually ruled it had become cumulative under Rule 403." *Id.* at 193, 777 S.E.2d at 829. In contrast, the trial court here cited nothing that made this case unique or unusual, or that made the evidence of non-economic damages so compelling as to render the jury's verdict unduly conservative. To the contrary, juries in mesothelioma cases have awarded non-economic damages in similar or lesser amounts than the award here. *See, e.g.*, *Ford v. Ferro Eng'g*, 2014 Jury Verdicts Lexis 4374 (Pa. Com. Pl. 2014) ($50,000 for pain and suffering); *Ihlenfeld v. Ferro Eng'g*, 2014 WL 5023563 (Pa. Com. Pl. 2014) ($120,000 for pain and suffering when plaintiff died of mesothelioma); *Paasch v. Crane Co.*, 2012 WL 4077858 (Pa. Com. Pl. 2012) ($38,000 for pain and suffering and $70,000 for wrongful death in a mesothelioma case).

iii. Mrs. Jolly's loss of consortium damages.

The trial court similarly did not offer any reason for nearly tripling the award to Mrs. Jolly. It merely said that $100,000 was inadequate "[g]iven everything that the Jollys have endured and that [Mrs. Jolly's] time with Mr. Jolly will be cut short by at least ten years." (R. 20). Again, the trial court must articulate compelling reasons for finding a verdict is unduly conservative; it cannot merely substitute its judgment for that of the jury. *See Riley*, 414 S.C. at 193, 777 S.E.2d at 829. The trial court failed to provide ***any*** reasons to increase this award. Moreover, as it stated in the jury charge, an award of damages for loss of consortium is inherently subjective and cannot be easily quantified. (R. 2368).

Plaintiffs' presentation as to Mrs. Jolly's loss of consortium claim was extremely brief. Mr. Jolly did not mention his wife. *See generally* (R. 470–561). Mrs. Jolly testified that Mr. Jolly no longer brings her coffee in bed and that they spend much of their time traveling to appointments. (R. 588–90). Although Plaintiffs presented testimony that Mrs. Jolly had a mild heart attack, they presented no expert testimony that it was related to her husband's disease. (R. 575, 580–81). The jury would have been well within its rights to conclude it was not related.

Finally, awards for loss of consortium in other asbestos-related cases illustrate that the jury's award in this case was reasonable, not unduly conservative. *See, e.g.*, *Thalman v. Owens-Corning Fiberglas Corp.*, 676 A.2d 611, 615 (N.J. Super. Ct. App. Div. 1996) ($168,000 loss of consortium award where a decedent and his wife were married for 44 years and decedent "ceased the activities he ordinarily enjoyed with his wife"); *Schiavo v. Owens-Corning Fiberglas Corp.*, 660 A.2d 515, 517 (N.J. Super. Ct. App. Div. 1995) (affirming award of $100,000).

III. The trial court improperly allowed Plaintiffs to allocate settlement funds to nonexistent claims for the purpose of avoiding the statutorily-required setoff.

In the alternative, if this court affirms the trial court's granting of new trial *nisi additur*, the court should reverse the trial court's ruling that Plaintiffs' $2,270,000 in pre-trial settlements do not entirely offset the trial court's addited $1,870,000 damages award.

A. South Carolina law requires set-off of settlement amounts to prevent plaintiffs from obtaining a double recovery.

A "settling defendant is 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). This principle is codified in South Carolina Code section 15-38-50:

> When 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 . . . 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 consideration paid for it, whichever is greater . . . .

Accordingly, "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" and "the circuit court *must* award a setoff." *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012); *Huck v. Oakland Wings, LLC*, Op. No. 5500 (S.C. Ct. App. filed March 28, 2018) (Shearouse Adv. Sh. No. 13, at 18). The purpose of a setoff is to prevent an injured person from obtaining a double recovery for any damages sustained, because it is "almost universally held that there can be only one satisfaction for an injury or wrong." *Smith*, 397 S.C. at 472, 724 S.E.2d at 191.

Although settling parties may allocate settlement proceeds in a manner that promotes their best interests, "the . . . allocation must yield to fairness and justice." *Welch v. Epstein*, 342 S.C. 279, 313–14, 536 S.E.2d 408, 426 (Ct. App. 2000). In *Welch*, the plaintiff settled a malpractice claim with one defendant for $450,000, and allocated $5,000 to the wrongful death claim and $445,000 to the survival claim. 342 S.C. at 312, 536 S.E.2d at 425. The remaining defendant was not a party to the allocation, and the plaintiff did not have evidence of damages in the survival action other than the medical bills. *Id.* at 313–14, 536 S.E.2d at 426. The trial court reallocated the settlement so that $28,535.88—the amount of medical bills—went to the survival action, and the remainder to the wrongful death action. *Id.* The trial court reasoned that reallocation of settlement funds to the wrongful death action that could not have been awarded in the survival action ensured "there is one complete satisfaction for the injury suffered by [plaintiff]." *Id.* at 314. The Court of Appeals affirmed the reallocation, stating "we agree with the trial judge the allocation between the survival and wrongful death claims must yield to fairness and justice." *Id.* at 313.

The Supreme Court reached the same result in *Rutland*. There, the plaintiff settled with a defendant before trial, allocating $138,000 to conscious pain and suffering in a potential survival

claim, and $167,000 for a wrongful death claim. 400 S.C. at 212, 734 S.E.2d at 143. The plaintiff only pursued a wrongful death claim against the remaining defendant; after the verdict the trial court re-allocated the entire settlement to offset the wrongful death damages. *Id.* at 213. The Supreme Court affirmed. It noted that there was no evidence to support a survival claim, so "the trial court properly reallocated that portion of the settlement to the wrongful death claim." *Id.* at 217. The Court explained, "[c]ompensatory damages are intended to make the plaintiff whole, not to punish the tortfeasor," and therefore "[w]here reallocation of damages furthers that policy, we do not believe the result is inequitable." *Id.* Hence, it was proper to reallocate settlement funds from a claim that did not exist (the survival claim) to offset the claim that did exist (the wrongful death claim) so that the plaintiff did not receive a double recovery.

In contrast, in *Riley v. Ford Motor Co.*, the personal representative of the estate settled both a wrongful death claim and a survival claim based on the decedent's conscious pain and suffering, and the settlement was approved by the trial court. 414 S.C. at 189, 777 S.E.2d at 827. Had the decedent not died before trial, he could have asserted his claim for conscious pain and suffering as part of a personal injury action, and therefore it "survived" to his estate. *See* S.C. Code Ann. § 15-5-90; *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 97 (2002) ("Generally, any cause of action which could have been brought by the deceased in his lifetime survives to his representative."). The personal representative tried only the wrongful death claim to verdict. The Supreme Court upheld the trial court's refusal to reallocate the settlement of the survival claim to offset the damages awarded in the wrongful death action. *Riley*, 414 S.C. at 196, 777 S.E.2d at 830. In *Riley*, as opposed to *Rutland* or *Welch*, the settlement agreement explicitly

allocated the settlement funds between two existing, viable claims, and thus the court refused to alter the allocation. *Id.* at 196–97.[14]

B. The trial court erred by refusing to offset amounts Plaintiffs unilaterally allocated to a "future wrongful death claim" that is barred as a matter of law.

Here, the trial court erred as a matter of law because it refused to reallocate amounts Plaintiffs set aside—"internally," unilaterally and non-binding—for a "future" wrongful death claim that does not exist as a matter of law, to offset Mr. Jolly's personal injury claim.

Plaintiffs received \$2,270,000 in settlements from other defendants.[15] (R. 44). The settlement agreements were not approved by the trial court and did not allocate the amounts paid between various causes of action. Rather, Plaintiffs represented that they had "internally" allocated the settlements one-third each to Mr. Jolly's claim, Mrs. Jolly's claim, and a "future" wrongful death claim. (R. 2501; R. 46).

After trial, Defendants moved to set off the verdict amount by the amount of the settlements pursuant to South Carolina Code section 15-38-50 and the common law. (R. 4758). Although the trial court granted Defendants' motion, it refused to reallocate Plaintiffs' purported "internal" allocation. (R. 45). Thus, the trial court allocated \$756,666.67 to each of the three purported claims, such that the "addited" verdict for Mr. Jolly of \$1,580,000 was reduced to \$823,333.33, and the "addited" verdict for Mrs. Jolly was reduced from \$290,000 to \$0. (R. 46). As a result, the Jollys

[14] This court recently adhered to these well-settled principles in *Huck v. Oakland Wings, LLC*, Op. No. 5500 (S.C. Ct. App. filed March 28, 2018) (Shearouse Adv. Sh. No. 13, at 18, 21–23), and held a plaintiff was required to produce pretrial settlement agreements so the trial court could "determine the amount of settlement and its terms," analyze whether the agreements allocated settlement amounts among different claims, and calculate the proper setoff amount.

[15] Defendants moved for production of the agreements. (R. 4765). The trial court denied the request—which Defendants assert was error—stating that it verified that the settlements totaled \$2,270,000. (R. 44).

will receive $3,093,333.33 for their claims, even though the jury only awarded $300,000 in total damages, and the trial court's "addited" verdict totaled $1,870,000.

C. Settlement proceeds cannot be allocated to a "future" wrongful death claim because that claim does not exist.

The trial court erred as a matter of law in accepting Plaintiffs' allocation of one-third of their pre-trial settlement proceeds to a "future" wrongful death claim, because that claim is barred as a matter of law. Consistent with the language of South Carolina code section 15-51-10, South Carolina courts have repeatedly held "a claim under the Wrongful Death Act lies in the decedent's estate only when the decedent possessed the right of recovery at his death." *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 347, 699 S.E.2d 143, 145 (2010). Thus, if a plaintiff executes a release during his life, that same release bars his estate from later pursuing a wrongful death claim on his behalf. *Stokes*, 389 S.C. at 349.

In *Price v. Richmond & D.R. Co.*, 33 S.C. 556, 12 S.E. 413, 414 (1890), the decedent settled personal injury claims and released the defendant prior to death. The administrator of his estate filed a wrongful death claim against the same defendant. *Id.* The Supreme Court found:

> the capacity of the deceased to maintain an action based upon the injury which caused his death is made the test of the right of the administrator to maintain the action provided for by the statute; hence if the deceased has debarred himself, by his contributory negligence, *or by any other cause*, from maintaining his action based upon the injury which caused his death, it follows necessarily that his administrator is likewise barred of his right of action, which would otherwise be secured to him by the statute.

Id. at 413–14 (emphasis added). Thus, the test is whether the decedent, *if he had not died*, could have maintained the action. *Id.* at 414. Because the decedent had already settled and released his personal injury claims, he could not have maintained another cause of action if he had not died, and his estate was barred from recovering on its wrongful death claim. *Id.*; *see also Reed v.*

Northeastern R. Co., 37 S.C. 42, 16 S.E. 289, 291 (1892) (a valid release will "defeat the right of recovery . . . in case of his death.").

Recent cases reaffirm these principles. In *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 940 (D.S.C. 1988), an insulator with an asbestos-related disease sued and settled personal injury claims with numerous manufacturers; years later, after his death, his estate's personal representative filed a wrongful death claim against a defendant who was not a prior party. *Id.* The statute of limitations on the insulator's personal injury claims had run, but the wrongful death statute of limitations had not. *Id.* Judge Anderson analyzed the wrongful death statute and held that it "creates a new statutory right in the personal representative, the right exists only if the decedent could have maintained such an action had he lived. The right to bring a wrongful death claim is thus conditioned upon the decedent's right to maintain a claim or action." *Id.* Thus, since the insulator could not have maintained a personal injury claim at the time of his death due to the expiration of the statute of limitations, his estate could not maintain a wrongful death claim. *Id.*

The Supreme Court approved of this analysis in *Stokes*, 389 S.C. 343, 699 S.E.2d 143. Justice Kittredge—citing *Price*—explained, "Succinctly stated, if the decedent had no claim at his death, the estate has no claim." *Id.* at 347, 699 S.E.2d at 145. The court found Judge Anderson correctly decided *Quattlebaum* by "adher[ing] to the principle that a decedent's estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived." *Id.* at 349, 699 S.E.2d at 146. Finally, the court reaffirmed "that a claim under the Wrongful Death Act lies in the decedent's estate only when the decedent possessed the right of recovery at his death." *Id.*

In this case, Plaintiffs unilaterally allocated settlement amounts to "future" wrongful death claims that do not exist. It was improper not to set off this amount. Mr. Jolly asserted the same

claims—his personal injury claims—against the settling defendants as he did against Fisher and Crosby. *See generally* (R. 55). He had no estate because he is alive. His future estate could not, and did not, pursue wrongful death claims against either the settling defendants or Fisher and Crosby because he is not dead. When Mr. Jolly settled his personal injury claims against the settling defendants, he was no longer able to pursue claims related to his personal injuries from mesothelioma against those defendants, because any such claims had been released. Similarly, the verdict against Fisher and Crosby forecloses pursuit of any future claims by Mr. Jolly against them related to his mesothelioma. Accordingly, when Mr. Jolly dies, his estate cannot pursue a wrongful death claim related to Mr. Jolly's mesothelioma. *See Stokes*, 389 S.C. at 348 ("If [the] decedent had no right, at the time of death, to maintain an action for personal injuries, then the right to maintain the present action could not be transmitted to her personal representative").

These facts make this case more similar to *Rutland* and *Welch* than *Riley*, upon which the trial court relied. *Riley* rejected a reallocation between two claims that then existed, instead deferring to the allocation in the settlement agreement between the parties and approved by the trial court. In *Rutland* and *Welch,* the court upheld reallocation of settlement amounts from claims that failed as a matter of law (survival claims) to the existing wrongful death claims to prevent a double recovery. As in *Rutland* and *Welch* (and unlike *Riley*), Plaintiffs here unilaterally allocated $756,666.67 in settlements to a wrongful death claim that did not exist as a matter of law at the time of the settlements and does not exist now, and is barred as a matter of law in the future, thereby depriving Defendants of the ability to set off those settlement amounts. Allowing plaintiffs to allocate funds to claims they cannot pursue defeats the intent of the set-off statute, and violates this Court's admonition that settlement allocations "must yield to fairness and justice." *See* S.C. Code Ann. § 15-38-50; *Welch*, 342 S.C. at 313–14, 536 S.E.2d at 426.

D. Plaintiffs are receiving a double recovery in violation of South Carolina law.

The trial court's refusal to apply all settlement proceeds to setoff, combined with its granting of the new trial *nisi additur*, also violates South Carolina law because it results in a double recovery for Plaintiffs. *See Smith,* 397 S.C. at 472, 724 S.E.2d at 190. The trial court explicitly instructed the jury to consider Plaintiffs' future damages, because Plaintiffs would not be able to bring another action to recover those damages:

> Damages – future damages. Now, in determining the amount of compensation for someone personally injured by another's misconduct, it's proper to consider past, present and future aspects of the injury. The injured party may recover for those future damages that are reasonably certain to result. ***The principal [sic] underlying compensation is that only one action can be brought, and therefore, only one recovery had.*** So it may be, depending on your view of the evidence, proper to include the estimate of future damages, future medical expenses, and pain and suffering that will with reasonable certainty result.

(R. 2366–67) (emphasis added). Therefore, regardless of how Plaintiffs titled their causes of action, the settlements and damages they received were all for the same injury, requiring setoff. *Smith,* 397 S.C. at 472, 724 S.E.2d at 190. The trial court's refusal to setoff the amount Plaintiffs allocated to their non-existent future wrongful death claims creates a windfall.

Likewise, in the trial court's decision granting the new trial *nisi additur* and increasing the damages to $1,580,000 for Mr. Jolly and $290,000 for Mrs. Jolly, the court noted categories of *future* damages, including damages related to "Mr. Jolly's expected death," which the court noted would likely be "a bad death" and to Mrs. Jolly losing her husband. (R. 19–20). Even after the trial court's *additur* ruling, which was explicitly intended to include future damages related to Mr. Jolly's death from mesothelioma, Plaintiffs recovered $400,000 more in *settlements* than the trial court's calculation their total damages. The trial court's refusal to set-off Plaintiffs' full settlement amounts results in Plaintiffs receiving an additional $823,333.33 from Fisher and Crosby, for a total of over $1.2 million more than the trial court's addited damages award.

"Compensatory damages are intended to make the plaintiff whole, not to punish the tortfeasor." *Rutland*, 400 S.C. at 217, 734 S.E.2d at 146; *see also Haselden v. Davis,* 353 S.C. 481, 486, 579 S.E.2d 293, 296 (2004) (the "central tenet of compensatory damages [that] awards are intended to make an injured person whole by placing him in the position enjoyed prior to the injury and no more").[16] Yet, for Plaintiffs' injuries related to Mr. Jolly's mesothelioma, Plaintiffs will receive $3,093,333.33 in payments for claims that resulted in only $300,000 in damages according to the jury, and $1,870,000 in damages according to the trial court. That is not compensation; that is a double payment to the tune of over $1.2 million. It is also an error of law, because it denies Defendants the setoff to which they are entitled under section 15-38-50. Accordingly, setoff of the settlement proceeds is required both as a matter of law and public policy.

In short, even if this Court affirms the granting of new trial *nisi additur* (which it should not), this Court should reverse the trial court's setoff and allocation ruling and order that all settlement funds allocated to personal injury claims and "future wrongful death claims"—a total of approximately $1,513,333.34—be set off against the increased award to Mr. Jolly.

IV. The trial court improperly compelled Fisher and Crosby representatives to appear at trial in Plaintiffs' case-in-chief.

A. Plaintiffs failed to properly serve the subpoenas on Crosby or Fisher.

Rule 45, SCRCP, incorporates the service requirements in Rules 4(d) and (j), SCRCP. Rule 4(d) requires *personal* service. For a corporation, this requires delivering a document to "an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process." Rule 4(d)(3), SCRCP. Defendants are out-of-state companies that are not registered to do business, and have no registered agent, in South Carolina.

[16] The jury rejected Plaintiffs' request for punitive damages. (R. 52).

Plaintiffs "served" their subpoenas on Defendants' counsel. This was not valid service.[17] *See Hamilton v. Davis*, 300 S.C. 411, 414, 389 S.E.2d 297, 298 (Ct. App. 1990) (that a person is an agent for some purpose does not render that person an authorized agent for service of process); *see also Harrison v. Prather*, 404 F.2d 267, 273 (5th Cir. 1968) (service on attorney did not meet personal service requirements).[18] Plaintiffs were required to serve a person authorized by Defendants to accept service of process—the companies' registered agents, and the trial court erred in compelling the corporate representatives to appear at trial.

B. The trial court lacked power to compel out-of-state witnesses to testify, regardless of whether the witnesses were parties.

The trial court denied defense motions to quash stating that a party who has "submitted to the jurisdiction of the Court . . . can be compelled to submit testimony in the case." (R. 333–34). This ruling was erroneous. A court's exercise of personal jurisdiction over parties to litigation is separate from its subpoena power. *See, e.g.*, *Syngenta Crop Prot., Inc. v. Monsanto Co.*, 908 So. 2d 121, 128 (Miss. 2005) ("[T]he concepts of personal jurisdiction and subpoena power are altogether different."). Moreover, no South Carolina authority links the exercise of personal jurisdiction to subpoena power, and Rule 45 does not authorize courts to exercise subpoena power over out-of-state parties. *See* Rule 45, SCRCP; *see also* Fed. R. Civ. P. 45(c)(1) (court cannot compel person to travel over 100 miles and across state lines to attend trial).

In ruling on the motions to quash, the trial court interpreted Rule 45 to include an exception to the out-of-state limitations for "agents, managing directors, and other representatives of a

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[17] Defendants did not concede the validity of service by trial counsel simply signing for a FedEx package without knowing its contents. *See* (R. 332).

[18] *See also* 9A Wright & Miller, *Federal Practice & Procedure* § 2454 (3d ed.) (as to subpoenas, "unlike service of most litigation papers after the summons and complaint, service on a person's lawyer will not suffice").

corporation." (R. 334). This ruling was error. The "exception" applies to "a party or an officer, director or managing agent of a party." Rule 45(a)(3), SCRCP. Plaintiffs directed the subpoenas generally to Defendants, not to an officer, director, or managing agent of Fisher or Crosby. There are no exceptions for non-officer employees or "other representatives" of a corporation or for the corporation itself. Therefore, the Rule 45 exception did not apply, and there is no exception in Rule 45 that allows a South Carolina court to command an out-of-state person to attend a trial here. If Plaintiffs wished to present testimony from Defendants' corporate representatives, they were required to do so by presenting deposition testimony at trial.

C. Fisher and Crosby suffered prejudice.

The trial court's decision to compel the corporate representatives to testify was prejudicial to Fisher and Crosby. First, it is more powerful for a plaintiff to present testimony to the jury *from* a defendant, rather than by cross-examination in the defendant's case. Fisher and Crosby were deprived of the opportunity to control the presentation of their case; instead, the ruling allowed Plaintiffs to call their witnesses and exert control over the presentation of Defendants' case. The trial court also permitted Plaintiffs to examine the corporate representatives via leading questions in their own case. (R. 334). Finally, it allowed Plaintiffs to present a significant amount of evidence during their case-in-chief that they would not otherwise have been able to present—including evidence about the details of Fisher and Crosby's operations. *See generally* (R. 1068–1171, 1176-1354, 1362–1534). Thus, in ruling on Fisher and Crosby's directed verdict motion, the trial court considered substantially more evidence than it otherwise would have. The trial court's denial of Fisher and Crosby's motions to quash and joint motion to reconsider should be reversed.

CONCLUSION

This Court should reverse the trial court's evidentiary rulings and subpoena ruling and grant JNOV in favor of Fisher and Crosby. If the Court affirms the evidentiary rulings and denial of JNOV, however, it should reverse the trial court's new trial *nisi additur* ruling and reinstate the jury verdict. Finally, if the Court affirms the *nisi additur* ruling, it should reverse the trial court's allocation ruling and order that all funds allocated to personal injury claims or "future wrongful death claims" must be set off against Mr. Jolly's damages for his personal injury claims.

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September 7, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2016-002611
Case No. 2016-CP-42-1592

Beverly Dale Jolly and Brenda Rice Jolly,........................... Respondents,

v.

General Electric Company, et al., ... Defendants,

Of whom Fisher Controls International LLC and Crosby Valve, LLC are the .... Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Appellants' Brief complies with Rule 211(b), SCACR.

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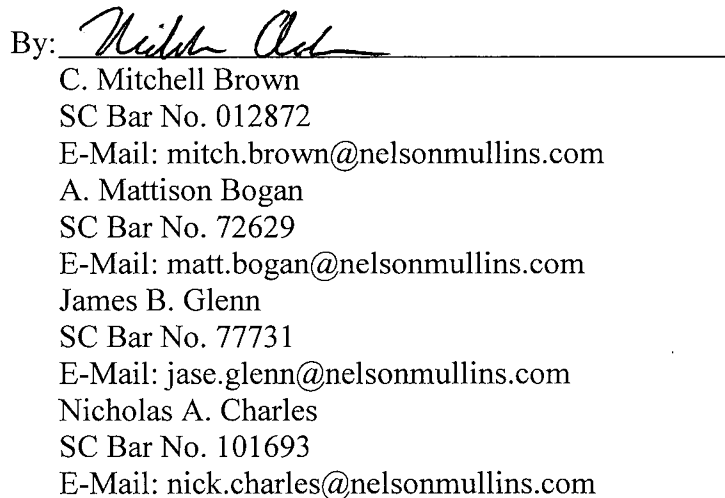

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