THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean Hoefer Toal, Chief Justice of the Supreme Court of South Carolina (Retired),
Acting as Circuit Court Judge

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

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

vs.

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

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

FINAL BRIEF OF RESPONDENTS

Lisa W. Shirley (admitted *pro hac vice*)
Jonathan M. Holder
DEAN OMAR BRANHAM, LLP
300 N. Market Street, Suite 300
Dallas, TX 75202
Telephone: (214) 722-5990

Theile B. McVey
John D. Kassel
KASSEL MCVEY ATTORNEYS AT LAW
P.O. Box 1476
1330 Laurel Street
Columbia, SC 29201

Counsel for Respondents

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STATEMENT OF ISSUES

1

The circuit court admitted Respondent's medical experts' opinions that Beverly Dale Jolly's exposure to asbestos from Fisher/Crosby valves was a substantial factor in causing his mesothelioma, finding their opinions relevant and reliable. Was the admission of this testimony a proper exercise of the court's considerable discretion?

2

The jury found for Respondents on their negligence and breach of implied warranty claims. Fisher/Crosby contend that they were entitled to judgment as a matter of law on the issues of duty to warn, breach of duty, and design defect. Was there no evidence to reasonably support the jury's findings?

3

Trial courts have discretion to grant a new trial *nisi additur* upon a finding that the jury's damage award is inadequate. Finding the damages awards to the Jollys to be inadequate given the serious nature of Dale Jolly's cancer, Judge Toal ordered an addited verdict and increased Dale Jolly's damages from $200,000 to $1,580,000 and increased Brenda Jolly's damages from $100,000 to $290,000. Did the court act within its discretion?

4

A trial defendant is only entitled to a setoff for the amount other defendants have paid to settle the same cause of action. Respondents' pre-trial settlements were for three claims: personal injury, loss of consortium, and wrongful death. Respondents went to verdict against Fisher/Crosby on only the first two claims. Did the circuit court correctly setoff only the settlement proceeds allocated to the two claims tried to verdict against Fisher/Crosby?

Rule 45, SCRCP, allows a trial subpoena to be quashed for geographic reasons only if the subpoena is directed to "a person who is not a party nor an officer, director or managing agent of a party." Respondents served trial subpoenas on Fisher/Crosby as parties to this action. Did the trial court properly require Fisher/Crosby to comply with trial subpoenas and testify at trial through their corporate representatives?

STATEMENT OF FACTS

I. Dale Jolly was exposed to asbestos from Fisher/Crosby valves.[1]

Dale Jolly was diagnosed with malignant pleural mesothelioma in January of 2016, at the age of 71. (R. p. 470, line 25-p. 471, line 2; R. p. 760, lines 3-6). He is a former school teacher who decided to go to work for Duke Power Company in 1979. (R. p. 473, lines 4-18). After passing certain math tests, he became a mechanical inspector for Duke within a few months of starting his employment. (R. p. 473, line 19-p. 474, line 25). He was an inspector authorized by the Nuclear Regulatory Commission. (R. p. 487, lines 1-15). He rotated among Duke's nuclear power plants at Oconee, McGuire, and Catawba. (R. p. 479, lines 7-19).

Between 1980 and 1984, Dale's job as an inspector brought him into close proximity to mechanics repairing valves during plant outages (also called "shutdowns"). (R. p. 487, line 1-p. 489, line 21; R. p. 497, line 17-p. 507, line 7). Each plant had scheduled shutdowns during which the uranium core was changed and the plant equipment was brought off line and repaired. (R. p. 485, line 20-p. 486, line 15). McGuire and Catawba had one shutdown per year and Oconee had two to three shutdowns each year. (R. p. 519, line 25-p. 520, line 9). The shutdowns generally

[1] Beverly Dale Jolly goes by his middle name "Dale." For clarity, Dale and Brenda Jolly will be referred to by their first names given that they share the same last name. No disrespect is intended.

lasted about 12 weeks. (R. p. 520, lines 10-20).

Dale's position as an inspector required him to be present when valves were taken apart, and he had to verify the type of replacement gaskets required to be used on the valve and valve flange. (R. p. 487, line 19-p. 488, line 5). He would often arrive on site before the old gaskets were removed and was present during the removal process. (R. p. 488, line 6-p. 489, line 10). He was standing just a few feet away when the mechanics used wire brushes and power grinders to remove the asbestos gaskets, and he described that "the dust would be everywhere." (R. p. 488, lines 6-17; R. p. 487, line 1-p. 489, line 21; R. p. 497, line 17-p. 507, line 7). The gasket removal process took quite a while because it was important to get the valve flange completely clean. (R. p. 500, line 3-p. 501, line 6). Part of Dale's job was to observe and verify that the flange was completely clean and that the gasket was put back in and torqued correctly. (R. p. 408, line 18-p. 490, line 13).

Dale was "regularly and consistently" present when asbestos gaskets were removed from Fisher/Crosby valves. (R. p. 506, line 23-p. 507, line 3). He testified that there were a lot of Fisher/Crosby valves present at Duke. (R. p. 484, line 16-p. 485, line 17; R. p. 503, line 15-p. 505, line 7). Dale was exposed to asbestos materials on valves manufactured by Fisher/Crosby. (R. p. 497, line 2-p. 507, line 7). At times, engineers from Fisher or Crosby were present to assist with the maintenance of the valves. (R. p. 520, line 21-p. 521, line 8).

Dale's co-worker, David Taylor, also worked at Duke's Oconee plant. (R. p. 867, line 24-p. 868, line 13). Taylor's job involved removing and replacing asbestos gaskets that were located on flanged connections between the valves and the pipe. (R. p. 868, line 18-p. 870, line 6). He removed valve gaskets about once a week. (R. p. 871, lines 9-19). Dale was nearby when Taylor and other workers removed asbestos flange gaskets with scrapers and wire brushes that created

dust. (R. p. 869, line 13-p. 876, line 20; R. p. 887, line 13-p. 889, line 4). The replacement asbestos flange gaskets came from the valve manufacturers. (R. p. 882, lines 2-11).

II. Fisher/Crosby designed their valves to utilize asbestos gaskets and packing and sold asbestos-containing valves and replacement parts to Duke.

Fisher/Crosby sold valves to Duke with flange connections that utilized asbestos flange gaskets. (R. p. 486, lines 21-23; R. p. 878, lines 3-9; R. p. 1121, line 3-p. 1123, line 15; R. p. 1486, line 22-p. 1487, line 22; R. p. 1489, line 7-p. 1490, line 1; R. p. 1529, line 19-p. 1530, line 4). Most of the valve flange gaskets sold by Fisher/Crosby were asbestos gaskets. (R. p. 869, lines 5-12; R. p. 877, line 22-p. 881, line 7; R. p. 3899). Fisher/Crosby valves also had internal asbestos gaskets and packing. (R. p. 877, line 22-p. 881, line 7; R. p. 1122, line 23-p. 1124, line 21.) Asbestos gaskets contain up to 90% asbestos. (R. p. 709, lines 14-23).

Fisher supplied asbestos valve gaskets when the valves were sold to Duke, and also supplied replacement asbestos gaskets. (R. p. 882, line 2-p. 884, line 16; R. p. 1035, line 24-p. 1036, line 12; R. p. 1091, line 2-9). Purchase orders confirm the presence of Fisher valves at Duke and the sale of replacement asbestos gaskets, including asbestos flange gaskets, to Duke. (R. p. 882, line 2-p. 884, line 16; R. p. 1101, line 3-p. 1104, line 25; R. pp. 2950-3308; R. pp. 3586-3615; R pp. 3870-3903; R. pp. 3572-3578).

Crosby sold a lot of valves to the Duke plants where Dale worked—66 to Oconee, 72 to McGuire, and 18 to Catawba. (R. p. 1507, line 20-p. 1515, line 18; R. pp. 3962-4325). Some Crosby valves sold to Duke contained asbestos gaskets. (R. p. 1522, lines 9-23). Crosby sold asbestos-containing replacement gaskets and packing to Duke. (R. p. 1515, line 24-p. 1516, line 14; R. p. 1520, line 15; R. pp. 3948-3953).

Crosby recommended that asbestos gaskets be used as replacement parts. (R. p. 1391, line 25-p. 1392, line 12). In addition to specifying asbestos gaskets, Fisher recommended that the gasket should be replaced whenever the valve is opened. (R. p. 1213, line 16-p. 1214, line 5). Crosby was similarly aware that the internal gaskets in its valves would have to be removed and replaced during routine maintenance of its valves. (R. p. 1402, lines 16-25).

At least some of the gaskets and packing sold by Fisher contained crocidolite or "Blue African" asbestos fibers. (R. p. 1135, line 19-p. 1137, line 12; R. p. 1141, lines 3-7; R. pp. 3579-3585; R. p. 3904). Experts on both sides testified that gaskets and packing were known to contain crocidolite. (R. p. 2074, line 1-p. 2075, line 10; R. p. 693, line 15-p. 694, line 4). In 1980, Fisher's own air monitoring tested a Blue crocidolite spiral wound gasket. (R. pp. 3579-3585). Fisher also had a specification for crocidolite packing. (R. p. 1136, line 16-p. 1137, line 16; R. p. 1141, lines 3-7; R. p. 3904). This is significant because, even according to Fisher/Crosby's experts, crocidolite is by far the most potent type of asbestos fiber for causing mesothelioma. (R. p. 1707, lines 8-p. 1708, line 9; R. p. 2064, lines 3-p. 2065, line 4).

III. The qualifications and opinions of the Jollys' causation experts.

A. Dr. Arthur Frank

Dr. Frank is a board-certified physician who specializes in occupational and preventive medicine. (R. p. 676, lines 11-20; R. p. 2734; R. p. 2706). He earned his medical degree from Mount Sinai School of Medicine in New York in 1972, where he studied with Dr. Irving Selikoff, a world-renowned expert in the field of asbestos and asbestos-related disease. (R. p. 678, line 19-p. 679, line 8). He then became a commissioned officer in the U.S. Public Health Service, serving active duty for two years at the National Cancer Institute in the lung cancer branch studying asbestos diseases. (R. p. 679, lines 9-17). In 1977, he obtained his Ph.D. in

biomedical sciences based on his study of the effects of asbestos on respiratory tissue. (R. p. 677, lines 2-6; R. p. 679, lines 18-23; R. p. 2705). He has held professorships at medical schools and schools of public health ever since. (R. p. 682, line 3-p. 683, line 6; R. pp. 2706-2707). Since 2002 he has been at Drexel University as a professor of public health and a professor of medicine in the pulmonary division of the college of medicine, and since 2011 he has also been a professor of engineering in the college of engineering. (R. p. 682, line 3-p. 683, line 6; R. p. 2734; R. p. 2706-2707).

For almost fifty years, Dr. Frank has devoted his career to the study and prevention of asbestos-related diseases, including through participation in epidemiologic studies of asbestos-exposed populations, teaching asbestos medicine to medical students and doctors, and testifying as an expert witnesses in cases like this one. (R. 684, line15-p. 685, line 2; R. p. 681, line 20-p. 464, line 2; R. p. 2734). Dr. Frank frequently consults with state, federal, and international agencies on occupational and environmental health issues, as well as medical schools and public health organizations all over the world. (R. p. 685, line 7-p. 686, line 5; R. pp. 2709-2718). He has authored more than 80 books and book chapters, more than 90 articles, and more than 40 abstracts, almost all on asbestos-related topics. (R. p. 686, line 11-p. 690, line 3; R. pp. 2719-2733). He has received many awards, including one in 2016 from a prestigious international organization that recognized his global work seeking to improve occupational safety and health related to asbestos. (R. p. 679, line 25-p. 681, line 19; R. p. 2734; R. p. 2706).

Dr. Frank is very familiar with asbestos exposures in the workplace, having reviewed thousands of articles on asbestos-related topics, including many that measured exposure levels from working with asbestos products. (R. p. 707, line 14-p. 708, line 1). He has also interviewed many workers with asbestos-related diseases who have described what conditions were like

when working with asbestos products. (R. p. 708, lines 1-8). Part of his role as an occupational physician has involved site visits to power plants. (R. p. 706, line 6-p. 707, line 5).

Dr. Frank has reviewed the body of literature that has been published about the levels of asbestos emitted when asbestos gaskets are removed with hand tools and power tools. (R. p. 708, lines 9-17). The removal of asbestos gaskets with wire brushes and electric grinders results in "significant levels" of exposure. (R. p. 708, line 21-p. 709, line 13). Removal of asbestos gaskets generates asbestos exposures in the range of 1 to 9 fibers per cubic centimeter (fibers/cc) of air, even for a bystander like Dale. (R. p. 735, line 21-p. 736, line 24). By contrast, the average background level of asbestos in urban areas has been measured as .00001 fibers per cubic centimeter (fibers/cc) of air. (R. p. 734, line 22-p. 735, line 16). Exposures from the removal of asbestos gaskets are thus five to six orders of magnitude greater than background levels. (R. p. 736, lines 17-24). That amounts to hundreds of millions times greater. (*Id.*). The fact that the dust was visible indicates that the exposures were "very high." (R. p. 773, line 10-p. 774, line 8.)

Dr. Frank explained that even at the current permissible exposure limit (PEL) of .1 fiber/cc, the government has determined that not all mesothelioma will be prevented. (R. p. 710, line 4-p. 711, line 14; R. p. 711, line 25-p. 712, line 3). Epidemiological studies have established that exposures of .1 fiber/cc for one year increases the risk of mesothelioma four times. (R. p. 710, lines 17-22). In some individual cases, mesothelioma has occurred after only one day of asbestos exposure. (R. p. 700, lines 1-13).

Mesothelioma is caused by a person's cumulative asbestos exposure. (R. p. 725, line 25-p. 726, line 7). The more exposure a person has, the greater the risk of getting the disease. (R. p. 698, line 24-p. 699, line 12; R. p. 725, line 25-p. 726, line 7). When there are exposures to multiple products, all the exposures contribute to the cumulative dose. (R. p. 726, lines 3-5).

For his opinions in this case, Dr. Frank reviewed information about Dale's exposures, his medical records, the deposition testimony of Dale and others, and some case documents. (R. p. 716, line 20-p. 717, line 3). He "read several of [Dale's] own transcripts where he described what it was like at workplaces and that he was standing there watching as this work was being done." (R. p. 718, line 25-p. 719, line 5). Dr. Frank testified that Dale's exposures to asbestos from the removal of asbestos gaskets from Fisher/Crosby valves contributed to the cumulative dose of asbestos that caused Dale's mesothelioma. (R. p. 726, lines 11-21). It is his opinion, within a reasonable degree of medical certainty, that Dale's exposures from Crosby and Fisher valves were substantial contributing factors in the development of Dale's mesothelioma. (R. p. 730, line 23-p. 733, line 23). He gave this opinion in response to hypotheticals that asked him to assume that over a four-year period, from 1980 to 1984, it was part of Dale's normal job responsibilities to regularly be within ten feet of the removal of asbestos gaskets from valve flanges on Crosby and Fisher valves, that the gaskets were removed with wire brushes and scrapers, and that Dale saw and breathed the dust that was created from that work. (*Id.*)

B. Dr. John Maddox

Dr. John Maddox is a board-certified anatomical and clinical pathologist, currently practicing as a pathologist at Riverside Regional Medical Center in Newport News, Virginia, where he has been for almost 35 years. (R. p. 1535, lines 4-13; R. p. 1537, lines 9-17; R. p. 3526). Dr. Maddox regularly diagnoses patients suffering from malignant mesothelioma—his hospital has seen over 500 patients with this disease. (R. p. 1537, line 20-p. 1538, line 9). The circuit court recognized Dr. Maddox as an expert in the subject of pathology specifically as it relates to asbestos and asbestos-related disease. (R. p. 1539, line 24-p. 1540, line 3).

Dr. Maddox testified that there are a number of epidemiologic studies that have examined the number of people who get mesothelioma when exposed at certain levels. (R. p. 1545, lines 4-21). Those studies establish that even people in the lowest exposure category develop mesothelioma and die from the disease. (R. p. 1545, line 22-p. 1546, line 4). He testified about four studies in particular, from authors Iwatsubo, Rodelsperger, Roland, and LaCourt, which each found an increased risk of mesothelioma at the lowest levels of exposure. (R. p. 1550, line 8-p. 1551, line 6). The risk was at least doubled at exposure levels ranging from .5 fiber years in Iwatsubo, .15 fiber years in Rodelsperger, .1 fiber years in LaCourt, and .07 fiber years in Roland. (*Id.*)[2] The medical literature also establishes that the lower the exposure, the longer it takes mesothelioma to develop. (R. p. 1551, line 7-p. 1552, line 21).

Dr. Maddox reviewed Dale's pathology materials and determined that he has a right pleural malignant mesothelioma, epithelioid type. (R. p. 1543, lines 13-21). It is Dr. Maddox's opinion that Dale's mesothelioma was caused by his cumulative exposure to asbestos throughout his life. (R. p. 1544, lines 2-7). In response to a hypothetical question, Dr. Maddox identified Dale's exposures to asbestos from Fisher/Crosby valves as substantial contributing causes of his disease. (R. p. 1546, line 5-p. 1548, line 19). The facts in the hypothetical were that Dale was exposed over a four-year period to dust created by the removal of asbestos gaskets and packing used in Fisher/Crosby valves at power plants, that the exposures were during outages which happen as a regular part of his job, that he was within a few feet of the work and close enough to see visible dust, and that the exposures were in the hundreds or in the thousands, to the hundreds of thousands to millions, times higher than background. (*Id.*)

[2] These studies can be found at R. pp. 4579-4618.

C. Dr. Arnold Brody

Dr. Arnold Brody has a doctorate in cell biology and has spent his career conducting laboratory research to learn how asbestos causes disease. (R. p. 929, line 19-p. 930, line 1; R. p. 935, lines 1-15; R. p. 2677). Early in his career, Dr. Brody worked with Dr. Chris Wagner, the pathologist who first published about mesothelioma as an asbestos-related disease in 1960. (R. p. 932, line 18-p. 933, line 23). For fifteen years, Dr. Brody was head of pulmonary pathology at the National Institute of Environmental Health Sciences, which is part of the National Institutes of Health (R. p. 941, line 18-p. 942, line 12). He was a professor in the pathology department at Tulane University Medical School for many years, where he remains a professor emeritus. (R. p. 942, line 20-p. 943, line 19; R. p. 2677). Dr. Brody's research has always been funded by competitive grants from the National Institutes of Health, which only awards such research grants to about 10-15% of the scientists who apply. (R. p. 944, line 8-p. 945, line 20). Since 1981, his research findings have been published in more than 100 peer-reviewed, published articles about asbestos and lung disease. (R. p. 935, line 22-p. 936, line 17; R. p. 937, line 8-p. 938, line 17; R. pp. 2688-2704.) He regularly teaches and lectures on asbestos and disease. (R. p. 940, line 6-p. 941, line 13; R. pp. 2678-2687).

Dr. Brody offered testimony, supported by a slide presentation, to explain how asbestos fibers cause cancer after they are inhaled into the body. (R. p. 946, line 14-p. 947, line 13). Dr. Brody testified that every disease has a target cell and for mesothelioma that is the mesothelial cells that run along the outside of the lung. (R. p. 949, lines 20-25; R. p. 955, lines 6-7.) He explained to the jury how asbestos fibers get into the lungs, make their way past the body's defense systems and to the target cells, and then transform those mesothelial cells into cancer cells by causing genetic errors. (R. p. 953, line 10-p. 970, line 7; R. p. 975, line 16-p. 998, line

25). Every time a person is exposed to asbestos, some portion of those fibers reach the target cell. (R. p. 1001, lines 1-7). Genetic errors increase each time the damaged cells are hit with asbestos fibers, and it is the accumulation of genetic errors that eventually causes a tumor to develop. (R. p. 997, lines 6-p. 998, line 25).

IV. Dale Jolly's mesothelioma diagnosis, treatment, and prognosis.

It is undisputed that Dale suffers from malignant mesothelioma. (R. p. 471, lines 14-24; R. p. 1744, line 24-p. 1745, line 2; R. p. 2067, line 16-p. 2068, line 3). He initially presented with shortness of breath and fluid in his lungs. (R. p. 756, lines 1-15). The fluid had to be drained from his lungs, and then he had a biopsy of his tissue in order for the doctors to make a diagnosis. (R. p. 756, lines 16-18). The tumor was so large at that time that Dale underwent three rounds of chemotherapy to shrink the tumor. (R. p. 575, lines 17-20; R. p. 756, line 16-p. 757, line 6). The chemotherapy made his feet swell so much he could not walk, he lost a lot of weight, and he became very fragile and depressed. (R. p. 575, line 21-p. 576, line 4; R. p. 592, lines 7-20). He was nauseous and had trouble eating. (R. p. 592, lines 7-20).

In June 2016, Dale had major surgery to remove the mesothelioma tumor and the lining of his lung. (R. p. 576, lines 5-21; R. p. 757, lines 1-19; R. p. 762, line 15-p. 763, line 9). The surgery involved taking out one of his ribs and spreading his rib cage apart to scrape out the tumor. (R. p. 757, lines 1-19; R. p. 762, line 15-p. 763, line 9). His daughter testified that he was in "unbelievable" pain after the surgery. (R. p. 576, line 22-p. 577, line 2). He was released from the hospital with a drainage tube still located in his back. (R. p. 576, line 22-p. 577, line 9; R. p. 757, lines 17-21; R. p. 763, lines 2-9.)

Within two days of his release from the hospital, Dale fell and had to be re-admitted because he had blood poisoning. (R. p. 577, lines 3-18; R. p. 757, lines 17-25). He was so weak

from the surgery and the complications that he had to go to a rehabilitation facility. (R. p. 577, line 19-25). He was in a lot of pain, had to use a walker, and could not make it to the bathroom by himself. (R. p. 578, p. lines 1-11). He also had to use an oxygen tank. (R. p. 578, lines 12-22). Dale went to respiratory rehabilitation, and with a lot of hard work he recovered enough to walk and breathe without assistance. (*Id.*).

When he testified at trial, Dale was visibly weak and was having trouble breathing. He testified that he has lost 45 pounds. (R. p. 472, lines 15-17). Four months prior to trial, he found out that the tumor was back. (R. p. 561, lines 12-15; R. p. 578, line 23-p. 579, line 4). His daughter said he was "devastated" by this news after all he has been through. (*Id.*) He is now on an experimental drug therapy because he has no other treatment options. (R. p. 579, line 14-p. 580, line 8; R. p. 760, lines 3-12). Dale said that the pain and difficulty of this treatment "brings you to your knees." (R. p. 561, lines 16-21). Brenda testified that the treatment really wears him out and he has no strength. (R. p. 591, lines 1-15; R. p. 591, line 24-p. 592, line 6).

Experts on both sides of this case described mesothelioma as an unusually painful disease. (R. p. 758, lines 11-18; R. p. 1745, line 6-p. 1748, line 10). Defense expert Dr. Crapo testified that it's common to have bad pain with mesothelioma and that as the disease progresses, heavy doses of narcotics are commonly needed to control the pain. Significant breathlessness is also a common among people with mesothelioma. (R. p. 1745, line 6-p. 1747, line 21).

It is undisputed that Dale will more likely than not die from mesothelioma. (R. p. 759, lines 19-25; R. p. 2076, lines 8-16). Dr. Frank testified that Dale would likely die in a year or less. (R. p. 759, line 19-p. 760, line 12). Defense expert Dr. Crapo acknowledged that dying from mesothelioma is a "bad death." (R. p. 1748, lines 1-10). The tumor ordinarily grows into the air space of the lung and cuts off ventilation on at least one side. (R. p. 1746, lines 9-20). Dr. Crapo

expects that Dale will have more hospitalizations, will likely need supplemental oxygen, will eventually become completely incapacitated and unable to care for himself, and will need round-the-clock nursing or hospice care. (R. p. 1745, line 6-p. 1748, line 10).

Both doctors indicated that Dale will continue to require medical care until his death. (R. p. 761, line 25-p. 762, line 14; R. p. 1747, line 22-p. 1748, line 10). Dr. Frank testified that Dale's shortness of breath will be constant. (R. p. 758, lines 11-12). He will need increasing amounts of pain medication over time as the disease continues to progress. (R. p. 758, lines 12-18). The more his condition deteriorates, the more medical care he will need toward the end of his life. (R. p. 761, line 25-p. 762, line 14). He may need to be fed with a feeding tube or intravenously. (*Id.*). He may also need hospice care. (*Id.*).

Dr. Frank testified that all of the medical treatment received by Dale has been medically necessary. (R. p. 760, lines 13-23). Even before the surgery, he had medical bills of $142,000. (R. p. 845, lines 14-19). The cost of the surgery alone was hundreds of thousands of dollars. (R. p. 760, line 24-p. 761, line 16). Based on the extensive treatment Dale has already had, and his expected future treatment, Dr. Frank testified that the total cost of Dale's medical care would reasonably be $1,000,000 or more. (R. p. 760, line 24-p. 761, line 16; R. p. 845, lines 2-8).

V. The severe impact of Dale's mesothelioma

Dale's life has been irreparably ruined by his mesothelioma diagnosis. At the time of his diagnosis, he was still working as an ultrasonic technician at Duke. (R. p. 471, lines 3-p. 472, line 14). He had retired in 2002 but two months later they asked him to come back and work with his old crew. (R. p. 476, line 16-p. 477, line 2; R. p. 574, line 16-p. 575, line 2). He testified that he "loved" working, primarily because of the people he got to work with. (R. p. 477, lines 3-6; R. p. 504, lines 17-20). He had to stop working when he became ill with mesothelioma. (R. p. 471,

line 11-p. 472, line 14). He could no longer climb the stairs at Duke's Catawba nuclear plant because of his shortness of breath. (R. p. 471, lines 14-24).

When asked about how his life had changed after he got mesothelioma, Dale became so emotional that he was unable to talk about it. (R. p. 522, lines 3-12; R. p. 561, lines 6-23). He could only say that it was hard and that it was hurting him. (R. p. 522, lines 3-12).

His daughter and his wife described the kind of active man that Dale was before his diagnosis. (R. p. 569, lines 18-25; R. p. 586, line 11-p. 587, line 6). Typically, after working all day he would come home and after dinner he would work outside in his garden or in the yard. (R. p. 586, line 11-p. 587, line 6.). He kept a three-acre vegetable garden. (R. p. 569, lines 18-25). He kept a garden for 48 years. (R. p. 587, lines 13-18). His garden fed the family, their neighbors, and supplied a local meals-on-wheels program. (R. p. 587, line 19-p. 588, line 10).

Dale loves spending time with his grandchildren. (R. p. 571, line 11-p. 572, line 19). His daughter said his grandchildren are "his life." (R. p. 572, lines 7-9). He taught two of them to say his nickname, "Papa," as their first word. (R. p. 571, line 15-p. 572, line 6).

When asked about how life had changed for Dale and his wife after his diagnosis, their daughter said "their life came to a halt." (R. p. 573, lines 12-14). Dale was "heartbroken" by the diagnosis. (R. p. 573, lines 20-22). He can no longer do the things that bring him joy. (R. p. 573, line 25-p. 574, line 7). He cannot garden or cut grass. (R. p. 572, lines 3-10). He cannot go to church or have friends over for dinner. (R. p. 590, lines 17-24). They used to go to the beach for a vacation every year and they can no longer do that. (R. p. 590, lines 24-25). When he tries to do things that he used to do, Dale finds out that he is not physically up for it. (R. p. 572, lines 10-14). Now when they try to go out, he just wants to come back home. (R. p. 593, lines 2-7).

Dale's physical appearance has changed drastically in the year and a half he has been fighting mesothelioma, and he now looks like a much older version of himself. (R. p. 574, lines 8-15; R. p. 592, line 21-p. 593, line 1). He spends most of his time at doctor's appointments for his treatment. (R. p. 589, line 13-p. 590, line 1).

The Jollys have been married for 51 years. (R. p. 587, lines 13-15). When the cancer came back right before trial, Brenda was really scared. (R. p. 579, lines 7-13). She described herself as his caregiver as much as his wife. (R. p. 590, lines 10-16). She has witnessed him in a lot of pain. (R. p. 584, line 12-p. 585, line 17).

About two weeks before trial, the Jollys were staying in Durham over the weekend because Dale had medical appointments on Friday and the following Monday. (R. p. 580, line 9-p. 581, line 8). While they were there, Brenda collapsed from a heart attack. (*Id.*) Their daughter testified that Brenda had not been taking care of herself because she was so focused on caring for Dale. (R. p. 581, lines 9-16).

VI. Trial and post-trial proceedings

A jury trial was held against Fisher/Crosby over seven days in July and August 2017. The jury considered Jollys' claims of negligence, strict products liability, and breach of implied warranty. (R. p. 2343, lines 15-24). They returned a verdict for the Jollys on the negligence and breach of implied warranty claims, and awarded $200,000 in compensatory damages to Dale and $100,000 in compensatory damages to Brenda. (R. p. 2437, line 13-p.2439, line 4).

After trial, the Jollys moved for new trial *nisi additur* in the amount of $2,000,000 for Dale and $500,000 for Brenda. (R. p. 4697). The circuit court granted the motion and increased the verdict to $1,580,000 for Dale and $290,000 for Brenda. (R. p. 47).

Fisher/Crosby moved for judgment notwithstanding the verdict (JNOV) and also moved to setoff the verdict in the amount of the Jollys' pre-trial settlements. The circuit court denied JNOV but granted the setoff motion and ruled that Dale's damages would be setoff by one-third of the settlements, in the amount of $756,666.67, and that Brenda's damages would be set off by one-third of the settlements, in the amount of $756,666.67. (R. p. 47). Judgment was entered against Fisher/Crosby for $823,333.33. (*Id.*).

ARGUMENT

I. The circuit court did not abuse its discretion in admitting the testimony of the Jollys' causation experts.

The circuit court did not abuse its discretion in admitting the causation opinions of Dr. Frank, Dr. Maddox, and Dr. Brody. Contrary to Defendants' mischaracterization, these experts do not hold the opinion that "any exposure" or "every exposure" or "every asbestos fiber" causes mesothelioma generally or caused Dale's mesothelioma. Dr. Frank and Dr. Maddox, who gave specific causation opinions, testified that Dale's mesothelioma was caused by his cumulative asbestos exposure and that given the specific facts of his exposure to visible asbestos dust from Fisher/Crosby valves regularly for four years, these exposures were a substantial factor in causing Dale's disease. Based on the record evidence, Judge Toal rejected Fisher/Crosby's arguments, finding the testimony of Dr. Frank and Dr. Maddox to be reliable, admissible, and sufficient to meet the *Henderson* causation standard.[3]

[3] Fisher/Crosby also challenge Dr. Brody's opinions, but he only offered general causation testimony. As the federal multi-district (MDL) litigation court has observed in admitting Dr. Brody's testimony, "the purpose of Dr. Brody's testimony [is] to assist the jury in understanding the relationship between exposure to asbestos fibers and disease processes generally . . . ." *Larson v. Bondex Int'l*, No. 09-69123, 2010 WL 4676563, at *4 (E.D. Penn. Nov. 15, 2010).

"The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citing *Mizell v. Glover*, 351 S.C. 392, 570 S.E.2d 176 (2002); *State v. Caldwell*, 283 S.C. 350, 322 S.E.2d 662 (1984)). "A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support, or "when the ruling is manifestly arbitrary, unreasonable, or unfair." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

South Carolina Rule of Evidence 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." S.C. R. Evid. 702. Courts evaluating the admissibility of scientific expert evidence "must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508 (1999). Once the trial court has made the threshold determination that these requirements are met, the jury may give the expert's testimony such weight as it deems appropriate. *Id.* at 20-21.

A. The experts' opinions are consistent with the *Henderson* causation standard.

Fisher/Crosby would have this Court believe that Dr. Frank and Dr. Maddox had no factual foundation for their specific causation opinions and that their testimony is at odds with the *Henderson* causation standard. Judge Toal found otherwise. She determined that "[t]he specific causation opinions of Drs. Frank and Maddox were firmly grounded in the exposure

evidence presented at trial." (R. p. 41). She further found that "[t]he trial testimony of Dr. Frank and Dr. Maddox demonstrates that their causation opinions are based on the record of Mr. Jolly's repeated exposures to asbestos from Fisher/Crosby valves during four years at Duke, as well as the scientific literature." (R. pp. 41-42). Their testimony was "supported by the scientific literature as well as the facts of this case, and was relevant and helpful to the jury." (R. p. 42).

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

Although *Henderson* employs a qualitative standard of determining whether a particular asbestos exposure is sufficient to be considered a substantial cause, Fisher/Crosby seek to upend *Henderson* with their insistence that the Jollys should be required to quantify Dale's dose of exposure from their products. They are encouraging this Court to adopt the harsh and inflexible standard for proving causation utilized in Texas, and a handful of federal district courts, that requires asbestos plaintiffs to quantify their dose of exposure to the defendant's specific product. *See Borg-Warner Corp. v Flores*, 232 S.W.3d 765, 771-73 (Tex. 2007). This has been recognized as an outlier position, and the quantification requirement has been rejected in other states. *See, e.g., Rost v. Ford Motor Co.*, 151 A.3d 1032, 1049 (Pa. 2016) ("Texas . . . employs

the most stringent test of any state . . . ."); *Holcomb v. Georgia Pac., LLC*, 289 P.3d 188, 195 (Nev. 2012) ("We conclude that the *Flores* application of the 'substantial factor' test is too stringent.").

Most states, by contrast, employ the more qualitative "frequency, regularity, proximity" factors established in *Lohrmann.* South Carolina is among the majority of courts that utilize these factors for substantial causation in asbestos cases. *See Holcomb*, 289 P.3d at 195 (listing states and federal circuit courts that have adopted the *Lohrmann* test). The *Lohrmann* decision described its test as "a *de minimis* rule" in that the plaintiff merely has to "prove more than a casual or minimum contact with the product." *Lohrmann*, 782 F.2d at 1162. *Lohrmann* is an asbestosis case, and many courts have found that the factors should be applied even less strictly in mesothelioma cases given the scientific evidence that brief or low-level exposures can cause mesothelioma. *See Tragarz v. Keene Corp.*, 980 F.2d 411, 420 (7th Cir. 1992); *see also Bobo v. Tennessee Valley Auth.*, 855 F.3d 1294, 1309 (11th Cir. 2017); *Startley v. Welco Mfg. Co.*, 78 N.E.3d 639, 647 (Ill. Ct. App. 2017); *Georgia-Pacific Corp. v. Pranksy*, 800 A.2d 722, 725-26 (Md. Ct. App. 2002); *Purcell v. Asbestos Corp., Ltd.*, 959 P.2d 89, 94 (Or. Ct. App. 1998); *Kurak v. A.P. Green Refractories Co.*, 689 A.2d 757, 765-66 (N.J. Ct. App. 1997).

Indeed, Fisher/Crosby has not cited a single South Carolina case that requires evidence of a mathematical dose to prove causation in a toxic tort case. It is not a requirement of South Carolina law. Nor is it required simply because the Jollys' experts chose to rely on epidemiology showing that low cumulative doses cause mesothelioma.

Courts in other jurisdictions have consistently rejected Fisher/Crosby's position and have held expert causation testimony to be reliable and admissible based on a qualitative assessment of the plaintiff's exposures, not on a quantified dose. *See Hoffeditz v. AM Gen., LLC*, No. CV 09-

0257, 2017 WL 3332263, at *4 (D.N.J. Aug. 4, 2017); *Waite v. All Acquisition Corp.*, 194 F. Supp. 3d 1298, 1313 (S.D. Fla. 2016); *Osterhout v. Crane Co.*, 2016 U.S. Dist. LEXIS 35724, at *57-61 (N.D.N.Y. Mar. 21, 2016); *Rost*, 151 A.3d at 1051-52; *Davis v. Honeywell Int'l Inc.*, 245 Cal. App. 4th 477, 492 (Cal. Ct. App. 2016), *review denied* (May 25, 2016); *Payne v. CSX Transportation, Inc.*, 467 S.W.3d 413, 457 (Tenn. 2015); *Robertson v. Doug Ashy Bldg. Materials, Inc.*, 77 So. 3d 339, 359 (La. Ct. App. 2011); *John Crane, Inc. v. Linkus*, 988 A.2d 511, 523 (Md. Ct. App. 2010).

At trial, evidence meeting the *Henderson* substantial causation standard was presented by the Jollys and relied on by their experts. Dale testified at length about regularly being present when asbestos gaskets were removed from Fisher/Crosby valves during shutdowns at the Oconee, McGuire, and Catawba nuclear power plants. Those shutdowns lasted months and each plant had at least one shutdown a year. In order to properly inspect the work, he was so close to the mechanics that he could see the dust being released from the brushing and grinding of the asbestos gasket. This occurred constantly during his four years as a mechanical inspector between 1980-84. The evidence showed that Fisher used crocidolite asbestos in at least some of its gaskets and packing.

The Jollys' experts relied on this evidence for their opinions. Dr. Frank read Dale's deposition testimony and noted that this was not a case involving an isolated or one-time exposure, but that for four years Dale's job as an inspector "regularly put him in situations where gasket after gasket was something that he reviewed being taken out and new ones being put in." (R. p. 730, lines 2-11). Both experts were asked hypothetical questions that incorporated all of the relevant exposure facts, including that a regular part of Dale's job for four years was to observe mechanics removing asbestos gaskets from valves, including Fisher/Crosby valves, and

that he was close enough to the work to see and breathe visible dust. Such reliance on this qualitative evidence of exposure is surely sufficient for the experts' opinions to meet the *Henderson* causation standard.

The experts actually went even further, though, and relied on measurements of the specific exposure levels from brushing and grinding of asbestos gaskets. Dr. Frank testified that studies measuring the fiber release from the removal of asbestos gaskets in the manner described by Dale create exposures in the range of 1 to 9 fibers/cc, even to bystanders. (R. p. 735, line 21-p. 736, line 24). Both experts relied on the fact that Dale's exposures from Fisher/Crosby valves were hundreds, thousands, and even millions of times above background levels. (R. p. 734, line 22-p. 736, line 24; R. p. 1547, lines 1-16). The health risk from removing asbestos gaskets and packing was not even disputed by Crosby at trial, whose corporate representative acknowledged this risk associated with its valves. (R. p. 1428, lines 8-22).

There is simply no basis for Crosby and Fisher's contentions that Dr. Frank and Dr. Maddox did not have sufficient information about Dale's exposures, that the evidentiary basis for their opinions was somehow lacking, or that their opinions do not satisfy the *Henderson* causation standard. The circuit court did not abuse its discretion in admitting their testimony.

B. The experts have a reliable foundation for their opinions.

Judge Toal found that Dr. Frank and Dr. Maddox had a reliable basis for their specific causation opinions given their reliance on a broad range of scientific evidence as well as the exposure facts proven at trial:

> Dr. Frank and Dr. Maddox both relied on their many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including epidemiology and other scientific literature, the dose-response relationship, the science regarding the low levels of exposure that can cause mesothelioma, the exposure levels documented from working with gaskets and packing in the

> manner described by Jolly and Taylor, and the facts surrounding Jolly's exposure to visible dust from Defendants' valves.

(R. p. 41).

Both doctors follow the principles and methods established by the Helsinki criteria for attributing mesothelioma to asbestos exposure. (R. p. 1540, lines 5-13; R. pp. 2942-2943, 2947-2948).[4] Dr. Maddox uses six criteria to determine whether a particular exposure is a substantial contributing factor in causing disease: (1) it must be a verifiable, factual exposure; (2) above normal background levels; (3) measured above background levels by the presence of visible dust or quantification studies; (4) repetitive; (5) the smaller the exposure, the smaller the relative contribution to causation; and (6) within a 10-year latency period. (R. p. 1541, line 17-p. 1543, p. 12). Dr. Frank has a similar list of criteria for evaluating the relative contribution of specific asbestos exposures:

> In determining the relative contribution of any exposures to asbestos above background levels, it is important to consider a number of factors, including: the nature of exposure, the level of exposure and the duration of exposure, whether a product gives off respirable asbestos fibers, the level of exposure, whether a person was close to or far away from the source of fiber release, how frequently the exposure took place and how long the exposure lasted, whether engineering or other methods of dust control were in place, and whether respiratory protection was used.

(R. p. 2947).

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[4] In 1997, a panel of international experts met to establish universally accepted criteria for the diagnosis and attribution of asbestos-related diseases (known as the "Helsinki Criteria"). (R. p. 4431). In 2014, the same group met to reaffirm their position. (R. p. 4438). Among other principles, the Helsinki Criteria state that "[a]n occupational history of brief or low-level exposure should be considered sufficient for mesothelioma to be designated as occupationally related." (R. p. 4433). The Helsinki Criteria thus embraces a qualitative assessment of exposure, in line with the *Henderson* causation standard, rather than a quantitative dose as Fisher/Crosby advocate.

Among other bases for their opinions, Dr. Frank and Dr. Maddox testified that there is no known safe level of asbestos exposure and that mesothelioma can be caused by brief or low level cumulative exposures. (R. p. 698, line 24-p. 700, line 13; R. p. 769, line 16-p. 770, line 5; R. p. 1550, line 24-p. 1541, line 1; R. p. 1541, lines 6-9; R. p. 1545, line 4-p. 1546, line 4; R. p. 1550, line 8-p. 1551, line 6). This testimony is based on voluminous scientific literature and reflects the scientific consensus.[5] Even defense expert Dr. Crapo admitted that a "very low" level of exposure to crocidolite can cause mesothelioma. (R. p. 1707, lines 8-14).

Yet Fisher/Crosby attempt to distort the experts' reliance on these basic scientific facts by accusing them of having no other basis for their opinions and using these facts as a means to simply guess at Dale's exposure levels and at the causation of his disease. The Jollys' experts have never opined, as Fisher/Crosby suggest, that the lack of a known threshold is in and of itself proof of causation. Rather, as Judge Toal found, "[t]hese experts were entitled to rely on these

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[5] *See, e.g.*, R. pp. 2859-2880; R. pp. 2943-2946; R. pp. 4414-4421; R. pp. 4458-4459; R. pp. 4512-4513; R. p. 4521; R. pp. 4527, 4529; R. p. 4547.

All national and international agencies and organizations that have looked at the question have concluded that there is no safe level of exposure to asbestos. These include the World Health Organization, the International Agency for Research on Cancer, the Environmental Protection Agency, the American Cancer Society, the National Cancer Institute, the Occupational Health and Safety Association (OSHA), the National Institutes of Occupational Safety and Health (NIOSH), and the U.S. Consumer Products Safety Commission. (R. pp. 4415-4417, 4461, 4465, 4468, 4472, 4482, 4497, 4502; R. pp. 2868-2869). For example, in 1976, NIOSH reported that "[e]xcessive cancer risks have been demonstrated at all fiber concentrations studied to date. Evaluation of all available human data provides no evidence for a threshold or for a 'safe' level of asbestos exposure." (R. p. 2671). As recently as 2014, OSHA published that "[a]sbestos exposures as short as in duration as a few days have caused mesothelioma in humans." (R. p. 4461).

As explained by Dr. Maddox, epidemiological studies have established that low cumulative asbestos exposures cause mesothelioma. (R. p. 1550, line 8 – p. 1551, line 6; R. p. 4586 (cumulative exposure between 0.5 and 0.99 f/cc years carries relative risk of 4.2); R. p. 4598 (cumulative exposure up to 0.15 f/cc-years has odds ratio of 7.9); R. pp. 4606-4607 (cumulative dose between 0 and .07 fiber years has odds ratio of 2.8); R. p. 4613 (cumulative exposure between >0 - 0.1 fiber year has odds ratio of 4.0 and cumulative exposure between >.1 - 1 fiber year has odds ratio of 8.3)).

basic medical facts in reaching their opinion in this case." (R. p. 40). Such reliance on basic science is not the equivalent of testifying that "each and every exposure" was a substantial factor in causing Dale's mesothelioma. (*Id.*)

Even though the experts testified that all exposures contribute to the cumulative dose that causes disease, that does not mean that every exposure rises to the level of a *substantial factor*. Judge Toal noted that this distinction was recently made by the Pennsylvania Supreme Court in an opinion upholding the admissibility of Dr. Frank's causation opinions. *Rost v. Ford Motor Co.*, 637 Pa. 625, 648, 151 A.3d 1032, 1045–46 (2016). In *Rost*, the court found that the defendant had "confused or conflated the 'irrefutable scientific fact' that every exposure cumulatively contributes to the total dose (which in turn increases the likelihood of disease), with the legal question under Pennsylvania law as to whether particular exposures to asbestos are 'substantial factors' in causing the disease." *Id.* Expert witnesses were not precluded from "informing juries about certain fundamental scientific facts necessary to a clear understanding of the causation process for mesothelioma, even if those facts do not themselves establish legal (substantial factor) causation." *Id.*

Judge Toal also relied on the Eleventh Circuit's recent opinion in *Bobo v. Tennessee Valley Auth.*, 855 F.3d 1294 (11th Cir. Apr. 26, 2017). (R. p. 40) There, the plaintiff's expert opined that her mesothelioma was caused by her secondary exposure to asbestos brought home on the clothing of her husband when he was an employee at the Tennessee Valley Authority. *Id.* at 1301. The expert testified that "there is no evidence that there is a threshold level of exposure below which there is zero risk of mesothelioma," and that "all 'significant' exposures to asbestos 'contribute to cause mesothelioma.'" *Id.* The Eleventh Circuit rejected the defendant's argument that this testimony amounted to an opinion that "each and every exposure" to asbestos is

causative. *Id.* The court found the expert's opinion to be admissible because it was "based on an extensive knowledge of the facts in this case and was supported by scientific literature." *Id.* He had relied on scientific studies showing that exposures can occur from laundering asbestos-laden clothing, as well as other scientific publications such as the Helsinki Criteria. *Id.*

Fisher/Crosby's attack on the reliability of the Jollys' experts' opinions has absolutely no merit. Dr. Frank has explained that he does "not believe that exposure to a *single* asbestos fiber or a *single breath* of air containing asbestos fibers has ever caused a mesothelioma or any other asbestos related cancer or any non-malignant asbestos disease." (R. p. 2944). It is important to recognize that "an 'exposure' is never a single fiber . . . when someone breathes visible dust from an asbestos product, there may be millions or billions of asbestos fibers present." (R. p. 2945). Even one day of exposure at the current OSHA limit results in the inhalation of hundreds of thousands of fibers. (R. p. 2944).

The federal asbestos MDL has found that Dr. Frank does not hold the "any exposure" opinion, which differs substantively from the "cumulative exposure" opinion. *Mortimer v. A.O. Smith Corp.*, 2015 WL 12533103, at *8 (E.D. Pa. Oct. 23, 2015). The Pennsylvania Supreme Court similarly held that, contrary to Fisher/Crosby's mischaracterization, Dr. Frank does not hold the opinion that "each and every breath" of asbestos is a substantial factor. *Rost*, 151 A.3d at 1045-46. The federal asbestos MDL has similarly found that "Dr. Maddox does not assert that a single fiber can cause mesothelioma." *Schumacker v. Amtico*, No. 5:10-1627, 2010 U.S. Dist. LEXIS 144831, at *4 (E.D. Pa. Nov. 2, 2010).

The expert testimony of Dr. Frank, Dr. Maddox, and Dr. Brody has been consistently admitted by other courts as reliable and helpful to the trier of fact:

- **Dr. Frank**. *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975, 980 (4th Cir. 1987); *Waite v. AII Acquisition Corp.*, 194 F. Supp. 3d 1298, 1312-14 (S.D. Fla. 2016); *In re Asbestos Prod. Liab. Litig. (Breedlove)*, No. 09-CV-75120, 2011 WL 499993, at *2 (E.D. Pa. Feb. 10, 2011), *Rost*, 151 A.3d at 1045-47; *Lovelace v. B & R Auto Serv., Inc.*, 798 S.E.2d 439, 440 (N.C. App.), *review denied*, 804 S.E.2d 538 (N.C. 2017); *Smith v. Illinois Cent. R. Co.*, 37 N.E.3d 445, 452-53 (Ill. App. 2015); *In re Estate of Lilienthal*, No. 4-14-0280, 2015 WL 1234216, at *1 (Ill. App. Mar. 17, 2015); *Tyson v. H.K. Porter Co.*, 216 N.C. App. 184, 716 S.E.2d 441 (2011); *Shepard v. Grand Trunk W. R.R. Inc.*, No. 92711, 2010 WL 1712316, at *8 (Ohio App. Apr. 29, 2010); *In re Asbestos Litig.*, 911 A.2d 1176, 1193-94, 1205-06 (Del. Super. Ct. 2006).
- **Dr. Maddox**. *Newport News Shipbuilding & Dry Dock Co. v. Parks*, 202 F.3d 259 (Table) (4th Cir. 1999); *Dugas v. 3M Co.*, No. 3:14-CV-1096-J-39JBT, 2016 WL 7246096, at *3 (M.D. Fla. Jan. 11, 2016); *Rabovsky v. Air & Liquid Sys. Corp.*, No. CIV.A. 10-3202, 2012 WL 876752, at *3 (E.D. Pa. Mar. 13, 2012); *In re Asbestos Prod. Liab. Litig. (No. VI)*, No. 10-CV-03202, 2012 WL 252919, at *4 (E.D. Pa. Jan. 25, 2012); *Schumacker,* 2010 U.S. Dist. LEXIS 144831, at *8; *Exxon Mobil Corp. v. Minton*, 737 S.E.2d 16, 26 (Va. 2013); *Urbach v. Okonite Co.*, 514 S.W.3d 653, 658 (Mo. Ct. App. 2017).
- **Dr. Brody**. *Rabovsky*, 2012 WL 876752, at *3; *In re Asbestos Prods. Liab. Litig. (Rabovsky)*, 2012 WL 252919, at *1; *In re Asbestos Products Liab. Litig. (No. VI) (Larson)*, No. 09-69123, 2010 WL 4676563, at *3-4 (E.D. Penn. Nov. 15, 2010); *Rost*, 151 A.3d at 1038, 1045; *Startley,* 78 N.E.3d at 642, 647; *Hennegan v. Cooper/T. Smith Stevedoring Co.*, 837 So. 2d 96, 105-06, 110 (La. Ct. App. 2002).

Judge Toal did not abuse her discretion in reaching the same conclusion as to the admissibility of these experts' testimony in this case.

II. The jury's findings on duty to warn, breach of duty, and design defect are supported by the evidence.

When reviewing the denial of directed verdict or JNOV to Fisher/Crosby, the evidence must be viewed in the light most favorable to the Jollys, as they are the nonmoving party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). An appellate court will reverse the lower court's denial of directed verdict or JNOV only when there is no evidence to support the ruling below. *Creech v. South Carolina Wildlife and Marine Resources Dep't,* 328 S.C. 24, 491 S.E.2d 571 (1997) (citing *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994)). In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003). The jury's verdict must be upheld unless no evidence reasonably supports the jury's findings. *Id.*; *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 418–19 (Ct. App. 2000).

A. The evidence supports the jury's findings on the duty to warn.

1. The jury properly rejected the sophisticated intermediary defense.

The sophisticated intermediary defense has not been adopted in South Carolina. *See Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 226, 781 S.E.2d 548, 557 (2015), *reh'g denied* (Feb. 12, 2016). The circuit court nevertheless instructed the jury on this defense. (R. p. 2360, line 20-p. 2361, line 16). Judge Toal ruled that because this is an affirmative defense, Fisher/Crosby had the burden of proof. (R. p. 23, citing *Webb v. Special Elec. Co.*, 370 P.3d 1022, 1034 (Cal. 2016)). In California, which recognizes this defense, "the supplier bears the burden of proving

as well as Dale's numerous references to insulation. (R. p. 534, line 12-p. 535, line 8; R. p. 540, lines 1-20; R. p. 545, lines 16-22; R. p. 550, line 14-p. 551, line 9). Dale, in fact, followed pertinent warnings about asbestos. (R. p. 535, lines 1-8). But he was never informed of any risk from the gaskets sold by Fisher/Crosby. (R. p. 507, lines 8-14; R. p. 558, lines 5-13).

As noted, the evidence established that Duke was unaware that asbestos gaskets posed a hazard and made a distinction in its training materials between asbestos insulation and asbestos gaskets. (R. p. 4356). Taylor recalled that Duke made this distinction when Duke gave its employees information about asbestos hazards. (R. p. 1058, lines 8-16). Dale was only warned by Duke about asbestos hazards that Duke knew about. (R. p. 558, lines 5-25). Employees did not know there was a danger from asbestos gaskets until several years after Duke started warning that precautions needed to be taken around asbestos insulation. (R. p. 1059, lines 6-10).

As also noted, both and Dumistra and Martin contended at trial that there is no health risk from asbestos gaskets and packing. Not only do they deny any risk at all, there were instances in which their products were not clearly labeled as containing asbestos. Dale's co-worker, David Taylor, testified that the only way to know if a gasket had asbestos was whether it was marked as asbestos-containing on the gasket packaging. (R. p. 1046, lines 19-25).

As Judge Toal found, "[t]he Court finds it is not possible to conclude, as a matter of law, that asbestos gaskets and packing were obviously dangerous to Mr. Jolly when Fisher/Crosby completely deny that they were dangerous at all and did not even consistently notify Duke and its employees that valve gaskets and packing were asbestos-containing." (R. pp. 22-23). The evidence supports the jury's finding in the Jollys' favor on this issue. (*Id.*)

B. The evidence supports the jury findings on design defect.

Fisher/Crosby contend that the Jollys failed to prove their design defect claims because, they argue, there was no evidence of a reasonable alternative design. As Judge Toal found, under *Branham v. Ford Motor Co.*, 390 S.C. 203, 219, 701 S.E.2d 5, 13 (2010) the existence of a reasonable alternative design is a matter for the jury to decide. (R. pp. 26-27). The jury weighs the availability of a feasible alternative design, as well as the associated costs, safety, and functionality. *Id.* at 225, 701 S.E.2d at 16.

While Fisher/Crosby now claim that there were no alternatives to asbestos for high pressure and high-heat applications, their representatives took a different position at trial. Dumistra agreed that Fisher had non-asbestos gaskets and packing available "at all times." (R. p. 1347, lines 18-22). Martin similarly agreed that "one of the standards at that time would be asbestos but there are other materials they could have used." (R. p. 1487, lines 1-8). Dumistra and Martin both testified that there were a variety of non-asbestos gasket materials available, including graphite, metal, and Teflon. (R. p. 1304, line 15-p. 1305, line 10; R. p. 1490, lines 5-9). Crosby sold some valves to Duke that did not contain asbestos materials. (R. p. 1504, lines 7-15; T. p. 1528, line 14-p. 1529, line 3).

With regard to packing, Dumistra testified that Teflon packing has been available since the 1950s and was the most commonly used packing material. (R. p. 1305, lines 3-10; R. p. 1347, lines 1-22). He testified at length about the beneficial qualities of Teflon packing. (R. p. 1305, line 18-p. 1306, line 6).

Most significantly, Dumistra agreed that there was *absolutely no reason* for Dale to be exposed to asbestos gaskets and packing from Fisher valves because "[s]omething else could

have been selected." (R. p. 1352, lines 10-17). Fisher could decide at any time not to utilize asbestos-containing materials. (R. p. 1161, lines 18-21; p. 1162, line 25-p. 1163, line 14).

Based on this evidence, Judge Toal found that "there were multiple non-asbestos materials that were available to Fisher/Crosby and that they have could have sold gaskets and packing to Duke that were made exclusively out of graphite, metal, or Teflon." (R. p. 27). The evidence was more than sufficient to create a fact issue for the jury on reasonable alternative design.

C. The evidence supports the jury's finding that Fisher/Crosby deviated from the standard of care.

The circuit court rejected Fisher/Crosby's contention that there was a lack of evidence as to the standard of care and their deviation from that standard. (R. p. 28). Judge Toal found that as product manufacturers, Fisher/Crosby are held to the knowledge and skill of an expert in their industry and must keep abreast of relevant scientific knowledge. (*Id.*) Judge Toal also found that manufacturers have a duty to test and inspect their products, including component parts incorporated into the product. (*Id.*, citing *Nelson v. Coleman Co.*, 249 S.C. 652, 657, 155 S.E.2d 917, 920 (1967); *Duncan v. Ford Motor Co.*, 385 S.C. 119, 133, 682 S.E.2d 877, 884 (Ct. App. 2009)). In addition, "[s]afety standards promulgated by government or industry organizations [] are relevant to the standard of care for negligence." *Elledge v. Richland/Lexington Sch. Dist. Five*, 341 S.C. 473, 477–78, 534 S.E.2d 289, 290–91 (Ct. App. 2000), *aff'd,* 352 S.C. 179, 573 S.E.2d 789 (2002).

As noted above, Fisher/Crosby designed their valves with flanged connections. Because of that design, flange gaskets had to be used to connect their flanged valves to the pipeline. (R. p. 1121, lines 3-14; R. p. 1378, line 25-p. 1380, line 14; R. p. 1486, line 22-p. 1487, line 22).

Fisher/Crosby knew that asbestos flange gaskets would sometimes be used. (*Id.*). Their valves at Duke did, in fact, require asbestos flange gaskets. (R. p. 878, line 3-p. 880, line 16).

As set forth above, Fisher/Crosby specified asbestos gaskets for the valves at Duke. For example, Fisher material specification 17A2 was for asbestos gasket material composed of 80 to 85% asbestos fiber. (R. p. 1099, line 6-p. 1103, line 1). Fisher used a material specification number for its asbestos gaskets so that its customers could order replacement gaskets that were the exact same asbestos gaskets that had been supplied with the valve. (*Id.*) Every time the 17A2 specification was used in invoices and purchase orders through 1988, the gaskets would have contained 85% asbestos. (*Id.*) Fisher also had a specification number its customers could use to order asbestos packing from Fisher. (R. p. 1110, line 6-p. 1113, line 18; R. p. 1126, line 5-p. 1127, line 14; R. pp. 3572-3578; R. pp. 3349-3350).

Crosby valves have incorporated asbestos components since the 1930s. (R. p. 1387, lines 6-10). Some Crosby valves contained asbestos components until 1991, and thereafter asbestos replacement parts may still have been available. (R. p. 1399, line 16-p. 1401, line 6). Crosby's material specification for the gasket part card relevant to Duke sales showed that an asbestos gasket made by Garlock was supplied by Crosby. (R. p. 1437, line 8-p. 1440, line 4; R. p. 3943). This asbestos gasket was used in valve number 67261 at Duke. (R. p. 1440, line 24-p. 1441, line 22). This gasket specification was for an asbestos-containing gasket until 1989. (*Id.*; *see also* R. p. 1532, lines 17-24).

In addition to their valve design incorporating asbestos components, Judge Toal found that there was ample evidence for the jury's finding that Fisher/Crosby failed to meet the standard of care: "[t]hey did not keep aware of the health hazards caused by the asbestos products they were selling, they failed to test their products to determine whether they were

exempt from OSHA labeling regulations, they failed to comply with OSHA labeling requirements, and did not warn about asbestos hazards." (R. p. 29).

Dr. Frank established that the dangers of asbestos exposure became known in industry around the turn of the century. (R. p. 745, line 11-p. 749, line 1). As early as the 1930s, there were publications on the precautions that should be taken to reduce exposures, and Crosby received this information through its membership in the National Safety Council. (R. p. 745, line 11-p. 746, line 9; R. p. 1455, lines 1-p. 1457, line 2; R. p. 2528). It was known by 1955 that asbestos exposure causes lung cancer, and by 1960 that it causes mesothelioma. (R. p. 749, line 5-p. 753, line 18).

In the 1950s, the U.S. Department of Labor established workplace safety regulations for government contractors, called the Walsh-Healey Act, that required employers to take steps to control asbestos exposure levels below a certain threshold. (R. p. 742, line 13- p. 744, line 18; R. pp. 2567-2570.) Fisher/Crosby were government contractors subject to the requirements of the Walsh-Healey Act. (R. p. 742, line 13-p. 744, line 10; R. p. 1448, lines 18-22).

Fisher/Crosby did not keep up with safety information about their asbestos products. Fisher's corporate library contained no publications regarding the hazards of asbestos. (R. p. 1081, line 15-p. 1082, line 4). Crosby did not even maintain a library of health and safety materials, and had no industrial hygiene or medical department. (R. p. 1434, lines 5-13; R. p. 1462, line 9-p. 1463, line 3). Martin admitted that Crosby had done nothing to keep up with the dangers of the asbestos products it was selling. (*Id.*)

By 1980, Fisher/Crosby should have known that the only safe level of asbestos exposure is zero. (R. p. 769, line 16-p. 770, line 5). Dr. Frank testified that Fisher/Crosby should have

been warning users about the dangers of asbestos exposure from their valves and what precautions could be taken to reduce their exposure. (R. p. 768, line 19-p. 769, line 14).

As of 1972, Fisher/Crosby were required to comply with OSHA regulations requiring product manufacturers to place warning labels on their asbestos-containing products. (R. p. 740, line 12-p. 741, line 4; R. p. 742, lines 13-25; R. p. 771, lines 9-14; R. p. 2574). Fisher/Crosby never placed warnings on their asbestos-containing valves or replacement asbestos gaskets and packing. (R. p. 1076, lines 12-23; R. p. 1426, line 25-p. 1427, line 12.) If a manufacturer wanted to seek an exemption from the labeling requirement, it would have to conduct tests to demonstrate that the asbestos in the product was encapsulated and would not be released during the normal use of the product. (R. p. 771, line 15-p. 773, line 2). Fisher/Crosby never performed such tests. (R. p. 1079, lines 4-13; R. p. 1392, line 23-p. 1393, line 4; R. p. 1395, lines 2-10; R. p. 1402, lines 1-15; R. p. 1403, lines 1-7). Dr. Frank testified that a manufacturer cannot honestly say that its product does not release asbestos fibers unless that has been confirmed through product testing. (R. p. 773, lines 3-9). And, of course, it has been scientifically proven that asbestos fibers did not remain encapsulated during the ordinary wear and tear on the gaskets. (R. p. 708, line 21-p. 709, line 13; R. p. 770, line 6-p. 771, line 2).

In addition to warning labels, Fisher/Crosby should have provided material safety data (MSD) sheets with information about the product composition, hazards, and recommended precautions. (R. p. 854, line 22-p. 855, line 19). If Fisher/Crosby had provided MSD sheets to Duke, that would have corrected Duke's misconception, as stated in its asbestos policy, that gaskets do not release asbestos fibers. (R. p. 858, lines 8-17). In fact, MSD sheets provide to Fisher/Crosby by Garlock, their supplier of asbestos gaskets, provided the very warnings that Fisher/Crosby should have been passing along to their customers. (R. p. 1189, line 10-p. 1198,

line 18; R. p. 1195, lines 16-19; R. p. 1397, lines 6-11). Fisher did not discontinue its sales of asbestos-containing gaskets and packing until its customers demanded safer alternatives. (R. p. 3533).

Given this voluminous record, the circuit court found the evidence sufficient for the jury to conclude that the Jollys had established both the standard of care and that Fisher/Crosby deviated from that standard. (R. pp. 31-32).

III. The circuit court did not abuse its discretion in granting the Jollys' motion for new trial *nisi additur*.

The grant or denial of a motion for a new trial *nisi* is within the trial judge's discretion and will not be reversed on appeal absent an abuse of discretion. *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993). The consideration of a motion for a new trial *nisi additur* requires the court to consider the adequacy of the verdict in light of the evidence presented. *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006); *Waring v. Johnson*, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000); *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). A trial judge may grant a new trial *nisi additur* whenever he or she finds the amount of the verdict to be merely inadequate. *Todd v. Joyner*, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2008), *aff'd*, 385 S.C. 421, 685 S.E.2d 595 (2009); *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003). The decision to grant a new trial *nisi additur* will not be disturbed on appeal unless the trial judge's findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Proctor*, 368 S.C. at 320, 628 S.E.2d at 518; *Waring*, 341 S.C. at 256, 533 S.E.2d at 910. Great deference is given to the trial judge because "the trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-

informed view of the damages than [the appellate court]." *Rush v. Blanchard*, 310 S.C. 375, 381, 426 S.E.2d 802, 806 (1993).

A. The jury's verdict was inadequate under the evidence and applicable law.

The circuit court did not abuse its discretion in granting a new trial *nisi additur*. South Carolina courts have upheld *additur* in circumstances, like this one, where the jury did not award compensatory damages in an amount shown by the undisputed evidence. Contrary to Fisher/Crosby's insistence that the circuit court did not articulate compelling reasons for the *additur*, the court in fact explained its reasoning at length. (R. pp. 14-20; R. p. 2462 line 17-p. 2465, line 8). Judge Toal found that the "award is not consistent with the evidence presented" (R. p. 2463, lines 6-7) and that the award did not accurately reflect the extent of the Jollys' losses. (R. p. 17). The court followed the Supreme Court's instruction that the goal of compensatory damages is to restore the injured party to the same position he was in before the injury. (*Id.*, citing *Clark v. Cantrell*, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000)). With regard to Dale, the court found that "[t]he jury's award of only $200,000 was not sufficient to make Mr. Jolly whole for the magnitude of his losses resulting from his mesothelioma diagnosis, treatment, and expected death." (R. p. 17).

Contrary to Fisher/Crosby's position, in granting a new trial *nisi*, the trial court did not substitute its judgment for that of the jury, but rather gave Fisher/Crosby the option between *additur* and a new trial. *Graham v. Whitaker*, 282 S.C. 393, 402, 321 S.E.2d 40, 45 (1984). Judge Toal accorded due deference to the jury, and granted an additur for much less than requested by the Jollys. Although the motion requested an *additur* of $2 million for Dale and $500,000 for Brenda, (R. p. 4697), the court did not award that full amount and instead awarded an amount found by the court to be in line with the evidence.

B. The evidence supports the circuit court's determination that the jury's award to Dale Jolly was inadequate.

Dale was entitled to damages in four categories – medical expenses, pain and suffering, loss of enjoyment of life, and mental anguish. (R. p. 2365, line 2-p. 2366, line 21). The jury was also instructed that future damages should be awarded for the duration of Dale's life expectancy, which was a little more than eleven (11) years given his age of 73 at the time of trial. (R. p. 2367, line 19-p. 2368, line 4).

With regard to the evidence of Dale's medical expenses, the trial court relied on the testimony of Dr. Frank that all of the medical treatment Dale had received was medically necessary. (R. p. 760, lines 13-23). Dr. Frank testified that he had seen past medical bills of $142,000, which did not include the cost of Dale's major surgery to remove the lining of his lung. (R. p. 845, lines 14-19). According to Dr. Frank, the cost of that surgery was hundreds of thousands of dollars. (R. p. 760, line 24-p. 761, line 16). In addition to those past medical expenses, experts on both sides that Dale would need future care until his death. (R. p. 761, line 25-p. 762, line 14; R. p. 1747, line 22-p. 1748, line 10). At the time of trial, Dale was undergoing an experimental drug therapy that was quite intensive. (R. p. 579, line 14-p. 580, line 8; R. p. 760, lines 3-12; R. p. 591, lines 1-15; R. p. 591, line 24-p. 592, line 6). Given his past and future medical needs, Dr. Frank testified that the total cost of Dale's medical care would reasonably be $1,000,000 or more. (R. p. 760, line 24-p. 761, line 16; R. p. 845, lines 2-8).

The trial court's additur to $1 million for Dale's past and future medical expenses was thus based on the evidence at trial. Fisher/Crosby seem to take the position that an award for medical expenses can only be supported by the actual medical bills, but cite absolutely no law for the proposition that medical expenses cannot be proven through expert testimony. Judge

Toal's understanding that the jury's award to Dale reflected $142,000 for medical expenses is based on the fact that this evidence was offered without dispute at trial. Whether the jury's award included this amount or an even lower amount for medical expenses, the court did not abuse its discretion in determining that the evidence of Dale's medical expenses was much greater than the amount awarded.

The court was further justified in its determination that the jury's award did not adequately compensate Dale for his pain and suffering, loss of enjoyment of life, and mental anguish. (R. pp. 18-19). The court followed the holding in *Waring v. Johnson* that a new trial *nisi additur* is warranted when a jury has awarded medical expenses but not damages for pain and suffering. (R. pp. 14-15, citing 341 S.C. at 260, 533 S.E.2d at 912). The court also relied on *Riley v. Ford Motor Co.*, 414 S.C. 185, 188, 777 S.E.2d 824, 826 (2015). (R. p. 15). In *Riley*, the Supreme Court held that it was not an abuse of discretion to grant a new trial *nisi additur* that tripled the jury award. 414 S.C. at 189, 777 S.E.2d at 827. The jury had only awarded a total of $300,000, even though the plaintiff had died and the evidence showed that he had $228,000 in economic damages. *Id.* at 193, 777 S.E.2d at 829. The trial court had not abused its discretion in granting a new trial *nisi additur* of $900,000, as it was based on the evidence. *Id.* at 189, 194, 777 S.E.2d at 827, 829-30.

Here, the evidence established that Dale's pain has been extreme in the past year, would get worse in the future, and that he would almost certainly experience an awful death from cancer. (R. pp. 18-19). The trial court relied on the evidence that after his diagnosis Dale endured suffered three rounds of chemotherapy as well as major surgery that had involved removal of a rib to get to his tumor. He struggled to recover from the surgery that left him immobile and unable to breath without oxygen. He suffered extreme weight loss. And although he was quite

stoic at trial, he described his experimental treatment as something that "brings you to your knees." (R. p. 561, lines 16-21).

The trial court also found it significant that experts on both sides of the case had confirmed that the pain associated with mesothelioma is extreme. (R. p. 18). The court further relied on testimony from defense expert Dr. Crapo that the death Dale would likely experience from mesothelioma is "'in no way . . . a comfortable death [because it is] a very bad tumor,'" "'not a very good death,'" and "'a bad death.'" (R. p. 19, citing R. p. 1745, line 6-p. 1748, line 10).

The court also found "quite compelling" evidence of Dale's loss of enjoyment of life. (R. p. 19). He had been a very healthy, active person prior to his diagnosis but after developing mesothelioma could no longer do the things that brought joy to his life. The court cited the testimony that Dale's life "'came to a halt' after his diagnosis." (R. p. 19, citing R. p. 573, lines 12-14). Even though he still loved his work at Duke, he had to quit after he became sick. He could no longer garden, go to church, have friends to dinner, or go on vacation. (R. p. 19).

The court also relied on evidence of Dale's mental anguish. (R. p. 19). His daughter testified that he was "heartbroken" when diagnosed with a fatal disease and "depressed" after his chemotherapy treatment. (*Id.*) He was "devastated" by the recent news that his cancer had come back. (*Id.*). The court noted that Dale had become "overwhelmed with emotion." (R. p. 19; R. p. 522, lines 3-12; R. p. 561, lines 6-23).

It is simply not the case that the trial court ordered a new trial *nisi additur* without due regard to the evidence. The court's order was entirely grounded in the evidence, presented by Dale, his family, and medical experts, regarding his physical suffering and emotional trauma in the past, and the "bad" death he had to look forward to in the future. The court did not abuse its

discretion in awarding Dale $580,000 in noneconomic damages. The award is supported by case law upholding a new trial *nisi additur* for several times the jury's verdict. *See Riley v. Ford Motor Co.*, 414 S.C. at 188, 777 S.E.2d at 826; *see also Graham*, 282 S.C. at 405, 321 S.E.2d at 45 (upholding new trial *nisi additur* of several times the jury verdict, increasing actual damages from $10,000 to $67,500).

In granting a new trial *nisi additur*, the trial court properly relied on damages awards in comparable cases. *See Kapuschinsky v. U.S.*, 259 F. Supp. 1, 8 (D.S.C. 1966); *Lucht v. Youngblood*, 266 S.C. 127, 136, 221 S.E.2d 854, 858 (1976). One of the most relevant verdicts relied on by the trial judge is *Garvin v. Agco Corp.*, No. 2012-CP-40-6675 (S.C. Ct Comm. Pleas), a mesothelioma case tried before the Honorable D. Garrison Hill in Richland County in 2013. (R. pp. 4722-4723). The plaintiff in that case, Lloyd Garvin, was 74 years old at the time of trial, with a life expectancy of almost 11 years (R. p. 4756). There were a number of facts that made his damages less compelling than Dale's, however. He was not working at the time of his diagnosis, and unlike Dale, he did not enjoy good health prior to his diagnosis. (*Id.*) Garvin remained cancer-free after surgery to remove the tumor, and because he had a very rare type of mesothelioma the evidence was that there was a 50% chance that the mesothelioma would never return and he would not have any further medical expenses. (R. p. 4722). His past medical expenses were only $149,000, and any possible future medical expenses were not expected to exceed $150,000 to $300,000. (R. p. 4756). Judge Hill noted that Mr. Garvin's total economic damages were no more than $300,000 to $450,000. (R. pp. 4756-4757).

Despite these facts, the jury awarded Garvin $10 million in compensatory damages and his wife $1 million in loss of consortium damages. (R. pp. 4722-4723). Judge Hill granted a new trial *nisi remitter* and reduced Mr. Garvin's award to $1.5 million (the loss of consortium award

was not challenged). (R. pp. 4756-4757). In so doing, Judge Hill reasoned that, "based upon Mr. Garvin's pecuniary damages, the nature of his injury, his treatments, his age, and his life expectancy, compelling reasons justify reducing his actual damages award from $10 million to $1.5 million." (R. p. 4757). The loss of consortium damages of $1 million were not reduced. (*Id.*)

Here, the addited damages to Dale still puts his damages on the low end of pain and suffering awards in mesothelioma cases nationally. As the trial court noted, damages awards for pain and suffering in comparable mesothelioma cases range from $1.5 million to more than $20 million. (R. pp. 16-17 and cases cited therein). The court's analysis of damages awards in similar cases lends further support to the court's determination that the jury's award to Dale was inadequate to compensate him for his losses.

C. The evidence supports the circuit court's determination that the jury's award to Brenda Jolly was inadequate.

The trial judge did not abuse her discretion in awarding a new trial *nisi additur* regarding Brenda Jolly's loss of consortium damages. (R. pp. 19-20). Like the award to Dale, the trial court based the award on the evidence presented at trial. The court relied on the evidence that the Jollys have been married for 51 years. (R. p. 19). Instead of enjoying their remaining time together, Brenda has turned into Dales' caregiver and has had to witness him in pain. (R. pp. 19-20. Brenda's own health had even been impacted by the ordeal of Dale's illness. (R. p. 20). Her daughter described her as "really scared." (*Id.*).

Based on this evidence, the trial court did not abuse its discretion in finding the jury's award of $100,000 to be inadequate and granting a new trial *nisi additur* to increase the award to $290,000. (R. p. 20). As noted, this was less than the Jollys' request of $500,000. As with the

award to Dale, the new trial *nisi additur* for Brenda's loss of consortium damages should be upheld by this Court as within the trial judge's discretion.

IV. The circuit court properly applied a setoff for the Jollys' pre-trial settlements.

Fisher/Crosby's alternative request for a reallocation of the setoff for pre-trial settlements is based on several fundamental misunderstandings of the applicable law. First, their arguments ignore that the claims settled by the Jollys with other defendants are not completely identical to the claims the Jollys tried to verdict against Fisher/Crosby. As the trial court determined, the settlements were for the Jollys' personal injury, loss of consortium, and wrongful death claims. (R. p. 46). The trial court examined the Jollys' settlement agreements *in camera* and verified that the Jollys released all future claims against those defendants, including claims for wrongful death. (*Id.*) By contrast, the Jollys only tried their personal injury and loss of consortium claims against Fisher/Crosby.

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

Second, when, as here, the settlement "is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between" the claims. *Smith*, 397 S.C. at 473, 724 S.E.2d at 191. The trial court determined that, "[b]ecause the potential wrongful death claim is different, factually and legally, from the claims tried to verdict, the amount that Plaintiffs received as compensation for the release of future claims, such as

wrongful death, should not be considered by this Court when determining the setoff amount." (R. p. 45). The court therefore setoff the judgment only by the amounts the Jollys received in settlement for their personal injury and loss of consortium claims. (R. pp. 45-46).

Third, the Jollys were perfectly free to settle their future claims for wrongful death. Tort settlements almost invariably involve the release of all present and future claims in order to give the parties complete resolution. "Indeed, parties regularly reach compromise settlements for a variety of reasons, including the vagaries and unpredictability of litigation and the desire for finality." *Bowers v. Dep't of Transp.*, 360 S.C. 149, 155, 600 S.E.2d 543, 546 (Ct. App. 2004). South Carolina law recognizes the rights of parties to release contingent and future claims. *See S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2005); *Abu-Shawareb v. S.C. State Univ.*, 364 S.C. 358, 363, 613 S.E.2d 757, 760 (Ct. App. 2005).

Much of Fisher/Crosby's argument nevertheless focuses on the fact that the release of a personal injury claim precludes a later claim for wrongful death. While the Jollys do not disagree that this is the law, it has absolutely no relevance to the determination of what claims the Jollys and other defendants contracted to release. At the time those releases were executed, it was contemplated that Dale would die from mesothelioma and that his estate would have claims for survival and wrongful death. It was, of course, also possible that Dale would survive long enough to bring his claims as personal injury claims, which is what happened with Fisher/Crosby. But that does not alter the rights of the parties to release any and all possible claims that Dale might have against the defendants depending on whether or not he survived.

Fourth, the Jollys were entitled to allocate their settlement proceeds in accordance with their best interests. *Riley*, 414 S.C. at 196-97, 777 S.E.2d at 830-31. Here, the trial court found that the Jollys had internally allocated their settlement proceeds one-third to Dale's personal

injury claim, one-third to Brenda's loss of consortium claim, and one-third to their future wrongful death claim. (R. p. 46). The trial court found this allocation to be reasonable and in accordance with *Riley*.

Finally, there has been no double recovery. Fisher/Crosby not only disregard that wrongful death claims compensate for different injuries than survival or personal injury claims, but also that wrongful death claims are separate and distinct from loss of consortium claims. *See Burroughs v. Worsham*, 352 S.C. 382, 406, 574 S.E.2d 215, 227 (Ct. App. 2002). Wrongful death claims seek to recover the damages sustained by the beneficiaries as a result of the death, and those beneficiaries include the decedent's spouse and children. *Id.*; *Self v. Goodrich*, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989). The general elements of damages recoverable in a wrongful death action are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and loss of the decedent's experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries. *Self*, 300 S.C. at 351, 387 S.E.2d at 714. Only a spouse may recover for loss of consortium and the recoverable damages are relatively narrow:

> Loss of consortium includes afforded services provided by the other spouse, love, companionship, affection, society, sexual relations, comfort, solace, guidance. Plaintiff is entitled to recover the value of those services of her spouse which were lost including the loss of her spouse's society and companionship in her home and for any expenses for the care and treatment to her spouse.

(R. p. 2368, lines 16-23). These damages do not encompass the mental shock and suffering, wounded feelings, and grief and sorrow that the spouse and children may recover for wrongful death. In addition, there could not possibly a "double recovery" for Dale's own damages, as his pain and suffering is not an element recoverable under wrongful death.

Fisher/Crosby have failed to show that the Jollys' settlement of their future wrongful death claim was improper or that the internal allocation of their settlement proceeds was unreasonable. The trial court acted in accordance with *Rutland* and *Smith* in allocating the settlements one-third to Dale's personal injury claim and one-third to Brenda's loss of consortium claim. (R. p. 46). The addited damage award for personal injury was $1.58 million, and the setoff was $756,666.67, leaving a balance of $823,333.33. The addited damage award for Brenda's loss of consortium claim was $290,000, but the setoff of $756,666.67 exceeded the damages awarded. The trial court's application of the setoff was entirely proper and should be upheld by this Court.

V. The Jollys properly subpoenaed Fisher/Crosby to testify at trial.

The Jollys served Fisher/Crosby with trial subpoenas on July 12, 2017 for trial beginning July 24, 2017. (R. pp. 4638-4639; R. p. 4650). The trial subpoenas were served via hand delivery by Federal Express to Fisher/Crosby's counsel, Leath, Bouch and Seekings, whose office is located in Charleston. (R. p. 4650).

A. The circuit court has authority to compel parties to testify at trial.

Fisher/Crosby contend that the trial subpoenas are not valid because they are merely "out-of-state witnesses." (Appellants' Initial Br. p. 49). On the contrary, Fisher/Crosby are parties to this action who have submitted to the jurisdiction of this Court.

Rule 45, SCRCP, only allows *non-parties* to quash a trial subpoena. The rule states in pertinent part that the court shall quash a subpoena if it:

> requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause

> (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held[.]

Rule 45(c)(3)(A) (ii), SCRCP. Rule 45 thus provides that only a non-party may quash a subpoena for geographic or travel reasons, and even then a non-party may be subpoenaed to attend trial from anywhere in the state.

The rule does provide a mechanism for quashing a trial subpoena, but again only for non-parties. A subpoena may be quashed if it "requires a person who is not a party nor an officer, director or managing agent of a party . . . to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person . . . ." Rule 45(c)(3)(B), SCRCP. There is simply no provision for a party to quash a trial subpoena because the party resides outside the county or even the state.

In contending that they cannot be compelled to attend trial because they are corporations, Fisher/Crosby ignore the key fact that they are parties to this case. Their status as nonresident corporations does not change the fact that they submitted to the jurisdiction of the circuit court by making a general appearance and litigating this case to trial. A general appearance constitutes a voluntary submission to the jurisdiction of the court. *See, e.g., Stickland v. Consol. Energy Prod. Co.*, 274 S.C. 554, 555, 265 S.E.2d 682, 683 (1980); *Brays Island Plantation, Inc. v. Harper*, 245 S.C. 399, 405, 140 S.E.2d 781, 784 (1965).

This issue was addressed earlier this year in Louisiana, where the same arguments were made by nonresident corporations who claimed that they could not be subpoenaed to trial. The Louisiana Court of Appeal held that because the nonresident corporations were parties, the court had subpoena power and could compel their attendance at trial. *See Hayden v. 3M Co.*, 211 So. 3d 528, 532 (La. App. 2017), *writ denied, stay denied,* 216 So. 3d 799 (La. 3/3/17). The

Louisiana court explained that "[i]n the same way that Louisiana exercises personal jurisdiction over parties participating in litigation in the state, those parties may, upon the discretion of the court, be compelled to appear in Louisiana for discovery depositions, hearings, and/or trial." *Id.*

The Court should also reject Fisher/Crosby's arguments that the only mechanism to secure trial testimony from their corporate representatives is through presenting deposition testimony at trial. There is no authority for the proposition that a plaintiff cannot obtain live testimony from a *party* to the case. Rule 32, SCRCP, references the use of depositions of "witnesses" that reside more than 100 miles from the courthouse, not parties. Plaintiffs should not be deprived of the right to have a defendant testify live at trial simply because the defendant happens to be a corporation. Presentation of corporate witness testimony through depositions is less than ideal. These depositions are usually from other cases in other jurisdictions, and generally must be read in from paper transcripts. It was only fair that the Jollys were allowed to question Fisher/Crosby, through their representatives, through live testimony at trial. In-person testimony certainly aided the jury's understanding of the relatively complex issues presented in this case regarding Fisher/Crosby's wrongful conduct in manufacturing and marketing asbestos products without a warning and their knowledge of the danger.

B. The Jollys effected proper service on Fisher/Crosby.

There is no merit to Fisher/Crosby's contention that the Jollys' method of service was deficient. The Editor's Notes to the 2002 Amendments to Rule 45 confirm that service may be made in the same manner provided in Rule 4, SCRCP, and the person's attorney may accept service under Rule 4(j). Notes to 2002 Amendments, Rule 45, SCRCP. Subsection (j) of Rule 4 defines acceptance of service and provides that "[n]o other proof of service shall be required when acceptance of service is acknowledged in writing and signed by the person served

or his attorney, and delivered to the person making service. The acknowledgement shall state the place and date service is accepted." Rule 4(j), SCRCP.

In addition, Rule 5(b), SCRCP, applies to all service requirements. Subsection (b)(1) of Rule 5 provides that unless the Court orders that service on the party must be made personally, whenever "service is required to be made upon a party represented by an attorney the service shall be made upon the attorney." *Id.* Rule 5 even defines delivery as meaning "handing it to the attorney or the party or leaving it at his office with his clerk or other person in charge thereof." *Id.* As there was never any order that Fisher/Crosby were to be served personally, service on their attorneys was sufficient.

CONCLUSION

For the reasons set forth herein and in Judge Toal's Post-Trial Order, Fisher/Crosby have failed to demonstrate that the circuit court abused its discretion in admitting the testimony of the Jollys' expert witnesses or in granting a new trial *nisi additur*. They have also failed to show that the jury's verdict was unsupported by the evidence, or that there was any error in the circuit court's application of setoff or trial subpoenas compelling Fisher/Crosby to give live testimony at trial. The Jollys therefore ask this Court to affirm the circuit court's rulings in all respects.

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Respectfully submitted,

Theile B. McVey (SC Bar No. 16682)
tmcvey@kasselllaw.com
John D. Kassel (SC Bar No. 03286)
jkassel@kassellaw.com
KASSEL MCVEY, ATTORNEYS AT LAW
1330 Laurel Street
P.O. Box 1476
Columbia, South Carolina 29202-1476
803-256-4242

803-256-1952 (Facsimile)
Other email: emoultrie@kassellaw.com

Lisa W. Shirley (admitted *pro hac vice*)
Jonathan M. Holder (SC Bar No. 77935)
DEAN OMAR BRANHAM, LLP
300 N. Market Street, Suite 300
Dallas, Texas 75202
Telephone: (214) 722-5990

Attorneys for Respondents

Columbia, South Carolina.

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this Final Brief complies with Rule 211(b).

Theile B. McVey (SC Bar No. 16682)