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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean H. Toal, Acting Circuit Court Judge

Appellate Case No. 2022-000272

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.. Petitioners.

AMENDED PETITION FOR A WRIT OF CERTIORARI

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Introduction

Petitioners Fisher Controls International LLC and Crosby Valve, LLC ("Petitioners") hereby ask this Court to issue a writ of certiorari to review the Court of Appeals' opinion affirming the verdict and *additur* judgment in favor of Respondents Beverly Dale Jolly ("Mr. Jolly") and Brenda Rice Jolly ("Mrs. Jolly") ("Plaintiffs").[1] *See Jolly v. Gen. Elec. Co.*, Op. No. 5858 (S.C. Ct. App. filed Sept. 1, 2021) (Howard Adv. Sh. No. 30 at 139) (Op. 5858).

In its opinion, the Court of Appeals adopted Pennsylvania law, which differs from South Carolina law, as to causation. It wrongly suggested a different evidentiary standard exists for asbestosis cases as compared to mesothelioma cases for purposes of determining substantial factor causation. It erroneously unsettled the previously clear law regarding new trial *nisi additur* rulings. It shifted the burden of proof on Plaintiffs' design defect claims to Petitioners, holding Plaintiffs were not required to prove the cost of a purported alternative design was reasonable, and instead noting there was no proof from Petitioners that an alternative was cost-prohibitive. Finally, it held Plaintiffs are free to unilaterally allocate settlement funds and avoid a complete setoff, despite acknowledging that such conflicts with the plain language of the setoff statute. Accordingly, this Court should grant certiorari and reverse. *See* Rule 242(b), SCACR.

Questions Presented for Review

I. Whether Court of Appeals erred in finding Petitioners were not entitled to JNOV on Plaintiffs' design defect claims.

II. Whether the Court of Appeals erred in affirming the trial court's granting a new trial *nisi additur*.

III. Whether the Court of Appeals erred in affirming the trial court's setoff calculation based on Plaintiffs' improper, unilateral allocation of settlement proceeds to avoid a complete setoff, including an allocation of settlement funds to a nonexistent claim.

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[1] Counsel for Petitioners certify that they filed a petition for rehearing in the Court of Appeals, and the Court of Appeals denied the petition on February 25, 2022.

Statement of the Facts and Case

Plaintiffs filed this action on April 5, 2016, against sixty-three defendants, including Petitioners. (R. 55). Plaintiffs asserted various claims[2] based on Mr. Jolly's alleged exposure to asbestos while working for Duke Power Company ("Duke"). (*Id.*). Mr. Jolly worked for Duke from 1979 to 2003. (R. 64). Between 1980 and 1984, he worked as a mechanical inspector at the Oconee, McGuire, and Catawba Nuclear Stations, as well as other facilities. (R. 497–508, 533–34). He worked around other tradesmen tearing out asbestos insulation and gaskets, which released asbestos fibers into the air. (*Id.*). He was diagnosed with mesothelioma in late 2015. (R. 471). Petitioner Fisher manufactures and sells process control valves used in industrial facilities, including nuclear power plants. (R. 1300–01). Petitioner Crosby manufactured safety-related valves for industrial facilities, including nuclear power plants. (R. 1379–80).

Petitioners moved to exclude the testimony of Plaintiffs' three expert witnesses—Dr. Arthur L. Frank, Dr. Arnold R. Brody, and Dr. John Maddox—on the grounds that the experts intended to present opinions that "each and every exposure" to asbestos causes mesothelioma. *See* (R. 4371, 4390). Petitioners argued that no published or peer reviewed literature supports the theory that "each and every exposure" to asbestos causes mesothelioma, and that the theory was at odds with and not probative of substantial factor causation under South Carolina law. (R. 282). The trial court denied the motion. (R. 286). Prior to trial, Plaintiffs settled with various defendants for $2,270,000. These settlements were not approved by the Court.

At trial, Mr. Jolly's only testimony alleging exposure to asbestos in connection with Petitioners' valves related to flange gaskets, which Duke workers placed on the exterior of the

[2] All of Plaintiffs' claims submitted to the jury were design defect claims.

valves to connect the valves to piping systems.[3] (R. 490, 517–18). Mr. Jolly claimed that he stood near other tradesmen who used tools to grind gasket material from valve flanges. (R. 497–500). He did not testify as to how many of those valves were Petitioners' valves.[4] (R. 503–04).

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

Asked if a single exposure "to asbestos from the removal of asbestos-containing gaskets on a valve flange face" would be a substantial contributing factor to mesothelioma, Dr. Frank said that "since there is no exposure that can be left out for reasons we discussed a bit earlier, that would be a substantial contributing factor. It is part of one's cumulative exposure." (R. 723–24). He claimed that this would be true even if it were the only exposure, while at the same time admitting "I have not ever seen such a case(.)" (R. 724–25).

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[3] Although some Fisher valves had flange connections that required gaskets when connected to a pipe, Fisher did not manufacture or sell flange gaskets and did not incorporate flange gaskets into its valves. (R. 1123, 1312–13, 1343–44). Crosby also did not manufacture, sell, or otherwise provide external gaskets to Duke or its other customers. (R. 1428).

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

Dr. Frank reported his understanding that, from 1980–84, Mr. Jolly was regularly within ten feet of, and exposed to asbestos from, flange gaskets *associated with valves generally*. (R. 730–31). He said this exposure would be a significant contributing cause of Mr. Jolly's mesothelioma. (R. 731). Asked to assume that Crosby was one of the valves "and that the asbestos-containing gaskets were supplied or specified by Crosby with its valve," Frank said "*to the extent that Mr. Jolly was exposed to asbestos*, that it was *connected in some way with a Crosby valve*, that would have been a substantial contributing cause to his mesothelioma." (R. 732) (emphasis added). He gave the same answer as to Fisher. (R. 733). Consistent with that "every exposure" opinion, he said that either the Crosby or Fisher exposure alone would have been sufficient for causation. (R. 734)[5].

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

> Q: . . . You were asked about the cost of Mr. Jolly's treatment?
> A: Yes, sir.

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[5] Similar testimony was read from a deposition of expert Dr. John Maddox. (R. 1543–48). Plaintiffs' third expert, biologist Arnold Brody, addressed only general, not specific, causation. He acknowledged mesothelioma is a dose-response disease, yet said "there is no threshold" for causing mesothelioma and that "once you get above background, there is no level that we know is safe or will not cause mesothelioma." (R. 1001–02).

Q: And you said about a million dollars?
A: I said it would not be unreasonable to be a million dollars.

The jury returned a verdict in favor of Plaintiffs on their negligence and breach of implied warranty claims and awarded $200,000 in damages for Mr. Jolly and $100,000 for Mrs. Jolly's loss of consortium claim. (R. 52). Plaintiffs did not request a special verdict form, and the jury did not allocate the damages awards between medical expenses or pain and suffering. (*Id.*).

Petitioners moved for JNOV, arguing Plaintiffs failed to present reliable, admissible specific causation evidence. (R. 4793–4803). The trial court denied Petitioners' motion for JNOV on all grounds. (R. 11). Plaintiffs moved for new trial *nisi additur*, arguing the jury's verdict was inadequate and asking the trial court to increase the damages award. (R. 4696). The trial court granted Plaintiffs' motion. (R. 11). The trial court decided the jury's $200,000 verdict for Mr. Jolly consisted of $142,000 in medical expenses—because Dr. Frank claimed he had seen $142,000 in medical bills—and $58,000 in damages for pain and suffering. (R. 11). The trial court then characterized Dr. Frank's testimony that "cases like this" can incur medical bills of "a million dollars or more" as "undisputed" and increased Mr. Jolly's damages for medical expenses to $1,000,000. (R. 18, 755, 759–62). The trial court also assumed the jury failed to award Mr. Jolly damages for loss of enjoyment of life, mental anguish, and "future damages" and increased Mr. Jolly's noneconomic damages to $580,000, or ten times the $58,000 the trial court assumed the jury had awarded for those damages. (R. 18). It then awarded $290,000 to Mrs. Jolly as damages for loss of consortium. (R. 19–20). In support, the trial recited certain elements of Mrs. Jolly's claimed damages. (R. 19–20).

Petitioners also moved to set off Plaintiffs' pretrial settlements against the verdict amounts. (R. 4758). The trial court granted the motion, in part. The court accepted Plaintiffs' counsels' representation that they had "internally" allocated the $2,270,000 in settlement funds one-third to

personal injury claims, one-third to loss of consortium claims, and one-third to "future wrongful death claims." (R. 44–47). Based on Plaintiffs' "internal" allocation, the trial court offset Mr. Jolly's personal injury claims and Mrs. Jolly's loss of consortium claims by $756,666.67 each, which resulted in an award of $823,333.33 for Mr. Jolly and a complete offset for Mrs. Jolly. (*Id.*). The trial court refused to set off any of the $756,666.67 Plaintiffs allocated to "future wrongful death claims" because those claims had not been tried. (*Id.*). Petitioners appealed. The Court of Appeals affirmed the trial court on all issues.

Argument

I. The Court of Appeals erred in finding Petitioners were not entitled to JNOV on Plaintiffs' design defect claims.

The Court of Appeals erred in finding Petitioners were not entitled to JNOV on Plaintiffs' design defect claims—whether based on a theory that the defect was the use of asbestos or that the defect was a failure to include a warning about asbestos—on several grounds. First, the Court of Appeals erred in finding Petitioners were not entitled to JNOV because Plaintiffs failed to present probative/admissible causation expert testimony. Second, Plaintiffs failed to present evidence of a reasonable alternative design. Finally, Plaintiffs' claims that design did not include a warning fail because Plaintiffs failed to present evidence as to what a warning should have contained, where a warning could have been given, or that Mr. Jolly would have heeded a warning.

A. The trial court and Court of Appeals erred in finding Petitioners were not entitled to JNOV because Plaintiffs failed to present admissible specific causation expert testimony.

South Carolina law requires a mesothelioma plaintiff to prove specific causation[6] by satisfying the substantial factor causation test adopted by this Court in *Henderson v. Allied Signal,*

[6] Where medical causation is at issue and is not within common knowledge—such as the relationship between a particular asbestos exposure and mesothelioma—a plaintiff must prove

Inc., 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007), which derives from the Fourth Circuit's opinion in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986). *See Henderson*, 373 S.C. at 185, 644 S.E.2d at 727 ("In determining whether exposure is actionable, we adopt the 'frequency, regularity, and proximity test' set forth in *Lohrmann* . . . : 'To 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.'"); *Pace v. Air & Liquid Sys. Corp.*, 642 Fed. App'x 244 (4th Cir. 2016) (noting claimants must prove (1) exposure with frequency, regularity, and proximity to (2) asbestos-containing products (3) placed in the stream of commerce by defendant).

Plaintiffs' expert witnesses avoided this legal causation standard by opining that "every exposure" to asbestos at levels "above background"—i.e., above the amount of exposure the general public receives from asbestos in the ambient air (which varies by location)—was a substantial factor in causing Mr. Jolly's development of mesothelioma. (R. 699–700, 715–16, 719–35, 1001–02, 1544). The trial court erred in admitting the experts' opinions and denying JNOV, and the Court of Appeals erred in affirming.

Rule 702 governs the admissibility of expert testimony: "If 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." Rule 702, SCRE. Before allowing

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both general and specific causation through expert testimony. *See Fisher v. Pelstring*, 817 F. Supp. 2d 791, 814 (D.S.C. 2011). "General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury." *Id.* Only specific causation is at issue in this appeal. Further, to the extent the Court of Appeals found Mr. Jolly's testimony alone was sufficient to create a jury question, that finding is erroneous because the medical causation at issue here is not within common knowledge, and expert testimony is therefore required. *Id.*

expert testimony under Rule 702, a trial court must determine whether the substance is reliable. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 446–47, 699 S.E.2d 169, 175–76 (2010); *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (providing factors for determining reliability).

The trial court denied Petitioners' motion for JNOV, and rejected their arguments on the inadmissibility of the expert opinions, on the grounds that the "cumulative dose" opinion is a "basic medical fact" and is not an improper specific causation opinion, and because the experts' opinions were based on the record and the scientific literature.[7] (R. 40–42). The Court of Appeals acknowledged the "each and every exposure" opinion is inadmissible, Op. 5858 at 151–52, but nonetheless affirmed the trial court's rulings. The Court of Appeals' analysis is erroneous. First, it relied on Pennsylvania law, which conflicts with this Court's adoption of the Fourth Circuit's *Lohrmann* test and incorrectly differentiates between "cumulative dose" and "every exposure" opinions. *See id.* at 152–54. Second, it relied on evidence that *was never presented to the jury* in its mischaracterization of Dr. Frank's testimony, which plainly stated that "every exposure" to asbestos was a substantial contributing factor in causing Mr. Jolly's mesothelioma. *See id.* at 154–

[7] Experts espousing the "every exposure" or "cumulative dose" opinions base their claims not on epidemiological evidence but on hypothetical extrapolations from existing data in high-dose tests. *See* Mark A. Behrens & William L. Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 SW. U. L. REVIEW 479, 483–86 (2008). The "dose principal" follows the adage that "dose makes the poison": every substance in sufficient quantities can be harmful, and even harmful substances in the correct quantity can be beneficial. *Id.* However, "any exposure" theorists either ignore or exempt background levels of asbestos and state that any exposure "***above*** background level" is sufficient to cause disease. This inconsistency shows the fallacy of the any exposure logic and demonstrates the dose-response theory in action—the experts implicitly admit the existence of a threshold below which asbestos exposure does not cause disease. Thus, the assumption that every exposure (no matter the details such as size, duration, or fiber type, among others) is a substantial factor in causing disease is flawed and unsupported by the science. Moreover, the experts do not even account for the differences between fiber types. *See In re Specialty Prod. Holding Corp.*, No. BR 10-11779-JKF, 2013 WL 2177694, at *4 (Bankr. D. Del. May 20, 2013) (noting expert testimony "that amphibole asbestos (crocidolite and amosite) is more potent than chrysotile").

57 & n.17. Finally, it suggested the legal standard is lower in mesothelioma cases than in asbestosis cases—a finding that has no support in South Carolina law.

The admissibility of the "cumulative dose" and "every exposure" opinions has not been squarely addressed by this Court. Application of South Carolina law requires that the trial court's and Court of Appeals' rulings permitting Plaintiffs' experts' opinions be reversed.

i. Background of the substantial factor causation standard.

The substantial factor causation test is a commonly-used tort causation standard applied where two or more independent causes combine to bring about an injury. *See J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006) (discussing substantial factor causation in a case arising from a train accident); *see also, e.g.*, Restatement (Second) of Torts §§ 431–33; *State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 453 (D. Md. 2019). In the typical case involving more than one potential cause of an injury, a plaintiff must prove that a particular defendant's actions were independently sufficient to bring about the harm. *Id.* The analysis requires consideration of "the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it" to determine "whether the actor's conduct is a substantial factor in bringing about harm to another." Restatement (Second) of Torts § 433. For example, if the harm to a plaintiff was caused by several forces at the same time (all of which are possible causes) a plaintiff must prove *probability*—he must prove it was "'more likely than not' that the defendant's conduct was a substantial factor in producing the plaintiff's injuries." *Exxon Mobil Corp.*, 406 F. Supp. 3d at 453; *see also Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 (4th Cir. 1982). Thus, a mesothelioma plaintiff's claims against a particular defendant must be evaluated relative to all other sources of exposure, and a plaintiff must prove a particular exposure was a *probable* cause, rather than merely a *possible* cause. *Lovelace*, 681 F.2d at 242.

Courts in the Fourth Circuit, applying South Carolina law, have followed the majority view and found substantial factor causation requires more than proof that a decedent had "occupational" or "above background" exposures from a defendant's product. *See Haskins v. 3M Co.*, No. 2:15-CV-02086-DCN, 2017 WL 3118017, at *7 (D.S.C. July 21, 2017) ("[T]he mere fact that 'occupational' or 'above-background' exposures contribute to the total cumulative dose fails to explain why [a plaintiff's expert] views them as more causative than non-occupational or below-background exposures."); *see also, e.g.*, *Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950, 955 (6th Cir. 2011) ("Given that the Plaintiff failed to quantify Robert's exposure to asbestos from Garlock gaskets and that the Plaintiff concedes that Robert sustained massive exposure to asbestos from non-Garlock sources, there is simply insufficient evidence to infer that Garlock gaskets probably, as opposed to possibly, were a substantial cause of Robert's mesothelioma. On the basis of this record, saying that exposure to Garlock gaskets was a substantial cause of Robert's mesothelioma would be akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume." (citations omitted)). Substantial factor causation also requires a *contextual analysis*—causation experts must evaluate the relative significance of a decedent's exposures. *See Haskins*, 2017 WL 3118017, at *8 ("[A] robust concept of 'substantial causation' should account for the broader context in which a particular exposure occurs—including the defendant's relative contribution to the overall exposure, rather than an assessment of whether its contribution was sufficiently harmful in the abstract."); *see also Connor v. Covil Corp.*, 996 F.3d 143, 155 (4th Cir. 2021) (applying North Carolina law which, like South Carolina law, requires application of the *Lohrmann* substantial factor causation test).[8]

[8] *See also, e.g.*, *McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009) ("[O]ne measure of whether an action is a substantial factor is 'the number of other factors which contribute in producing the harm

Lohrmann, adopted by *Henderson*, is a product-specific test, which asks whether the evidence would permit a reasonable jury to conclude that a specific manufacturer's product was a substantial cause of the plaintiff's disease. *Lohrmann*, 782 F.2d at 1162–63. A plaintiff cannot meet his burden under *Lohrmann* by simply showing in the abstract that general asbestos exposure cumulatively caused his disease and the defendant's contributions to the cumulative exposures were therefore a *possible* cause. *See, e.g.*, *Schwartz*, 102 N.E.3d at 482 (applying *Haskins* and collecting cases from across jurisdictions); *Martin*, 561 F.3d at 443 (rejecting the "any exposure" test as contrary to principles of substantial factor causation); *Yates v. Ford Motor Co.*, 115 F. Supp. 3d 841, 847 (E.D.N.C. 2015); Behrens, et al., 37 SW. U. L. REV. at 480. The Court of Appeals should have simply applied this Court's test—and asked whether there was probative and admissible evidence of proximate, regular, and frequent exposure of Mr. Jolly to Petitioners' (friable) asbestos-containing products. Instead, Plaintiffs were allowed to submit expert "any exposure" and "cumulative dose" testimony about mesothelioma in the abstract.

Numerous courts have found the "cumulative exposure" and/or "every exposure" opinion inadmissible.[9] Those opinions are contrary to the requirement that the *plaintiff* prove a particular

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and the extent of the effect which they have in producing it.'"); *Laney v. Celotex Corp.*, 901 F.2d 1319, 1321 (6th Cir. 1990) ("The substantial factor analysis cannot be made in a vacuum."); *Schwartz v. Honeywell Int'l, Inc.*, 102 N.E.3d 477, 482 (Ohio 2018) ("[A] major failing of the cumulative-exposure theory is that it does not consider the relationship that different exposures may have to the overall dose to which an individual is exposed. . . .'" (quoting *Haskins*, 2017 WL 3118017, at *7)); *Allen v. Owens-Corning Fiberglas Corp.*, 571 N.W.2d 530, 533 (Mich. Ct. App. 1997) ("[I]n order to determine whether a particular factor was a substantial factor in causing a plaintiff's injury, a jury should be permitted to weigh evidence of other contributing factors.").

[9] *See, e.g.*, *Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 675 (7th Cir. 2017) (rejecting a cumulative exposure theory of causation because it was effectively the same as an each and every exposure theory); *Smith v. Ford Motor Co.*, No. 2:08-CV-630, 2013 WL 214378, at *3 (D. Utah Jan. 18, 2013) ("Dr. Hammar seeks to base his causation opinion not on the thin reed that he cannot rule any exposure out, but on the opposite: he rules all exposures 'in,' boldly stating that Mr. Smith's mesothelioma 'was caused by his total and cumulative exposure to asbestos, with all exposures and all products playing a contributing role.' This asks too much from too little evidence as far as

exposure or set of exposures was a substantial factor; instead, they convey to the jury that every *possible* cause was, in fact, a legal proximate cause and force the defendant to disprove causation.

Importantly, the *Lohrmann* substantial factor causation test is a thoughtful effort to balance fairness to plaintiffs and defendants. Recognizing the potential unfairness of depriving persons with latent diseases of any recovery because they cannot prove certain causation,[10] the *Lohrmann* test provides an avenue for those persons to recover without throwing the law of proximate causation to the wind and permitting those persons to affix liability against any party for whom there is a mere possibility of causation. *See, e.g.*, David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 56 (2008) ("This [*Lohrmann*] test attempts to reduce the

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the law is concerned."); *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 611 (N.D. Ohio 2004); *In re W.R. Grace & Co.*, 355 B.R. 462, 476 (Bankr. D. Del. 2006); *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304, 320–21 (Tex. App. 2007) ("The [plaintiffs'] experts failed to show, however, that the 'any exposure' theory is generally accepted in the scientific community—that *any* exposure to a product that contains asbestos results in a statistically significant increase in the risk of developing mesothelioma."); *Doolin v. Ford Motor Co.*, No. 3:16-CV-778-J-34PDB, 2018 WL 4599712, at *13 (M.D. Fla. Sept. 25, 2018); *Clarke v. Air & Liquid Sys. Corp.*, No. 2:20-CV-00591-SVW-JC, 2021 WL 1534975, at *5 n.3 (C.D. Cal. Mar. 18, 2021) ("The 'every exposure' theory would allow an expert to testify that a particular exposure is sufficient to cause mesothelioma simply because there is no evidence that it is insufficient. . . . [C]ourts have also rejected for the same reason the so-called 'cumulative exposure' theory – that every exposure which contributes to a plaintiff's cumulative exposure is a contributing cause to that plaintiff's asbestos-related disease."); *Barabin v. Scapa Dryer Fabrics, Inc.*, No. C07-1454JLR, 2018 WL 840147, at *12–13 (W.D. Wash. Feb. 12, 2018) (agreeing with the overwhelming precedent that the "every exposure" theory is unreliable, noting "the law is now headed toward a consensus that the 'every exposure' theory is unreliable and inadmissible," and finding the "cumulative exposure" theory has the same reliability issues as the "every exposure" theory); *Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196, 1207 (W.D. Wis. 2016) ("Defendant contends that Dr. Frank's opinion, couched in terms of a person's 'cumulative exposure,' is no different from the 'any exposure' theory that plaintiff agreed he would not proffer at trial and therefore should be stricken. I agree."). *But see Berman v. Mobil Shipping & Transportation Co.*, No. 14 CIV. 10025 (GBD), 2019 WL 1510941, at *11 (S.D.N.Y. Mar. 27, 2019) (finding a "cumulative exposure" opinion admissible).

[10] *See Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973) (explaining it is "impossible, as a practical matter, to determine which exposure or exposures to asbestos dust caused the disease").

evidentiary burden on plaintiffs while still absolving defendants who were not responsible for plaintiffs' injuries."). After the creation of the test by the Fourth Circuit, the *Lohrmann* test has enjoyed wide adoption and application for decades by numerous courts, many of which adopted the test precisely because it ensures fairness to both plaintiffs and defendants.[11]

Plaintiffs' experts' opinions conflict with the legal standard and are therefore unreliable, inadmissible, and lacking in probative value as to the required legal standard of substantial factor causation in South Carolina.

ii. The Court of Appeals' reliance on *Rost* is incompatible with South Carolina law.

In approving of Plaintiffs' experts' opinions, the Court of Appeals relied primarily on the Supreme Court of Pennsylvania's 4–2 decision in *Rost*. Pennsylvania law differs from South Carolina law in several respects, including the origin of its substantial factor causation standard.[12] The Pennsylvania Supreme Court adopted the substantial factor causation test set forth by the

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[11] *See, e.g.*, *Slaughter v. Southern Talc Co.*, 949 F.2d 167 171 (5th Cir. 1991) (noting the *Lohrmann* test is the most frequently used test for causation in asbestos cases); Charles Greene, *Determining Liability in Asbestos Cases: The Battle to Assign Liability Decades After Exposure*, 31 AM. J. TRIAL ADVOC. 571, 572 (2008) ("The majority of the federal circuits and state courts addressing this question have chosen to apply the *Lohrmann* test to determine whether the plaintiff has satisfied his burden of showing that a specific defendant's products caused his disease.").

[12] Pennsylvania law differs from South Carolina law in material respects. First, the Pennsylvania Supreme Court disallows apportionment of fault in asbestos cases because experts agree "the individual contributions to the plaintiff's total dose of asbestos are impossible to determine" and "[b]ecause it is impossible to determine which actor caused the harm, it follows that it is impossible to apportion the amount of each defendant's liability on a percentage basis." *See Roverano v. John Crane, Inc.*, 226 A.3d 526, 541–42 (Pa. 2020). Second, the Pennsylvania Supreme Court also held the doctrines of comparative negligence and apportionment of fault do not apply to strict liability claims. *Id.* at 538–39. Thus, it appears Pennsylvania law allows a defendant to be held liable for a per capita share of the plaintiff's damages if it was merely ***possible*** that it caused the damages. This is inconsistent with South Carolina law, which does not allow liability to be affixed based on a mere possibility. Moreover, comparative fault principles apply in South Carolina even for strict liability. *Donze v. Gen. Motors, LLC*, 420 S.C. 8, 14, 800 S.E.2d 479, 482 (2017). This Court should therefore grant certiorari and reverse the Court of Appeals' reliance on Pennsylvania law.

Seventh Circuit in *Tragarz v. Keene Corp.*, 980 F.2d 411, 420 (7th Cir. 1992). *Gregg v. V-J Auto Parts, Co.*, 943 A.2d 216, 226 (Pa. 2007) (adopting the *Tragarz* test). In *Tragarz*, the Seventh Circuit applied Illinois proximate cause law, which allows for a "less rigid" frequency, regularity, and proximity test in cases of mesothelioma. 980 F.2d at 420–21. Moreover, the majority in *Rost* rejected any need for a comparative assessment of differing exposures on the ground that "[i]n *Tragarz*, the Seventh Circuit specifically rejected any notion that its test requires a comparative analysis of different exposures to asbestos, and instead made clear that the focus must be on the level of exposure to the defendant's product." *Rost*, 151 A.3d at 1051 n.13. *Rost*, *Tragarz*, and the Pennsylvania and Illinois law on which they are based are contrary to core principles of substantial factor causation under South Carolina law.

Unlike the Pennsylvania Supreme Court in *Rost*, the South Carolina Supreme Court has never rejected the principle that the substantial factor causation test requires a contextual analysis of different actual exposures to asbestos. *See Rost*, 151 A.3d at 1051 n.13. Further, South Carolina prohibits liability based on possibility. *See, e.g.*, *Harris v. Rose's Stores, Inc.*, 315 S.C. 344, 346–47, 433 S.E.2d 905, 907 (Ct. App. 1993) (noting causation equally possible among options cannot create liability, and no evidence the fire was most probably caused by defendant). The Court of Appeals erred in failing to recognize the conflict between the foreign authorities and South Carolina law. Thus, by applying *Rost*, the Court of Appeals applied a different standard than that adopted by this Court, and its holding in this case therefore conflicts with binding precedent.

iii. Plaintiffs' experts did not differentiate between "cumulative dose" and "every exposure"; they told the jury that every exposure to asbestos was a substantial factor in causing Mr. Jolly's mesothelioma.

The Court of Appeals erred in holding Dr. Frank did not opine that every exposure to asbestos was a substantial factor in causing Mr. Jolly's mesothelioma. In its order denying Fisher

and Crosby's motion for JNOV, the trial court found Dr. Frank and Dr. Maddox "testified that mesothelioma can be caused by brief or low level cumulative exposures" and "were entitled to rely on this basic medical fact in reaching their opinion in this case," but "[t]hat does not mean that they concluded that 'each and every exposure' that Mr. Jolly had was a substantial factor in causing his disease." (R. 40). The Court of Appeals erroneously affirmed this conclusion. The Court of Appeals: (1) failed to address a substantial amount of improper testimony offered by Dr. Frank; (2) recharacterized some of Dr. Frank's improper testimony by ascribing a certain meaning to the testimony; and (3) relied on evidence never presented to the jury as clarifying to the jury that Dr. Frank was not testifying as to the legal causation standard.

The Court of Appeals cited examples of Dr. Frank's testimony that the court construed as stating only that every exposure to asbestos contributes to a person's cumulative exposure, rather than stating that every exposure to asbestos is a substantial contributing factor in causing a person's mesothelioma. Op. 5858 at 154 n.17 (citing two examples of Dr. Frank's testimony). The Court of Appeals recited that Dr. Frank testified, "If [Mr. Jolly] was exposed to asbestos-containing John Crane packing, it would have been, in my opinion, a ***substantial contributing cause*** to his mesothelioma," but the court deemed the words used by Dr. Frank to be insignificant. *Id.* (emphasis added). Moreover, it held Dr. Frank actually meant the exposure would only be a contributor to Mr. Jolly's *cumulative dose*, <u>*not*</u> a substantial contributing factor in causing Mr. Jolly's disease. *Id.* The Court of Appeals also characterized that testimony as "an isolated reference to the term 'substantial.'" *Id.* It thus improperly analyzed Dr. Frank's testimony as a whole and erroneously discounted Dr. Frank's "every exposure" opinions.

However, Dr. Frank repeatedly testified that <u>***every***</u> exposure is a substantial contributing factor, thus telling the jury every exposure is a legal proximate cause of Mr. Jolly's mesothelioma:

- Dr. Frank agreed that if somebody is exposed to gasket removal and "gets mesothelioma decades later," that exposure was "an *important and substantial part of the cause* of that mesothelioma." (R. 714–15) (emphasis added).

- Dr. Frank agreed that exposure to the removal of asbestos-containing gaskets "on one occasion" "*would be a substantial contributing factor*." (R. 723–24) (emphasis added).

- When asked how his opinion would be affected if a person had multiple exposures, he explained "*[t]hey all were substantial factors*." (R. 725–26) (emphasis added).

- Dr. Frank testified, "If Mr. Jolly was, in fact, exposed to Fisher Control valves and had exposure to asbestos, they would have been a *substantial contributing cause* to his mesothelioma." (R. 733) (emphasis added).

- Dr. Frank testified, "*Whatever can be documented that he actually had*, I would be sitting here telling you it *was a substantial contributing cause* to his disease." (R. 791) (emphases added).

The Court of Appeals failed to recognize this testimony, which shows that Dr. Frank's use of the word "substantial" was not isolated and which plainly espouses the opinion that every exposure to asbestos is a substantial contributing factor in causing Mr. Jolly's mesothelioma. Thus, Dr. Frank *did* offer the inadmissible, unreliable, and non-probative "each and every exposure" opinion.

The Court of Appeals also misapprehended the testimony and legal standard when it relied on the word "contributing" as distinguishing Dr. Frank's testimony from the legal standard. Op. 5858 at 154 n.17. "Substantial factor" and "substantial contributing factor" have the same meaning. Courts regularly refer to the standard as requiring proof that a defendant's product was a "substantial contributing factor." *See, e.g.*, *Haislip v. Owens-Corning Fiberglas Corp.*, 86 F.3d 1150 (4th Cir. 1996) ("To prevail on a product liability asbestos action under North Carolina law, the estate needed to establish that OCF–Kaylo was a *substantial contributing factor* to Elmore's contraction of mesothelioma." (emphasis added)). Thus, Dr. Frank testified about the legal standard, and his testimony must be evaluated as he gave it.

Moreover, the Court of Appeals repeatedly relied on an "affidavit" published by Dr. Frank in 2016—essentially a comprehensive report of Dr. Frank's asbestos-related opinions, but not specific to this case—as a critical factor separating his opinions from the "each and every exposure" opinion. Op. 5858 at 148–49, 154 n.17, 158–59 ("We decline to associate this isolated reference to the term 'substantial' with either an adoption of the each and every exposure theory or a rejection of the legal requirement that a plaintiff's exposure to a particular defendant's product must be frequent, ***especially given Dr. Frank's previous statements in his affidavit that his opinions were medical and scientific and that he was not offering opinions about whether any exposure is substantial within the meaning of the law***." (emphasis added)); (R. 2944–45). However, Dr. Frank's affidavit was admitted as demonstrative evidence only—as a "learned treatise"—and was not supplied to the jury for use during deliberations. (R. 781–82). Any statement in the affidavit not read aloud at trial was never presented to the jury. The portion quoted above from the affidavit by the Court of Appeals was not read to the jury. Failing to recognize this critical fact, the Court of Appeals erroneously found statements in Dr. Frank's affidavit that were ***not read to the jury*** somehow clarified to the jury that Dr. Frank was not offering an opinion as to the legal causation standard. Op. 5858 at 159. This was error.

Hence, Dr. Frank's opinions are non-probative, unreliable, and inadmissible. *See* Rule 702, SCRE; *see also* Rule 403, SCRE.[13] "Each and every exposure" cannot satisfy the *Henderson* frequency, regularity, and proximity test. Petitioners are therefore entitled to JNOV.

[13] Although the Court of Appeals suggested Petitioners' Rule 403 argument is unpreserved, it is. The trial court ruled on the argument at trial. (R. 783–84) (denying Petitioners' renewal of their motion to exclude Dr. Frank's testimony based on the grounds stated in their written motion, which included a Rule 403 argument); (R. 4390). The Court ruled in its final order that the expert testimony was "supported by the scientific literature as well as the facts of this case, and was relevant and helpful to the jury," (R. 42), thus rejecting Petitioners' Rule 403 argument. Finally, the Court denied directed verdict and JNOV.

iv. The causation standard must not be lowered in mesothelioma cases.

The Court of Appeals suggested in a footnote that Plaintiffs' evidentiary burden may be lower in mesothelioma cases than in asbestosis cases based solely on Dr. Frank's opinion. *See* Op. 5858 at 147 n.11 ("[T]he present case does not concern asbestosis, which, *according to Dr. Frank*, requires higher exposure levels than the exposure levels that can cause mesothelioma. Therefore, the facts in *Lohrmann* do not lend themselves to a valid comparison with the facts in the present case." (emphasis added)). There is no basis in South Carolina law for lowering the amount of evidence required in a mesothelioma case compared to an asbestosis case. On the contrary, this Court adopted the *Lohrmann* test *in a mesothelioma case* and has never held or even suggested the standard differs depending on which asbestos-related disease is at issue. *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727. South Carolina courts should not adopt a lower standard in mesothelioma cases based on an expert's opinion. Unless this Court grants certiorari, this footnote will no doubt lead to confusion and error in other trials.

Further, whether to lower the substantial factor causation standard in mesothelioma cases is not at issue here, and this Court should vacate the Court of Appeals' opinion and hold that the evidentiary burden is the same regardless of the disease at issue. *See Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 339 (Tex. 2014) ("[I]f we were to adopt a less demanding standard for mesothelioma cases and accept that any exposure to asbestos is sufficient to establish liability, the result essentially would be not just strict liability but absolute liability against any company whose asbestos-containing product crossed paths with the plaintiff throughout his entire lifetime.").

B. Plaintiffs failed to present evidence of a reasonable alternative design, and the Court of Appeals improperly shifted the burden of proof to Petitioners.

Plaintiffs' claims that the design of Petitioners' valves were defective because they failed to use non-asbestos gaskets fails as a matter of law because Plaintiffs failed to present evidence of

a reasonable alternative design. For a plaintiff to succeed on a design defect claim, "he must show that the design of the product caused it to be 'unreasonably dangerous.'" *Branham v. Ford Motor Co.*, 390 S.C. 203, 218, 701 S.E.2d 5, 13 (2010). South Carolina courts apply the risk-utility test in analyzing design defect claims. *Id.* at 220, 701 S.E.2d at 14. The risk-utility test requires a plaintiff asserting design defect claims to prove the availability of a reasonable alternative design. *Id.*; *Holland*, 407 S.C. at 237, 754 S.E.2d at 720. A plaintiff must "point[] to a design flaw in the product and show[] how his alternative design would have prevented the product from being unreasonably dangerous." *Graves*, 401 S.C. at 79, 735 S.E.2d at 658. The plaintiff's presentation of an alternative design "*<u>must</u> include consideration of the <u>costs</u>*, safety and functionality *associated with the alternative design*." *See Branham*, 390 S.C. at 225, 701 S.E.2d at 16 (emphases added). The Court of Appeals erroneously shifted the burden to Petitioners to disprove the existence of any reasonable alternative design.

Fisher manufactured control valves and Crosby manufactured safety valves that Duke opted to use for high-pressure and high-heat applications. *See, e.g.*, (R. 502, 1379–80). If the valves do not work properly, those high-pressure and high-heat lines may explode, endangering everyone in the facility. (R. 559, 1472). Although the trial court highlighted several other materials from which gaskets could be made, *see* (R. 27), Plaintiffs presented no evidence those alternative materials would make Petitioners' valves safer or work in the applications in which Duke used the valves, nor did Plaintiffs present evidence of the costs of such alternative gaskets.

Plaintiffs thus failed to present the required evidence that a reasonable alternative design existed during the time that Mr. Jolly allegedly worked around Petitioners' valves. Although the Court of Appeals acknowledged the lack of any evidence of the cost of any purported alternative design, it improperly shifted the burden of proof to Petitioners and held "there was no evidence

that a metal gasket was more expensive than an asbestos gasket." Op. 5858 at 168. However, *Plaintiffs* bore the burden of proving the costs of the alternative design. Thus, this is a failure of Plaintiffs' proof; it cannot be a basis to affirm the trial court's failure to grant JNOV. *See Newbern v. Ford Motor Co.*, 428 S.C. 310, 318–19, 833 S.E.2d 861, 866 (Ct. App. 2019) (affirming a directed verdict after failing "to find evidence of both defective design and a feasibly alternative design that would have made the airbag system safer").

Although the Court of Appeals held in the alternative that "the jury could have reasonably inferred from the expert testimony on causation that the risk of exposing Duke employees to deadly asbestos fibers was so grave that no economic cost savings would have been worth that risk," the court failed to cite any South Carolina law supporting the proposition that cost evidence is not required if the danger is "grave" enough. *See* Op. 5858 at 168. The cases it relied upon, *Branham* and *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995), do ***not*** allow a plaintiff to avoid presenting evidence as to the cost of a proposed alternative. Thus, the Court of Appeals' decision conflicts with binding precedent, and this Court should grant certiorari.

C. Plaintiffs' claims that the design of Petitioners' valves was defective based on the lack of a warning fail because Plaintiffs presented no evidence a warning would have been effective or that Mr. Jolly would have heeded a warning.

Plaintiffs' claims that the design of Petitioners' valves was defective because the design did not include a warning fail because Plaintiffs failed to present evidence as to what a warning should have contained, where a warning could have been given, or that Mr. Jolly would have heeded a warning. There is no presumption in South Carolina that a plaintiff would have heeded a warning, and if the plaintiff would not have heeded a warning, the failure to warn cannot be the proximate cause of the plaintiff's injuries. *See Owings v. Moneynick Oil Mill*, 55 S.C. 483, 33 S.E. 511, 513 (1899). Plaintiffs presented no evidence regarding how any warning could have been

effectively communicated to Mr. Jolly or that Mr. Jolly would have heeded a warning. *See generally* (R. 470–562). The Court of Appeals found a question of fact whether Mr. Jolly heeded warnings about asbestos in general—warnings that the Court of Appeals found addressed only insulation and did not address gaskets—but it failed to identify any evidence presented by Plaintiffs showing Mr. Jolly would have heeded any warning provided by Petitioners. Op. 5858 at 164–66. Moreover, in addressing Petitioners' sophisticated intermediary defense, the Court of Appeals acknowledged the lack of evidence showing how Petitioners could have effectively warned Mr. Jolly. *See id.* at 163–64 (suggesting some hypothetical methods of warning—but not citing any evidence supporting those methods—and noting Petitioners bore the burden on their sophisticated intermediary defense to prove they could not have warned Mr. Jolly). Plaintiffs failed to meet their burden to prove a warning would have been effective. Thus, Petitioners were entitled to JNOV.

II. The Court of Appeals erred by affirming the trial court's grant of new trial *nisi additur*.

The Court of Appeals committed three key errors in affirming the trial court's grant of new trial *nisi additur*. An appellate court must reverse an *additur* ruling if the trial court abused its discretion. *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). Here, the trial court abused its discretion in granting a new trial *nisi additur,* and the *additur* should be reversed on several grounds. *See id.*; *Ellis v. Davidson*, 358 S.C. 509, 524, 595 S.E.2d 817, 825 (Ct. App. 2004) ("An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support."). First, the Court of Appeals failed to follow binding precedent precluding courts from speculating about the jury's intended allocation of a general verdict. Second, the trial court improperly substituted its judgment for the jury's and improperly construed disputed evidence in the light most favorable to the *moving* party. Finally, the Court of Appeals

applied an incorrect standard of review in affirming the trial court's ruling, and supplied its own reasoning for the *additur* despite lacking the power to grant *additur*. This Court should grant certiorari because the settled law regarding *additur*, and the trial court and appellate court roles with *additur*, is rendered unsettled and in conflict by the Court of Appeals' opinion.

A. Courts cannot speculate about the composition of a general verdict.

South Carolina precedent prohibits courts from speculating about any allocation within a general verdict because it is impossible to determine such an allocation. *Jenkins v. Few*, 391 S.C. 209, 221, 705 S.E.2d 457, 463 (Ct. App. 2010); *Armstrong v. Collins*, 366 S.C. 204, 227, 621 S.E.2d 368, 379 (Ct. App. 2005); *Moore v. Moore*, 360 S.C. 241, 257, 599 S.E.2d 467, 475 (Ct. App. 2004). Nonetheless, the trial court separated the jury's general verdict of $200,000 to Mr. Jolly into a $142,000 "award" of medical expenses and a $58,000 "award" of pain and suffering damages and issued separate *additur* rulings for each, increasing the medical expenses "award" to $1,000,000 and increasing the pain and suffering "award" to $580,000. (R. 18–19).

Although the Court of Appeals attempted to distinguish the "essence" of the trial court's ruling here, the express basis for the ruling <u>*by the trial court*</u> was the speculation as to the components of the verdict and its improper finding that the jury was required to believe Dr. Frank's estimate that Plaintiffs could have incurred $1,000,000 in medical expenses, despite the requirement that it construe the evidence in the light most favorable to Petitioners. *See* (R. 14–20); *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989). Further, the Court of Appeals itself improperly guessed at the allocation of the jury's verdict, finding it is "more likely" that the jury awarded $142,000 in medical expenses to Mr. Jolly, rather than awarding any medical expenses to Mrs. Jolly. However, no evidence of the jury's intent exists.

This Court recently clarified that "it is not for the trial court to say what it thinks the verdict should be." *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 132, 866 S.E.2d 542, 554 (2021). In *Stoneledge*, confusion arose as to the jury's allocation of damages among three causes of action. *Id.* at 128–29, 866 S.E.2d at 553. The trial court determined the jury intended to award $5,000,000 (the aggregate of the amounts written on the verdict form for the three causes of action) for each cause of action and entered its judgment accordingly. *Id.* This Court found no authority supporting "the trial court's reformation of the jury's verdict" and repeated the well-settled principle that courts cannot so speculate:

> Did the jury find the HOA proved damages of $5,000,000 for each cause of action, as the HOA claims? Perhaps, but perhaps not. Did the jury find the HOA proved damages of $4,000,000? Perhaps, but perhaps not. Absent further dialogue with the jury, ***there was simply no way for the trial court to tell without speculating what the jury intended***.

Id. at 132, 866 S.E.2d at 554 (emphasis added).

The trial court's and Court of Appeals' speculation that the jury's $200,000 award to Mr. Jolly included $142,000 in medical expenses and $58,000 for pain and suffering thus conflicts with binding precedent prohibiting speculation regarding a general verdict. *See Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003) ("[I]f inapplicable grounds are given for granting *additur*, the order fails by error of law."). The *additur* ruling should thus be reversed.

B. The trial court improperly substituted its judgment for the jury's and improperly construed the evidence in the light most favorable to the moving party, and the Court of Appeals should not have affirmed this.

The trial court's stated basis for increasing the medical expenses "award" to $1,000,000 was its finding that Dr. Frank credibly and reliably testified, "without dispute," that Mr. Jolly's medical expenses "would reasonably be $1,000,000." (R. 18). The trial court committed an error of law by substituting its own credibility determination for that of the jury and by construing Dr.

Frank's testimony in the light most favorable to the moving party—Plaintiffs—rather than the nonmoving party. *See Umhoefer*, 298 S.C. at 224, 379 S.E.2d at 297.

The only evidence of Mr. Jolly's medical expenses was Dr. Frank's testimony that he had seen $142,000 in medical bills and that "it would not be unreasonable" for Mr. Jolly's total medical care "to be a million dollars." (R. 845–46). Plaintiffs did not present any medical bills or offer any other supporting evidence. Thus, a determination of the amount of Mr. Jolly's medical expenses turned on whether the fact finder believed Dr. Frank's testimony. The credibility of a witness is for the jury to decide. *See Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 465, 494 S.E.2d 835, 843 (Ct. App. 1997); *Melton v. Williams*, 281 S.C. 182, 186, 314 S.E.2d 612, 614–15 (Ct. App. 1984). Petitioners disputed Dr. Frank's testimony and, in any event, the jury is not required to believe even undisputed evidence. *See* (R. 2306) (emphasizing the lack of evidence during Petitioners' closing argument, stating, "There are no medical records. No medical bills. . . . You have to wonder why."); *Steele v. Dillard*, 327 S.C. 340, 343–44, 486 S.E.2d 278 (Ct. App. 1997); *Black v. Hodge*, 306 S.C. 196, 410 S.E.2d 595 (Ct. App. 1991) ("Stated in the larger sense, the question is simply this: must a trier of fact always believe uncontradicted testimony? The answer to the question is, plainly, no.").

A trial court is not permitted to resolve disputed evidence, take credibility determinations away from the jury, construe evidence in the moving party's favor, or substitute its view of the evidence for the jury's. *Graham v. Whitaker*, 282 S.C. 393, 402, 321 S.E.2d 40, 45 (1984) (noting the trial court is not empowered to simply substitute its judgment for that of the jury); *Umhoefer*, 298 S.C. at 224, 379 S.E.2d at 297. Moreover, awards of non-economic damages are particularly within the province of the jury to determine because they are unfixed. *See Kalchthaler v. Workman*, 316 S.C. 499, 503, 450 S.E.2d 621, 623 (Ct. App. 1994) ("We particularly note her

claim for pain and suffering was one that peculiarly fell within the province of the jury to weigh and determine."). The trial court thus erred. The fact that the trial court viewed the damages differently than the jury is not a compelling reason to invade the jury's province.

C. The Court of Appeals applied an incorrect standard in reviewing the trial court's *additur* ruling.

The jury's determination of damages is entitled to substantial deference. *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109 (2003) (emphasis added). By failing to recognize the errors of law the trial court committed and instead essentially giving the trial court absolute discretion to revoke the jury's power to determine damages, the Court of Appeals failed to follow binding precedent. *Bailey*, 318 S.C. at 14, 455 S.E.2d at 691.

Moreover, the Court of Appeals erroneously supplied its own basis for granting *additur*. The Court of Appeals stated, despite the trial court expressly grounding its *additur* award on its finding that the jury awarded only $142,000 in medical bills, that it "do[es] not view [that] particular observation as critical to the circuit court's discretionary determination that the jury verdict was inadequate." Op. 5858 at 174–75. By referring to the language in the trial court's order as "inconsequential language" and performing a lengthy analysis itself of the trial evidence, the Court of Appeals affirmed the *additur* ruling on a basis not stated by the trial court. However, as the Court of Appeals acknowledged, an appellate court has no power to grant *additur*. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015) ("When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the trial [court] alone has the power to [alter] the verdict by the granting of a new trial nisi." (second alteration in original) (quoting *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 531, 431 S.E.2d 557, 558 (1993))). The trial court's express finding that the $200,000 verdict for Mr. Jolly consisted of $142,000 in medical expenses and $58,000 in noneconomic damages was the linchpin of the trial court's ruling. The

suggestion that the trial court's speculative allocation of the general verdict was "inconsequential" is thus contradicted by the trial court's own order issuing *separate* *additur* rulings for each purported component of the verdict. (R. 17–20). By affirming the *additur* award on grounds not stated by the trial court, the Court of Appeals exceeded its powers of review by supplying its own reasoning in place of the trial court's express basis for its ruling.

D. The trial court failed to articulate compelling reasons for granting *additur* as to Mrs. Jolly's loss of consortium damages, and the Court of Appeals should not have affirmed this.

The trial court did not offer a compelling reason for nearly tripling the award to Mrs. Jolly. It said that $100,000 was inadequate "[g]iven everything that the Jollys have endured and that [Mrs. Jolly's] time with Mr. Jolly will be cut short by at least ten years." (R. 20). The trial court must articulate compelling reasons for finding a verdict is unduly conservative; it cannot merely substitute its judgment for that of the jury. *See Riley*, 414 S.C. at 193, 777 S.E.2d at 829. The trial court failed to provide a recognized compelling reason to increase this award. The mere recitation of facts is not a compelling reason to invade the province of the jury. *Green*, 356 S.C. at 571, 590 S.E.2d at 41 ("Where, as here, the evidence of damages is disputed, the mere listing of Green's claimed damages by the trial judge in his order does not constitute compelling reasons for invading the jury's province."); (R. 19–20); Op. 5858 at 179. Moreover, as the trial court recognized in its jury charge, an award of damages for loss of consortium is inherently subjective and cannot be easily quantified. (R. 2368). Accordingly, by substituting its subjective view of the evidence for that of the jury, the trial court abused its discretion by committing an error of law. This Court should grant certiorari and reverse the Court of Appeals to preserve the law of *additur* both at the trial court and appellate court levels.

III. The Court of Appeals erred in giving effect to Plaintiffs' impermissible, unilateral allocation of settlement proceeds—including the improper allocation of proceeds to nonexistent "future wrongful death" claims—thereby denying Petitioners' right to a complete setoff.

The Court of Appeals erred in accepting and implementing Plaintiffs' private, unilateral, non-binding allocation of settlement proceeds to avoid a complete setoff. Plaintiffs received $2,270,000 in settlements from other defendants.[14] (R. 44). The settlement agreements were not approved by the trial court and did not allocate the amounts paid between various causes of action. Rather, Plaintiffs represented that they had "internally" allocated the settlements one-third each to Mr. Jolly's claim, Mrs. Jolly's claim, and a "future" wrongful death claim. (R. 2501; R. 46). After trial, Petitioners moved to set off the verdict amount by the amount of the settlements pursuant to South Carolina Code section 15-38-50 and the common law. (R. 4758). Although the trial court granted Petitioners' motion, it refused to reallocate Plaintiffs' "internal" allocation. (R. 45).

Section 15-38-50 of the South Carolina Code provides,

> When a release . . . is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: . . . it reduces the claim against the others ***to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater***.

S.C. Code Ann. § 15-38-50 (emphasis added). The Court of Appeals recognized statutes must be read "so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" Op. 5858 at 188 (quoting *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). The court also rightly questioned "whether section 15-38-50 contemplates the 'internal allocation' that was merely

[14] Petitioners moved for production of the agreements. (R. 4765). The trial court denied the request but stated that it verified that the settlements totaled $2,270,000. (R. 44).

claimed by [Plaintiffs] post-settlement rather than designated by all parties to the settlement agreement." *Id.* at 181. Despite acknowledging the statute, the court approved the unilateral, non-binding allocation on the ground that South Carolina case law "favors a plaintiff's ability to apportion settlement proceeds 'in the manner most advantageous to it.'" *Id.* at 182. The plain language of section 15-38-50, however, contradicts the Court of Appeals' rulings. The Court of Appeals thus erred.

Courts in other jurisdictions applying setoff statutes similar to section 15-38-50 have followed the plain language of the statutes and held that where a settlement agreement fails to allocate proceeds among separate and distinct causes of action, the total amount of the settlement must be set off from the entire verdict. *See Dionese v. City of W. Palm Beach*, 500 So. 2d 1347, 1349 (Fla. 1987) (applying Fla. Stat. Ann. § 768.31(5)); *see also Knox v. Los Angeles Cty.*, 167 Cal. Rptr. 463, 469 (Cal. Ct. App. 1980) (applying Cal. Civ. Proc. Code § 877 and holding, absent good faith allocation of settlement consideration between causes of action in which joint tortfeasor status was alleged, defendants were entitled to setoff of entire settlement amount); *Anderson v. Ewing*, 768 So. 2d 1161, 1164 (Fla. Dist. Ct. App. 2000) (finding plaintiffs cannot unilaterally allocate settlement proceeds to avoid full setoff). This is consistent with South Carolina law.

In *Dionese*, the Florida Supreme Court held the private, unilateral allocation of settlement proceeds between husband and wife plaintiffs should be ignored by a court in determining setoff. 500 So. 2d at 1348. The court distinguished cases in which plaintiffs and defendants agreed to a particular allocation. In cases where a "settlement agreement itself recognize[s] two separate and distinct causes of action and apportion[s] the proceeds accordingly," a non-settling defendant may be entitled to set off only the funds paid in settlement for a specific cause of action. *Id.* at 1349. Private, unilateral allocation agreements, however, "are contrary to all concepts of fairness" and

"would often result in a windfall recovery" for the plaintiffs. *Id.* at 1350. Thus, "[t]he only proper method of ensuring against duplicate recoveries in an undifferentiated lump sum settlement situation is to set off the total settlement funds against the total jury award. *Id.*

The same analysis applies to this case under section 15-38-50 of the South Carolina Code. Plaintiffs entered into general settlement agreements that did not allocate settlement funds and instead provided for "undifferentiated lump sum" payments. *See id.* Plaintiffs then privately and unilaterally allocated the funds—including allocating one-third of the funds to a nonexistent "future wrongful death" claim which could not be tried, thus removing those funds from the setoff calculation—to minimize a setoff and recover more than the total amount of damages the jury determined they suffered. To effectuate the policy against double recovery and give meaning to the language of section 15-38-50, this Court should grant certiorari, reverse the trial court and Court of Appeals, and direct a complete setoff against the total jury award.

Moreover, the trial court and Court of Appeals erred as a matter of law in accepting Plaintiffs' allocation of one-third of their pre-trial settlement proceeds to a "future" wrongful death claim, because that claim is barred as a matter of law. Consistent with the language of South Carolina Code section 15-51-10, South Carolina courts have repeatedly held "a claim under the Wrongful Death Act lies in the decedent's estate only when the decedent possessed the right of recovery at his death." *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 347, 699 S.E.2d 143, 145 (2010). Thus, if a living plaintiff executes a release, that same release extinguishes any wrongful death claim on his behalf. *Id.* at 349, 699 S.E.2d at 146.

In this case, Plaintiffs unilaterally allocated settlement amounts to "future" wrongful death claims that do not exist. (R. 2501; R. 46). It was improper not to set off this amount. Mr. Jolly asserted the same claims—his personal injury claims—against the settling defendants as he did

against Petitioners. *See generally* (R. 55). When Mr. Jolly settled his personal injury claims against the settling defendants, he was no longer able to pursue wrongful death claims related to his personal injuries from mesothelioma against those defendants, because any such claims had been released. Plaintiffs thus unilaterally allocated $756,666.67 in settlements to a wrongful death claim that did not exist as a matter of law at the time of the settlements or at the time of trial, and is barred as a matter of law in the future. Allowing Plaintiffs to allocate funds to claims they cannot pursue defeats the intent of the setoff statute and violates this Court's admonition that settlement allocations "must yield to fairness and justice." *See* S.C. Code Ann. § 15-38-50; *Welch v. Epstein*, 342 S.C. 279, 313, 536 S.E.2d 408, 426 (Ct. App. 2000).

Finally, the Court of Appeals appeared to rely on a policy statement that South Carolina case law "favors a plaintiff's ability to apportion settlement proceeds 'in the manner most advantageous to it.'" Op. 5858 at 181–82. But a statute is the General Assembly's expression of public policy, *see Ackerman v. S.C. Dep't of Corr.*, 415 S.C. 412, 420, 782 S.E.2d 757, 761 (Ct. App. 2016); *Perpetual Fed. Sav. & Loan Ass'n v. Willingham*, 296 S.C. 24, 28 n.2, 370 S.E.2d 286, 288 n.2 (Ct. App. 1988), and a general judicial policy favoring a plaintiff's ability to apportion settlement proceeds does not supersede the plain language of section 15-38-50. Plaintiffs' unilateral allocation is improper and must be disregarded. This Court should grant certiorari and reverse the setoff allocation.

<u>Conclusion</u>

This Court should grant certiorari to review the Court of Appeals' erroneous adoption of Pennsylvania law on substantial factor causation and the Court of Appeals' errors of law in denying JNOV, and in allowing the *additur* ruling to stand. Finally, the Court should review and reverse the Court of Appeals' failure to apply a complete setoff.

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