THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2017-002611
Case No. 2016-CP-42-1592

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

v.

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

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

FINAL REPLY BRIEF OF APPELLANTS

C. Mitchell Brown
A. Mattison Bogan
James B. Glenn
Nicholas A. Charles
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Fisher Controls International LLC and Crosby Valve, LLC

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INTRODUCTION

Respondents Beverly Dale Jolly and Brenda Rice Jolly (hereinafter "Plaintiffs") ask this Court to ignore numerous errors by the trial court. Further, they cite to testimony out of context and attempt to cast the arguments of Appellants Fisher Control Valves International LLC ("Fisher") and Crosby Valve, LLC ("Crosby") (hereinafter "Appellants") as fringe positions that are unsupported by the law. The court should not be persuaded by Plaintiffs' efforts.

Appellants, in contrast, ask the court to apply the law to the facts in the record. If the court applies the law to the facts—viewed in their proper context—it should reverse and grant judgment in favor of Appellants. Failing that, the court should reverse the trial court's new trial nisi additur and setoff and allocation rulings. Finally, the court should reverse the trial court's denial of Appellants' motion to quash the trial subpoenas mailed to their trial counsel.

ARGUMENT

I. Plaintiffs' brief contains incorrect and incomplete factual representations.

Much of Plaintiffs' argument is based on an incomplete and inaccurate recitation of the evidence. Therefore, at the outset, Appellants believe it is necessary to clarify several important factual representations made in Plaintiffs' brief. Appellants also address additional factual inaccuracies in the argument sections that follow.

First, Plaintiffs make scattered references to crocidolite allegedly sold by Fisher throughout their brief. *See* (Resp. Br. 5, 20, 23). Crocidolite is the most potent form of asbestos. Despite Plaintiffs' references, there is zero evidence that any crocidolite-containing Fisher product existed at the Duke facilities where Mr. Jolly worked.[1] The testimony and exhibit cited by Plaintiffs is not

[1] Plaintiffs limit their crocidolite allegations to Fisher. There is also zero evidence of any crocidolite-containing Crosby products, and Plaintiffs have not asserted otherwise.

case-specific, and Plaintiffs cite the evidence out of context. For example, Plaintiffs cite testimony that crocidolite was used in gaskets, but the evidence they cite states that crocidolite was used in "certain specialty gaskets," *see* (R. 2074), and there is no evidence that those "specialty gaskets" were used at facilities where Mr. Jolly worked.[2] To the contrary, Fisher's corporate representative, Ronald Duimstra, testified that he was not aware of Fisher ever shipping a crocidolite-containing product to Duke or any other customer. (R. 1329, 1348). Moreover, Fisher's expert witness, Dr. Crapo, testified "crocidolite gaskets were more expensive and for use on acid lines like in a chemical factory." (R. 1708). In a nuclear power plant such as the Duke plants, however, Dr. Crapo explained he was "not aware of any appropriate use for a crocidolite gasket." (R. 1708). Hence, Mr. Jolly was not exposed to crocidolite, and Plaintiffs' repeated references to crocidolite simply do not amount to supportive evidence here.

Second, Plaintiffs repeatedly state that Appellants sold asbestos-containing flange gaskets to Duke. *See, e.g.*, (Resp. Br. 4–5). Appellants do not dispute selling valves with flanges, and flanges need gaskets to prevent leaks. However, Appellants did not sell any flange gaskets to Duke. (R. 1312–13, 1485–87, 1489–90). In fact, the record demonstrates that *Duke* supplied the flange gaskets for the valves it used in its facilities. Crosby's corporate representative testified that "the end user would be responsible for deciding what gasket goes into" a particular connection, and he was not aware of any instance in which Crosby supplied flange gaskets. (R. 1487, 1490).

Similarly, Fisher's corporate representative testified that "the user would select a gasket and apply it against" the flange surface. (R. 1312). Both representatives further explained that

[2] Close examination shows that Plaintiffs stated only that some gaskets sold by Fisher contained crocidolite, *see* (Resp. Br. 5, 20); they do not state that Fisher sold any crocidolite gaskets to Duke, because there is no evidence to support such an assertion.

many valves in the power industry are welded in to avoid the possibility of leaks and, therefore, do not use flange gaskets. (R. 1313, 1489).

Plaintiffs attempt to convey to this court that Mr. Jolly was surrounded by numerous asbestos-containing valves from Appellants during his employment at Duke. This is incorrect. Plaintiffs disregard the facts that Appellants' valves were only two of more than a dozen different types of valves on site, *see* (R. 877–78),[3] that the vast majority of Crosby's valves sold anywhere contained no asbestos, *see* (R. 1504), and that it was Duke—not Appellants—that applied any asbestos-containing flange gaskets with regard to the facts here. (R. 1312, 1489). In addition, Mr. Jolly's testimony about his gasket exposure was generic to all valves; it was not specific to Appellants' valves. (R. 497–503).

Plaintiffs also allege that "most" flange gaskets sold by Appellants contained asbestos. (Resp. Br. 4). The testimony Plaintiffs cite—from Mr. Jolly's coworker, David Taylor—does not support that assertion. Mr. Taylor said that certain Appellants' valves had *internal* asbestos components and that he encountered flange gaskets from valves in general—not specifically Appellants' valves. *See* (R. 869, 877–81). The exhibit cited by Plaintiffs is for Fisher alone, is from 1991 (more than seven years after Mr. Jolly's alleged exposure), and references an *internal* flange—not the valve to pipe connection that Plaintiffs focused on as the source of Mr. Jolly's exposure at trial. (R. 3892).[4]

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[3] Mr. Taylor testified that he worked on asbestos-containing valves from "so many" manufacturers, including Crane, Anchor/Dar, Kennedy, Grinnells, Fisher, Chapman, Velan, Newco, and Edward. (R. 877). Mr. Jolly testified at trial that he remembered Warren, Grinnell, Ingersoll Rand, Anchor, Newco, Crane, Kennedy, and Velan valves. (R. 530-31).

[4] Purchase orders were generated by Duke seeking "gasket, flanged fitting" incorporating asbestos for a "U type" valve. *See, e.g.*, (R. 3892). However, this appears to have been an *internal gasket*. Certain Fisher valves had an internal joint at which a "bottom flange" connected to a bonnet body assembly and utilized a gasket. (R. 3323, 3325, 3342 (inc. Figure 1-23), 3422). Plaintiffs provided no evidence Fisher (or Crosby) supplied gaskets connecting valves to

Importantly, Mr. Taylor admitted he did not know whether Crosby valves contained *internal* asbestos components.[5] (R. 1039). Moreover, Mr. Jolly did not testify that he ever worked around or was exposed to asbestos from internal valve components—such as internal gaskets and packing—whether from Appellants or valves in general.

II. The improper causation testimony offered by Plaintiffs' expert witnesses was inadmissible.

Dr. Frank, Dr. Maddox, and Dr. Brody opined that "each and every exposure" to asbestos caused mesothelioma. These opinions are inadmissible under Rule 403 of the South Carolina Rules of Evidence. Further, Plaintiffs' arguments fail to resolve two important deficiencies in their experts' opinions—first, the opinions were not connected to evidence of Mr. Jolly's actual exposure to asbestos from Appellants' products, and second, the opinions conflict with the legal standard for asbestos exposure cases in South Carolina. At its simplest level, Plaintiffs' expert testimony went as follows: (1) elicit testimony that there is no safe level of asbestos exposure, and that every exposure contributes to the development of mesothelioma; and (2) ask whether Crosby (and then Fisher) were part of a cumulative dose that caused the disease. This presentation of expert testimony conflicts with the legal standard—Plaintiffs were required to prove that both Fisher and Crosby's products were a *substantial* factor in Mr. Jolly's development of mesothelioma, not merely a factor. *See Henderson v. Allied-Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). Accordingly, this court should reverse the trial court and rule that Plaintiffs' experts' opinions are inadmissible. Without the expert opinions, Plaintiffs cannot prove causation, and Appellants are entitled to JNOV.

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pipelines, the type Jolly testified about and for which Appellants had no legal responsibility. Further, while Duke continued to order asbestos components, Fisher had stopped selling asbestos components by 1988. (R. 1286, 1320–21).

[5] Crosby valves did not contain packing. (R. 1495, 3905).

A. Plaintiffs' experts offered the "each and every exposure opinion"

Plaintiffs claim throughout their brief that their experts did not espouse the "each and every exposure opinion." (Resp. Br. 16–27). This claim fails upon examination of the evidence.

First, Plaintiffs' brief is filled with quotes that belie the true nature of their experts' opinions. *See* (Resp. Br. 11) ("Every time a person is exposed to asbestos, some portion of those fibers reach the target cell. Genetic errors increase each time the damages cells are hit with asbestos fibers, and it is the accumulation of genetic errors that eventually causes a tumor to develop."); (Resp. Br. 23) (noting "Dr. Frank and Dr. Maddox testified that there is no known safe level of asbestos exposure"); (Resp. Br. 24) ("[A]ll exposures contribute to the cumulative dose that causes disease."). In other words, because Plaintiffs' experts cannot rule out any exposure, they choose to rule every exposure *in*—thus, *every* exposure contributes to causing mesothelioma. This is directly at odds with *Henderson*—which requires proof of regular, frequent, and proximate exposure to a specific defendant's products for that defendant to be liable. 373 S.C. at 185, 644 S.E.2d at 727. Further, Plaintiffs' experts' views have been thoroughly rejected in numerous courts. *See, e.g.*, *Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950, 955 (6th Cir. 2011); *Krik v. Owens-Illinois, Inc.*, 2015 WL 5050143, at *1 (N.D. Ill. 2015); *Smith v. Ford Motor Co.*, No. 2:08-CV-630, 2013 WL 214378, at *2 (D. Utah Jan. 18, 2013); *see also* (App. Br. 18 n.4) (citing additional cases).

Second, Plaintiffs' experts made numerous statements at trial indicating that each and every exposure causes mesothelioma. *See* (R. 715) ("What we have to say at the end of the day, if someone gets a mesothelioma, is that the cumulative exposure they have had to asbestos from whatever products over whatever time is what gave it to them."); (R. 715–16) ("The same thing applies to asbestos. Some products contribute more; some contribute less, *but you can't leave any*

of them out because it is a cumulative exposure, the totality of what people were exposed to that gave them disease. So all of them have to be included." (emphasis added)); (R. 723–24) ("[S]ince there is no exposure that can be left out for reasons we discussed a bit earlier, that would be a substantial contributing factor. It is part of one's cumulative exposure."); (R. 1001–02) (stating "there is no threshold" for causing mesothelioma and "once you get above background, there is no level that we know is safe or will not cause mesothelioma"). Each of those statements espouses the theory that every exposure to asbestos must be considered causal—that each one must be ruled in because it cannot be ruled out. These statements directly contradict the requirements that plaintiffs prove specific causation and regular, frequent, and proximate exposure to asbestos from a particular source in order to establish liability for a particular defendant.

Third, Plaintiffs argue that a foundational scientific principle is that every exposure to asbestos contributes to a person's cumulative dose, and that cumulative dose becomes a substantial factor in his development of mesothelioma. (Resp. Br. 24). Next, they argue this supposed scientific fact must be considered in determining causation and therefore must be admissible. The problem is that this supposed scientific fact cannot be used to usurp and replace the operative legal standard for causation. Plaintiffs' approach is wrong as a matter of law because it focuses on the cumulative cause, not the responsibility of the individual defendant. Courts in South Carolina and elsewhere have repeatedly rejected attempts by plaintiffs to rely upon the "each and every exposure" opinion in a case.

In *Haskins v. 3M Co.*, No. 2:15-CV-02086-DCN, 2017 WL 3118017 (D.S.C. July 21, 2017), Judge Norton rejected this very argument about the scientific fundamentals of the "every exposure" theory. Judge Norton noted that the scientific theories that "mesothelioma may result from very small exposures" and that "there is no safe level of asbestos exposure" is "fairly

uncontroversial." *Id.* at *5. He explained "the court is convinced that these basic principles find enough support in the scientific literature that any attempt to challenge them would not disturb their reliability." *Id.* Even if those statements are scientifically valid, however, that is not sufficient to establish the admissibility of an expert's opinion. *Id.* at *6 ("Regardless of whether this is sound science, it is inconsistent with the law."). Judge Norton emphasized that causation must be analyzed on a defendant-specific basis and that "the basic assertion that . . . exposure was significantly above ambient asbestos levels" "did not speak to the severity of [the plaintiff's] exposure to [the defendant's product]." *Id.* (alterations in original). Because the expert's opinions evaluated causation in a manner inconsistent with the legal standard, the opinions were "essentially irrelevant, and any probative value they may have is easily outweighed by their tendency to confuse or mislead the jury."[6] *Id.* Therefore, the expert's opinions were inadmissible under Rule 403. *Id.* at *8; *see also Butler v. Union Carbide Corp.*, 712 S.E.2d 537, 544 (Ga. Ct. App. 2011) (excluding Dr. Maddox's "cumulative dose" opinion for its lack of scientific validity and other factors); *Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196, 1207 (W.D. Wis. 2016) (refusing to rely on Dr. Frank's testimony, citing its numerous methodological shortcomings). This Court should likewise reject this effort to circumvent the proper legal causation standard.

B. Plaintiffs failed to demonstrate how their expert opinions and causation evidence fit Mr. Jolly's alleged exposure.

Plaintiffs must prove that Mr. Jolly had regular, frequent, and proximate exposure to Appellants' products, and that the exposure was a substantial factor in causing his mesothelioma.

[6] Although Judge Norton applied maritime law in *Haskins*, he explained that there is no significant difference between the "substantial factor" causation test under maritime law and the frequency, regularity, and proximity test under South Carolina law. *See id.* at *6 n.7.

Henderson, 373 S.C. at 185, 644 S.E.2d at 727. They argue that, because exposure to Appellants' products contributed some small part to his cumulative dose, Appellants are liable.

Plaintiffs contend that Appellants want the Court to adopt a standard requiring Plaintiffs to prove the exact dose (or "mathematical dose") of exposure that Mr. Jolly received. *See* (Resp. Br. 18–19). This is a misrepresentation of Appellants' arguments. Under Fourth Circuit and District of South Carolina case law on general and specific causation, a plaintiff must prove two steps of causation in toxic tort cases. *See Fisher v. Pelstring*, 817 F. Supp. 2d 791, 814 (D.S.C. 2011). First, he must show that asbestos causes mesothelioma in general—"general causation"—and second, he must also show that his specific level of exposure was within the range of doses sufficient to cause disease—"specific causation." *Id.*

Appellants are not arguing that Plaintiffs had to exactly quantify Mr. Jolly's exposure to asbestos. However, Plaintiffs must show—in accordance with the proper legal standard for causation—the connection between the amount of Mr. Jolly's exposure *from Fisher or Crosby products*[7] and Mr. Jolly's development of mesothelioma. *See Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 850 (M.D. Fla. 2016) ("To prove that a given injury was 'caused by exposure to a specified substance,' a plaintiff must demonstrate 'the levels of exposure that are hazardous to human beings generally,' *and* 'the plaintiff's actual level of exposure.'" (emphasis added)). Thus, they must prove that Mr. Jolly's exposure from Appellants' products was within a range sufficient to cause his mesothelioma. *Id.* ("[T]here must be a showing that the plaintiff's level of exposure is comparable to the levels of exposure that are hazardous as a general matter."). The court in *Yates* explained that an exact quantification of a plaintiff's exposure is not required; instead,

[7] Of course, Fisher and Crosby are separate companies, so Plaintiffs were required to prove all elements of recovery against each of them.

"'qualitative' evaluations of asbestos exposures may also be used to establish the appropriate levels which science has shown to be hazardous, and which plaintiff has experienced." *Id.* at 851.

> [T]he caselaw provides that plaintiffs have flexibility in establishing the "levels of exposure that are hazardous to human beings generally" and drawing comparisons with the levels of exposure experienced by the plaintiff. Yet the flexibility afforded to plaintiffs does not relieve them of the burden to establish these levels and comparisons through application of methodologies meeting the standards for reliable testimony.

Id. at 852. Thus, Plaintiffs must prove a range of exposures that cause mesothelioma and prove that Mr. Jolly's exposure to Appellants' products fell within that range. They did not do so.

Plaintiffs are attempting to make an end run around this requirement by showing every exposure causes mesothelioma and, therefore, Mr. Jolly's exposure from Appellants' products caused his mesothelioma. However, background exposures—for example—do not cause mesothelioma. Plaintiffs make this attempted end run because they have not satisfied the proper causation standard.

Plaintiffs repeatedly cite the "evidence" relied upon by their experts to support the experts' opinions. Plaintiffs' experts did not deliver opinions based on evidence of Mr. Jolly's exposure from Appellants' valves. Instead, Plaintiffs' experts answered hypotheticals that assumed Mr. Jolly was exposed to cumulative levels of asbestos that included *some* exposure from Appellants' products. However, Plaintiffs never presented exposure evidence specific to Appellants. They simply presented evidence that Mr. Jolly was exposed to asbestos in general—without distinguishing between what came from Appellants' products, what was "associated with" Appellants' products, and what came from other sources—then asked their experts to offer causation opinions based on this aggregate exposure. (R. 719–22, 1014–15, 1546–48). Appellants' products were just two of numerous sources of alleged exposure. *See* (R. 877). Thus, Plaintiffs' expert opinions are based on a faulty premise and are unreliable. *See Pace v. Air &*

Liquid Sys. Corp., 642 Fed. App'x 244, 247–48 (4th Cir. 2016) (noting, under the *Henderson* test, "[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.*").

Plaintiffs also failed to connect the science on which their experts relied with Mr. Jolly's exposure. For example, Dr. Maddox relied on several studies, which Plaintiffs note in their brief. (Resp. Br. 9) (explaining Dr. Maddox relied on studies by Rodelsperger, Iwatsubo, LaCourt, and Roland). In keeping with the nature of their expert testimony arguments, Plaintiffs offered no evidence or explanation of how those studies apply to this case. They did not demonstrate that Mr. Jolly's exposure was similar to the exposures in those studies and, therefore, did not establish that those studies are relevant to this case. Appellants explained this lack of connection in their primary brief, (App. Br. 18–19), but Plaintiffs offered no counterargument. Those studies, standing alone, are not proof that Mr. Jolly developed mesothelioma from exposure to Fisher or Crosby products. Plaintiffs made no showing that the fiber types at issue in those studies were comparable to Mr. Jolly's exposure, a critical showing as discussed by the case law cited in Appellants' initial brief. Consequently, reliance on those studies does not validate the opinions of Plaintiffs' experts. *Yates*, 113 F. Supp. 3d at 860 (finding an expert's opinion unreliable because he relied on studies but did not compare the plaintiff's exposures to the quality of exposures experienced by the subjects of the studies he referenced).

Plaintiffs' expert opinions are unreliable and inadmissible under Rule 403 of the South Carolina Rules of Evidence and should have been excluded. Without expert testimony, Plaintiffs cannot meet their burden to prove causation, and Appellants are entitled to JNOV.

C. Plaintiffs incorrectly conflate the *Henderson* standard and the requirement that they prove general and specific causation.

Plaintiffs also attempt to collapse their experts' causation opinions into the *Henderson* standard. *See* (Resp. Br. 17–21). This attempt should be rejected.

Expert causation and the *Henderson* standard are two separate standards. *Henderson* does not address expert testimony. The expert testimony requirement instead comes from the general and specific causation requirements in toxic tort cases generally. *See Fisher*, 817 F. Supp. 2d at 814. Thus, two separate requirements exist: (1) Plaintiffs must prove regular, frequent, and proximate exposure, and (2) Plaintiffs must prove general and specific causation.

In *Rost v. Ford Motor Co.*, a 3-2 decision that Plaintiffs rely upon as supporting the admissibility of their experts' opinions, the majority found Dr. Frank's opinion admissible because—although he testified that every exposure contributes to a plaintiff's cumulative dose—he did not testify that every exposure is a "substantial factor" in causing the plaintiff's mesothelioma. 151 A.3d 1032, 1045–46 (Pa. 2016). Two dissenting justices disputed the majority's reasoning, explaining Dr. Frank's theory "is fundamentally inconsistent with the legal requirement of substantial-factor causation." *Id.* at 1058 (Saylor, C.J., dissenting). The dissenting justices explained that Dr. Frank's theory collapses the legal standard and the general and specific causation requirement into a confusing and speculative opinion that the defendant substantially caused the plaintiff's mesothelioma. *See id.* at 1059–63.

The *Rost* case demonstrates the confusing and misleading nature of the "cumulative dose" theory espoused by Dr. Frank and Plaintiffs' other experts. The experts explain to the jury that "every exposure counts" and "all exposures make up the cumulative dose" while carefully avoiding any statement that every exposure is the *legal* cause of a plaintiff's mesothelioma. *See id.* at 1060. However, the experts never explain how they determine whether a specific exposure

is "substantial," and often—similar to this case—never attempt to calculate the amount of the plaintiff's exposure. *Id.* at 1060, 1062. Instead, they simply respond to a general hypothetical question by asserting their belief that any exposure related to the defendant was substantially causative. *Id.* at 1060. The expert's hypothetical answer is, in the words of Chief Justice Saylor, a "reaffirmation[] of his other opinions on general and specific causation, i.e., that 'all [exposures] contributed.'" *Id.* (second alteration in original). Thus, "the basis for Dr. Frank's opinion concerning substantial-factor causation is not materially distinguishable from his other opinions concerning general and specific causation, i.e., that every exposure counts." *Id.* at 1063.

Here, Plaintiffs' experts testified that every exposure contributes to a person's cumulative dose and is therefore a cause of his mesothelioma. The experts then answered lengthy hypotheticals—which, importantly, were not based on actual evidence of exposure to Appellants' products, but instead were based on testimony by Mr. Jolly and Mr. Taylor about exposure to valves in general—and affirmed that those hypothetical exposures were the legal cause of Mr. Jolly's mesothelioma. *See* (R. 719–22, 1014–15, 1546–48). The experts did not explain how they arrived at the decision that Mr. Jolly's exposure from Appellants' products was sufficient to be a substantial cause of his mesothelioma. Thus, they never materially distinguished their legal causation opinions from their general causation opinions. The jury heard what Plaintiffs wanted it to hear—every exposure to asbestos causes mesothelioma; therefore, any exposure Mr. Jolly had to Appellants' products caused his mesothelioma. This testimony is insufficient as a matter of law to affix liability. Thus, Appellants are entitled to JNOV.[8]

[8] Plaintiffs also argue that because *Lohrmann* was an asbestosis case, "the factors should be applied even less strictly in mesothelioma cases." (Resp. Br. 19). This theory is not the law in South Carolina; in fact, it directly contradicts *Henderson*. In *Henderson*, which was a mesothelioma case, this court expressly adopted the regular, frequent, and proximate test from *Lohrmann* without any caveats. *Henderson*, 373 S.C. at 182, 185, 644 S.E.2d at 725, 727. Plaintiffs now ask this

III. Notwithstanding the admissibility of Plaintiffs' expert opinions, the trial court erred in denying Fisher and Crosby's motion for judgment notwithstanding the verdict as to each of Plaintiffs' claims.

A. Plaintiffs and the trial court improperly apply the sophisticated intermediary doctrine.

Plaintiffs argue the trial court properly denied Appellants' motion for JNOV based on the sophisticated intermediary doctrine because Appellants and Duke all thought asbestos gaskets were harmless and, therefore, the Appellants could not rely on Duke to warn its employees. (Resp. Br. 28–29). Plaintiffs' argument considers only part of the sophisticated intermediary doctrine. Appellants were not required to prove Duke had actual knowledge of the dangers. *See Webb v. Spec. Elec. Co.*, 370 P.3d 1022, 1031 (Cal. 2016). Rather, the sophisticated intermediary doctrine provides that Appellants did not have to warn end users if Duke was a sophisticated entity that *should have known* of the hazards. *Id.*

It was reasonable for Appellants to rely on Duke to warn its employees. *See* (App. Br. 25–27). Duke's alleged failure to actually warn its employees or its alleged lack of actual knowledge of the hazards of asbestos gaskets is not dispositive of this issue. To the contrary, if gaskets were a hazard as Plaintiffs claim, then Duke as a sophisticated entity *should have known* of the dangers of asbestos-containing gaskets, and it was therefore reasonable as a matter of law for Appellants to rely on Duke to warn its employees.[9] *See* (App. Br. 25–27).

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court to add a caveat to the supreme court's adoption of the *Lohrmann* test that has never existed. Other courts have acknowledged this and rejected this very argument. *See Meek v. Alcan Prods. Corp.*, Civil Action No. 2011-CP-23-5890 (Greenville Cty. filed Jan. 3, 2012) (rejecting this exact argument on the ground that *Henderson* "did not discuss the differences between causation in asbestosis and mesothelioma"); *Pace*, 642 Fed. App'x at 248 n.3 (applying South Carolina law and rejecting the same argument made by Plaintiffs in this case because *Henderson* was a mesothelioma case).

[9] Plaintiffs also assert that the sophisticated intermediary doctrine has not been adopted in South Carolina. As Appellants explained in their primary brief, this court expressly adopted the doctrine in *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 550, 462 S.E.2d 321, 332 (Ct. App. 1995), and *Lawing*

Plaintiffs also offer multiple ways that they believe Appellants could have warned Mr. Jolly about the hazards of asbestos gaskets. Plaintiffs either did not offer these alternatives at trial or have not shown how the alternatives would have been effective in warning Mr. Jolly. For example, Plaintiffs assert that Appellants could have placed warnings on the valves themselves next to the manufacturer name and serial number. (Resp. Br. 29). However, Plaintiffs did not establish that such an alternative was possible or, if it was, whether it would have been visible as placed by Duke in its plants. Further, the evidence is insufficient to show that such warnings would have been effective.

B. Plaintiffs cannot prove that Mr. Jolly would have heeded a warning, and Mr. Jolly knew of the dangers of asbestos.

Appellants argued that they are entitled to JNOV because Plaintiffs failed to prove Mr. Jolly would have heeded a warning, and the alleged danger was open and obvious. Plaintiffs' responsive argument fails in two respects. First, Plaintiffs did not dispute that they failed to prove Mr. Jolly would have heeded a warning. *See Owings v. Moneynick Oil Mill*, 55 S.C. 483, 33 S.E. 511, 513 (1899) ("Any warning which might have been given would have been entirely useless, and therefore the defendant neglected no duty in failing to give such a warning."); (App. Br. 27–28); (Resp. Br. 30–31).

Second, Plaintiffs urge this court to analyze whether the danger was open and obvious from the wrong perspective. They ask the court to look at this issue from Appellants' perspective. *See* (Resp. Br. 30–31). The issue, however, is whether the danger was open and obvious ***to Mr. Jolly***, *see Rife v. Hitachi Const. Mach. Co.*, 363 S.C. 209, 220, 609 S.E.2d 565, 571 (Ct. App. 2005), or whether it is "generally known and recognized," *Moore v. Barony House Rest., LLC*, 382 S.C. 35,

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v. Trinity Manufacturing, Inc., 406 S.C. 13, 23, 462 S.E.2d 126, 131 (Ct. App. 2013). *See* (App. Br. 24).

41, 674 S.E.2d 500, 504 (Ct. App. 2009). Thus, what matters is what Mr. Jolly knew, and Mr. Jolly knew that asbestos was hazardous. (R. 534–36). The knowledge or belief of Appellants' corporate representatives is not a basis for deciding an issue that turns on Mr. Jolly's knowledge. Thus, Appellants are entitled to JNOV on Plaintiffs' failure to warn claim.

C. Plaintiffs failed to establish the existence of a *reasonable* alternative design as a matter of law.

Contrary to Plaintiffs' assertion, there is no jury question as to their design defect claim. Plaintiffs must prove a *reasonable* alternative design exists to prevail on this claim. Thus, they must prove two things: (1) an alternative design exists, and (2) that design is reasonable. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 225, 701 S.E.2d 5, 16 (2010). Appellants do not dispute that gaskets can be made from materials other than asbestos. Nearly any material can be shaped into a gasket. However, the evidence presented at trial—including Mr. Jolly's own testimony—showed that other materials cannot be used in the high-heat, high-pressure applications for which Duke used Appellants' valves. (R. 497, 502–03, 559, 1472). Plaintiffs' own expert, Dr. Frank, admitted that asbestos was the only insulating option available in the hot settings in which Duke used Appellants' valves. (R. 811). Importantly, Appellants did not sell asbestos-containing flange gaskets to Duke. (R. 1312, 1489). Moreover, evidence that other materials exist is only part of Plaintiffs' evidentiary burden. Their presentation of an alternative design "must include consideration of the costs, safety and functionality associated with the alternative design." *Branham*, 390 S.C. at 225, 701 S.E.2d at 16. Plaintiffs made no such presentation. Thus, there was no question for the jury to decide—the only evidence was that no *reasonable* design exists as an alternative to asbestos-containing gaskets. Appellants are therefore entitled to JNOV on Plaintiffs' design defect claim.

D. Plaintiffs failed to show the standard of care *for negligence* and breach.

Plaintiffs' negligence standard of care argument is based entirely on the existence of federal statutory and regulatory schemes related to asbestos and workplace hazards. (Resp. Br. 33–37). Plaintiffs do not explain how they presented evidence to the jury of the negligence standard of care that Appellants allegedly failed to meet. (*Id.*; R. 29–32). The statutes and regulations cited do not provide the legal standard of care for negligence claims. They are federal health and safety regulations—enacted based on forward-looking evaluations performed by regulatory agencies—that are not related to the standard of care for tort claims. *See Yates*, 113 F. Supp. 3d at 847 ("[C]ourts have recognized a distinction between evaluations made by regulatory agencies and the standard of causation necessary to show tort liability."); *see also, e.g.*, *In re Garlock Sealing Tech., LLC*, 504 B.R. 71, 81 (Bankr. W.D.N.C. 2014) (holding regulatory statements, policies, or regulations "cannot be probative on the issue of causation because of the differences in the way courts and regulatory authorities assess risk"); *Glastetter v. Novartis Pharm. Corp.*, 252 F.3d 986, 991 (8th Cir. 2001) ("The FDA will remove drugs from the marketplace upon a lesser showing of harm to the public than the preponderance-of-the-evidence or more-likely-than-not standards used to assess tort liability. 'The methodology employed by a government agency "results from the preventive perspective that the agencies adopt in order to reduce public exposure to harmful substances."'" (citation omitted)).

The existence of regulations and different laws that address asbestos are irrelevant to whether Appellants committed a tort against Mr. Jolly, and the trial court erred in denying Appellants' JNOV motion on Plaintiffs' negligence claim.

IV. The trial court erred in granting Plaintiffs' motion for new trial nisi additur.

South Carolina law is clear that juries—not trial courts—are "the sole judge of issues of fact, including the issue of damages." *Vinson v. Hartley*, 324 S.C. 389, 408, 477 S.E.2d 715, 725 (Ct. App. 1996). That means that "[t]he jury's determination of damages . . . is entitled to substantial deference," and trial courts cannot substitute their judgment for that of the jury without articulating a ***compelling reason*** for doing so. *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 140 (2003); *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015). Here, not only did the trial court fail to identify any compelling reasons for increasing the jury's verdict by over 600%—but it also erred by making unwarranted assumptions about the jury's verdict and crediting Plaintiffs' speculative damages evidence as "undisputed." Plaintiffs' response—that the trial court properly granted additur because they are "entitled" to the inflated damages, (Resp. Br. 39)—ignores Plaintiffs' burden to prove the amount of those damages with reasonable certainty.

The trial court's additur decision fails from the outset because it is based on an unsupported factual conclusion regarding the jury's $200,000 damages award to Mr. Jolly. (R. 18). Plaintiffs did not request a special verdict form and "[w]ithout a special verdict form, we cannot speculate as to what portion of the award the jury attributed to" different types of damages. *Moore v. Moore*, 360 S.C. 241, 257, 599 S.E.2d 467, 475 (Ct. App. 2004). Yet, speculation about the nature of the jury's verdict is exactly what occurred here when the trial court concluded, "The jury only awarded Mr. Jolly medical expenses in the amount of $142,000, plus $58,000 for pain and suffering." (R. 18). In contrast, Plaintiffs infer that the jury did not award damages for pain and suffering at all. (Resp. Br. 40). Basing a decision on speculation—rather than evidence—is an abuse of discretion. *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) ("An abuse

of discretion occurs when the conclusions of the circuit court . . . are based on unsupported factual conclusions."); *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 298 (Ct. App. 1989) (providing an abuse of discretion occurs when a trial court decision is "wholly unsupported by the evidence").

The trial court further erred in treating Plaintiffs' equivocal expert testimony regarding Mr. Jolly's medical damages as "undisputed." Plaintiffs had the burden to prove the amount of their damages with reasonable certainty. *See* (R. 2367) ("[T]he plaintiff must present evidence that's sufficient to allow you to make a reasonable approximation of damages, and the plaintiff must prove their damages to a reasonable degree of certainty"). They did not.

Plaintiffs did not introduce a single medical bill into evidence. Instead, Plaintiffs showed their expert Dr. Frank $142,000 in unidentified medical bills and asked him to speculate regarding Mr. Jolly's total medical bills. Although Plaintiffs attempt to characterize Dr. Frank's testimony as "proving" medical damages, (Resp. Br. 39–40), the transcript of his actual testimony shows he did nothing of the sort. During his direct examination, Dr. Frank testified, "Cases like his with the kind of extensive treatment and surgery he's had, clearly hundreds of thousands. Cases even go to a million dollars or more." (R. 760–61). Dr. Frank clarified that he was not saying the medical bills *would* be a million dollars, only that a million dollars was within a *possibility*:

Q. And you said about a million dollars?
A. I said *it would not be unreasonable to be a million dollars.*
. . . .
Q. You said you had not seen many or all of the bills, correct?
A. I have not seen what I understand are all of the bills. I have seen some of them.
Q. How much have you seen?
A. $142,000.
Q. Is there any reason that [$]900,000, in your estimation, is missing?
A. I don't know why they were or were not available to show me, but I was asked questions about what, for example, a surgical procedure might cost.
Q. But the best opinion on that would be . . . the medical bills, right?

A. That would be the best data.

(R. 845–46) (emphasis added). Thus, Dr. Frank himself did not consider the $1 million in medical damages to be reasonably certain, and the trial court erred as a matter of law in crediting his testimony as "undisputed." *See Umhoefer*, 298 S.C. at 224, 379 S.E.2d at 298 (explaining a court "must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party"); *Black v. Hodge*, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991) ("The fact that testimony is not contradicted directly does not render it undisputed."). The jury's refusal to award medical damages based on Dr. Frank's conjecture does not provide a compelling reason justifying additur. *Luchok v. Vena*, 391 S.C. 262, 263–64, 705 S.E.2d 71, 72–73 (Ct. App. 2010) (finding a jury verdict not covering medical bills was not a compelling reason to grant additur in light of conflicting evidence); *Tarrants v. Owens-Corning Fiberglass Corp.*, No. 97-6043, 2000 WL 977375 at *4 (6th Cir. 2000) (refusing to set aside a jury's damages award when plaintiff "failed to produce any written documentation to support her claims for out-of-pocket medical and funeral expenses").

Likewise, the trial court cited no compelling reason to ignore the jury's awards of non-economic damages, particularly given that non-economic damages "peculiarly [fall] within the province of the jury to weigh and determine." *Kalchthaler v. Workman*, 316 S.C. 499, 503, 450 S.E.2d 621, 623 (Ct. App. 1994). The trial court repeatedly praised the jury for its attention and the seriousness with which it was undertaking its duty. *See, e.g.*, (R. 923–24) ("I've been in this business for almost 50 years, . . . I don't believe I've ever seen a jury that is this attentive about what is a very technical and sometimes tedious case."); (R. 2082) ("I continue to just be amazed at the kind of seriousness and attention that you have paid and consideration you have given to both sides and to all parties in this controversy."). However, rather than giving the jury's award

substantial deference as required, the trial court merely recited the same evidence presented to the jury, and then increased the amount that the court assumed the jury awarded for Mr. Jolly's non-economic damages by a factor of ten, and the amount awarded to Mrs. Jolly by nearly three times. (R. 18–20). This Court has previously rejected similar orders as an abuse of discretion. *See Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003) ("[T]he mere listing of [the plaintiff's] claimed damages . . . does not constitute compelling reasons for invading the jury's province. The order offers no reasons upon which we can review the appropriateness of usurping the jury's decision on damages."). Even on appeal, Plaintiffs merely recite the evidence presented to and considered by the jury, and even admit that Mr. Jolly was "quite stoic" when describing his pain and suffering. (Resp. Br. 41).

Plaintiffs further argue that damages awards in other cases have been higher, (Resp. Br. 42–43), but damages awarded by other juries to other plaintiffs in other factual situations do not provide compelling reasons to overturn the damages award of the properly instructed, undisputedly attentive jury in this case. *See Lucht v. Youngblood*, 266 S.C. 127, 136, 221 S.E.2d 854, 858 (1976) ("The comparison approach is helpful and sometimes forceful, however, each case must be evaluated as an individual one, within the framework of its distinctive facts."). Moreover, there are numerous recent cases where juries have awarded *less* in damages than here, even in cases involving the plaintiff's death. *See, e.g.*, *Ford v. Ferro Eng'g*, 2014 Jury Verdicts Lexis 4374 (Pa. Com. Pl. 2014) ($50,000 for pain and suffering); *Ihlenfeld v. Ferro Eng'g*, 2014 WL 5023563 (Pa. Com. Pl. 2014) ($120,000 for pain and suffering when plaintiff died of mesothelioma); *Paasch v. Crane Co.*, 2012 WL 4077858 (Pa. Com. Pl. 2012) ($38,000 for pain and suffering and $70,000 for wrongful death in a mesothelioma case). Thus, consideration of other verdicts is not a

compelling reason here to ignore the conclusions of this jury.[10] Hence, the trial court's additur order was erroneous, and it should be reversed.

V. The trial court improperly applied the required setoff and allocation.

With regard to the trial court's ruling on set-off, the areas of dispute are narrow. Where the parties differ regards whether Appellants should be able to set off the full $2,270,000 in settlements Plaintiffs received against the addited $1,870,000 judgment against them, even though Plaintiffs "internally" allocated $756,666.67 to a future wrongful death claim rather than a personal injury claim.[11] The law is clear that setoff is required, because a "settling defendant is entitled to credit for the amount paid by another defendant who settles for the same cause of action." *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012); *see also Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). When a release is given "for the same injury or the same wrongful death," it must reduce the claim against the non-settling tortfeasors "in the amount of consideration paid for it." S.C. Code Ann. § 15-38-50.

Although Plaintiffs argue that they did not try wrongful death claims against Appellants (because such claims do not exist prior to Mr. Jolly's death), the settlement amounts Plaintiffs unilaterally and internally allocated to "future wrongful death claims" compensate for the same injuries at issue in the personal injury litigation against Appellants. As the wrongful death statute makes clear, wrongful death claims allow a decedent's heirs to pursue the decedent's personal

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[10] The only recent case before the same trial court to result in a plaintiffs' verdict did not result in a verdict in an amount nearly as high as the trial court believes was appropriate in this case. *See Stephen Edwards, Individually and as P.R. for the Estate of Steven Redfearn Stewart v. Scapa Waycross, et al.*, Civil Action No. 2013-CP-46-00368 (York County) ($700,000 verdict in February 2018—$600,000 for survival claims and $100,000 for wrongful death claim).

[11] Although Appellants were improperly barred from considering the settlement agreements themselves, the record is clear that the allocation of damages was made by Plaintiffs after the fact, rather than negotiated between Plaintiffs and the settling defendants or somehow approved by the trial court prior to trial. (R. 2501; R. 46).

injury claims after his or her death. S.C. Code Ann. § 15-51-10; *Burroughs v. Worsham*, 352 S.C. 382, 406, 574 S.E.2d 215, 227 (Ct. App. 2002) ("[A] wrongful death claim is to compensate the heirs of a decedent, who, if he had survived, could have brought a personal injury action."). Accordingly, although wrongful death and personal injury claims are facially different, they seek redress for the same injury—here, Mr. Jolly's mesothelioma and eventual death—and vary only in who brings the claims and whether the claims are brought before or after the injured person's death. *See* (R. 2366–67) (instructing the jury to compensate Plaintiffs for their future damages because only one recovery can be sought); (R. 19–20) (citing Mr. Jolly's expected death as a reason for additur).

For this reason, as Plaintiffs concede, the release (or trial) of a personal injury claim precludes a later claim for wrongful death. (Resp. Br. 45); *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, LLP*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010). If personal injury and wrongful death claims compensated for different injuries, such a restriction would not be warranted. Therefore, because the prior settlements "involve compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law," and the trial court erred in refusing to set off the amounts Plaintiffs allocated to the non-existent wrongful death claims. *Widener*, 397 S.C. at 473, 724 S.E.2d at 191.

Plaintiffs contend that they were "perfectly free to settle their future claims for wrongful death" and to allocate their settlement proceeds in accordance with their best interests. (Resp. Br. 45–46). Both of these assertions deal with Plaintiffs' relationship with the settling defendants, not their rights vis-à-vis Appellants. Moreover, as South Carolina law makes clear, even absent a situation where the settled claims and the tried claims compensate for the same injury (as they do here), a plaintiff's allocation of settlement proceeds "must yield to fairness and justice." *Welch v.*

Epstein, 342 S.C. 279, 313–14, 536 S.E.2d 408, 426 (Ct. App. 2000). Plaintiffs fail to rebut Appellants' discussion of *Welch* and *Rutland*, where this Court and the South Carolina Supreme Court respectively re-allocated settlement proceeds from causes of action that failed as a matter of fact or law (like Plaintiffs' wrongful death claim) to offset existing, viable claims. In those cases, as here, re-allocation of settlement proceeds was necessary and proper to ensure that "there is one complete satisfaction for the injury suffered by [plaintiff]," and to avoid imposition of an unwarranted punishment on the defendant.[12] *Welch*, 342 S.C. at 314, 536 S.E.2d at 426; *Rutland*, 400 S.C. at 217, 734 S.E.2d at 146.

VI. The trial court erred in denying Fisher and Crosby's motion to quash the trial subpoenas.

Plaintiffs' argument that the trial court properly compelled Fisher and Crosby to appear and testify at trial via corporate representatives fails for three reasons.[13] First, Rule 45, SCRCP does not limit the availability of a motion to quash to non-parties. Rule 45(c)(3)(A) provides that on a timely motion, "the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if" the subpoena is deficient. That sentence provides that the court issuing the subpoena generally has the responsibility to quash an improper subpoena; however, in the case of a non-party, a "court in the county where the non-party resides, is employed or regularly transacts business in person" assumes responsibility for quashing the subpoena. *See id.* There is no limitation based on an entity's status as a party or non-party.

[12] The jury rejected Plaintiffs' request for punitive damages. (R. 52).
[13] In their respondents' brief, Plaintiffs did not dispute that Fisher and Crosby suffered prejudice.

Second, a court does not gain unlimited subpoena power when a party "submits to the jurisdiction" of the court. Personal jurisdiction and subpoena power are different doctrines—governed by different rules—and there is no overlap between the two. *See, e.g.*, *Syngenta Crop Prot., Inc. v. Monsanto Co.*, 908 So. 2d 121, 128 (Miss. 2005) ("[T]he concepts of personal jurisdiction and subpoena power are altogether different."). Rule 45 contains geographic limits to a court's jurisdiction. Just as Congress established geographic limits to the federal courts' subpoena power, *see* FED. R. CIV. P. 45(c)(1), the South Carolina General Assembly established that a state court's subpoena power exists only within South Carolina. The trial court exceeded this power when it compelled out-of-state parties to appear and testify at trial.

Third, Rule 4(j) does not allow service of a subpoena on a party's trial attorney. Rule 4(j) provides, "No 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." Rule 4(j), SCRCP. Rule 4(j) relates back to Rule 4(g), which sets forth the requirements for proof of service. *Langley v. Graham*, 322 S.C. 428, 431, 472 S.E.2d 259, 261 (Ct. App. 1996). Proof of service is simply the method by which a serving party proves that it delivered a document and to whom it delivered the document; it "does not affect the validity of the service." Rule 4(g), SCRCP. "Rule 4(j) *establishes no new procedure for service of process*; rather, it is but a recognition of the long standing practice that acknowledgement or acceptance of service is equivalent to personal service." *Langley*, 322 S.C. at 431–32, 472 S.E.2d at 261 (emphasis added).

Rule 4(j) does not change the requirement in Rule 4(d)(3) that service upon a corporation must be made to "an officer, a managing or general agent, or to any other agent authorized by appointment or by law" by adding a corporation's attorney to the list of people who may be effectively served. Instead, it simply supports the proposition that Plaintiffs need not offer

additional proof that they delivered the subpoenas to Appellants' counsel if they have counsel's signature showing that he received the subpoenas through the mail. Service must be made to a registered agent to be effective; the attorney's acknowledgement of receipt does not make service effective.[14]

CONCLUSION

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

(signature page attached)

[14] Rule 5(b) of the South Carolina Rules of Civil Procedure does not apply to the subpoena issue. Rule 45 incorporates Rule 5(b) only as it relates to "prior notice in writing of any commanded production of documents and things or inspection of premises before trial." Rule 45(b)(1), SCRCP.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
James B. Glenn
SC Bar No. 77731
E-Mail: jase.glenn@nelsonmullins.com
Nicholas A. Charles
SC Bar No. 101693
E-Mail: nick.charles@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Fisher Controls International LLC and Crosby Valve, LLC

Columbia, South Carolina

September 7, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

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

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

v.

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

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

CERTIFICATE OF COUNSEL

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

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
James B. Glenn
SC Bar No. 77731
E-Mail: jase.glenn@nelsonmullins.com
Nicholas A. Charles
SC Bar No. 101693
E-Mail: nick.charles@nelsonmullins.com
1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Fisher Controls International LLC and Crosby Valve, LLC

Columbia, South Carolina

September 7, 2018