RECEIVED
Oct 18 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean H. Toal, Acting Circuit Court Judge

Appellate Case No. 2017-002611

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.

PETITION FOR REHEARING

Pursuant to 221(a) and 240 of the South Carolina Appellate Court Rules, Appellants Fisher Controls International LLC ("Fisher") and Crosby Valve, LLC ("Crosby") request rehearing of the Court's opinion issued September 1, 2021, affirming the trial court's rulings in favor of Beverly Dale Jolly ("Mr. Jolly") and Brenda Rice Jolly ("Mrs. Jolly") (together, "Plaintiffs"). *See Jolly v. Gen. Elec. Co.*, Op. No. 5858 (S.C. Ct. App. filed Sept. 1, 2021) (Howard Adv. Sh. No. 30 at 139). Fisher and Crosby further request rehearing *en banc* pursuant to Rule 219(b) of the South Carolina Appellate Court Rules.[1]

[1] Consideration by the full court is necessary to maintain uniformity of decisions and because the case involves questions of exceptional importance—including, among others, the standard of proof required in mesothelioma cases, whether South Carolina law allows the "every exposure" causation opinion, and whether a court can speculate about the allocation of a general verdict and grant a new trial *nisi additur* based on that speculation.

The Court incorrectly chose to adopt the Pennsylvania Supreme Court's 4-2 *Rost* decision as the law controlling this matter, rather than deciding the case on South Carolina law. In doing so, the Court relied on evidence actually never presented to the jury, and overlooked expert testimony espousing the "every exposure" opinion. The Court improperly shifted the burden of proof on Plaintiffs' design defect claims from Plaintiffs to Fisher and Crosby. The Court disregarded the trial court's expressed basis for its new trial *nisi additur* award, instead supplying this Court's own rationale for the award despite lacking the power to grant *additur*, and otherwise overlooked and misapprehended binding precedent and the record on appeal, as set forth herein.

The Court should grant rehearing and reverse the trial court's rulings based on the arguments below and all arguments raised by Fisher and Crosby in their briefing and at oral argument, which Fisher and Crosby incorporate into this petition.

Argument

I. The Court overlooked or misapprehended the law on substantial factor causation and the testimony by Plaintiffs' experts.

The Court's decision to affirm the trial court's proximate causation ruling is based on several errors. First, the Court applied the law adopted by the Supreme Court of Pennsylvania in a 4-2 decision, which is erroneous. Second, the Court misapprehended the record and relied on statements in Dr. Frank's affidavit—which were never published to the jury—to distinguish his opinions from the "every exposure" opinion, despite his clear testimony that any exposure to Fisher or Crosby valves was a substantial factor in causing Mr. Jolly's mesothelioma. Finally, the Court misconstrued the factual evidence to the extent it found Mr. Jolly's testimony alone is sufficient to establish substantial factor causation.

A. The Court incorrectly relied upon *Rost v. Ford Motor Co.* to lower the standard of proof required in mesothelioma cases and justify Plaintiffs' expert testimony.

In affirming the trial court's proximate causation rulings, this Court relied primarily on Pennsylvania law by citing *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016), a 4-2 Pennsylvania Supreme Court decision, and a predecessor to *Rost*, *Betz v. Pneumo Abex, LLC*, 44 A.3d 27, 30 (Pa. 2012). The Court improperly applied those cases and overlooked the differences between South Carolina law and Pennsylvania law generally, and those cases specifically. The Court's reliance on *Rost* caused two errors: first, the Court erroneously recognized a lower causation standard for mesothelioma cases than for asbestosis cases, and second, the Court erroneously distinguished the "cumulative dose" opinion from the "every exposure" opinion.

Pennsylvania law differs due to the origin of its substantial factor causation standard. The Pennsylvania Supreme Court adopted the substantial factor causation test set forth by the 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). *Tragarz* 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* (and Pennsylvania law more generally) is contrary to core principles of substantial factor causation under South Carolina law and should not be relied upon as persuasive authority.

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

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, the South Carolina Supreme Court adopted the "frequency, regularity, and proximity" test (from *Lohrmann*,[2] an asbestosis case) *in a mesothelioma case* and has never held or even suggested the standard differs depending on which asbestos-related disease is at issue. *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). This Court is not empowered, based on an expert's opinion, to adopt a lower standard in mesothelioma cases where the Supreme Court has not. Op. No. 5858 (Howard Adv. Sh. No. 30 at 147 n.11) ("However, the 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)).

Further, whether to lower the *Henderson/Lohrmann* standard in mesothelioma cases is not at issue, and this Court should not make such a consequential statement especially considering the question is not before the Court. *See Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 339 (Tex. 2014) ("More fundamentally, if 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."). Essentially, the Court should not take the step of excepting mesothelioma cases from *Henderson/Lohrmann*, while leaving *Henderson/Lohrmann* applicable for other diseases, because Plaintiffs' expert Dr. Frank says it should.

[2] *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1158 (4th Cir. 1986).

Importantly, the substantial factor causation test—created by the Fourth Circuit in *Lohrmann* and adopted for mesothelioma cases by the South Carolina Supreme Court in *Henderson*—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, 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 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.[3]

[3] *See, e.g., Slaughter v. Southern Talc Co.*, 949 F.2d 167 171 (5th Cir. 1991) (noting that 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.").

Courts adopting *Lohrmann* have said the purpose behind its test is to establish a standard for substantial factor causation. *See, e.g., Chism v. W.R. Grace & Co.*, 158 F.3d 988, 992 (8th Cir. 1998) (describing the test as a "standard for proximate causation in asbestos cases"); *Gorman-Rupp Co. v. Hall*, 908 So.2d 749, 755 (Miss. 2005) (describing the *Lohrmann* test in the context of causation principles); *Chavers v. Gen. Motors Corp.*, 79 S.W.3d 361, 367 (Ark. 2002) (describing the *Lohrmann* test as a standard for proof of causation); *Horton v. Harwick Chem. Corp.*, 653 N.E.2d 1196, 1206 (Ohio 1995) (Wright, J., concurring in part and dissenting in part) (dissenting from the majority's rejection of the *Lohrmann* test and noting that it "is not a test which is distinct from the substantial factor standard; rather, it is a tool to enable a court to determine whether the plaintiff in an asbestos case has put forth sufficient evidence against a defendant to show that a reasonable jury could find that the defendant's conduct was a substantial factor in

The Court should grant rehearing, follow *Henderson* as it is bound to do, and clarify that the causation standard is the same in both asbestosis and mesothelioma cases under South Carolina law.

ii. There is no basis in South Carolina law for differentiating between the "cumulative dose" and "every exposure" opinions.

This Court misapprehended the "cumulative dose" testimony of Plaintiffs' experts. Relying on *Rost* and *Bobo v. Tennessee Valley Authority*, 855 F.3d 1294 (11th Cir. 2017), the Court maintained that "cumulative dose" testimony is reliable and is different from "each and every exposure" testimony. *See generally* Op. No. 5858 (Howard Adv. Sh. No. 30 at 147–57). The Court further held the "cumulative dose" theory does not run afoul of the *Henderson* or *Lohrmann* causation tests. *Id.* The Court's holdings misapprehend the nature of the "cumulative dose" theory—which does not differ from the "each and every exposure" theory—and the law of substantial factor causation. *See 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 the law is concerned.").

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 comparative analysis

causing the plaintiff's harm"), *overturned due to legislative action* (Sept. 2, 2004) (adopting the *Lohrmann* test).

of different exposures to asbestos. *See Rost*, 151 A.3d at 1051 n.13. South Carolina's substantial factor causation test derives from the Fourth Circuit's adoption of the test in *Lohrmann*. *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727. Courts in the Fourth Circuit, applying South Carolina law, have found substantial factor causation requires more than proof 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."). It 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."). Thus, although short exposures ***may*** perhaps satisfy the standard if they are the ***only*** exposures, a plaintiff cannot satisfy her burden by merely showing "above background" exposure to a particular product if significant evidence of other exposures exists. *See id.*[4]

[4] The Court rejected the analysis of Judge David Norton of the U.S. District Court for the District of South Carolina in *Haskins* regarding expert testimony and relied, instead, on an unsigned case comment written by second-year law students reflecting the students' opinions as to what the causation standard in toxic tort cases should be. *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 144, 145 n.7, 156) (relying on *Tort Law — Expert Testimony in Asbestos Litigation — District of South Carolina Holds the Every Exposure Theory Insufficient to Demonstrate Specific Causation Even if Legal Conclusions Are Scientifically Sound*, 131 HARV. L. REV. 658 (2017)); *see also About*, HARV. L. REV. ("Most student writing takes the form of Notes, Recent Cases, and Recent Legislation. . . . Recent Cases and Recent Legislation are normally 8 pages and are written mainly by second-year students. Recent Cases are comments on recent decisions by courts other than the U.S. Supreme Court, such as state supreme courts, federal circuit courts, federal district courts, and foreign courts. . . . All student writing is unsigned."), https://harvardlawreview.org/about (last visited September 22, 2021). The Court should give the case comment no weight. Moreover, the

Similarly, Fisher and Crosby do not argue that Plaintiffs "must exclude every other possible cause" of Mr. Jolly's mesothelioma or that "a precise quantification of the number of asbestos fibers to which [Mr. Jolly] was exposed" is required. *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 151). Rather, Fisher and Crosby plainly argued, consistent with Fourth Circuit law from which the substantial factor causation test derives, that some qualitative analysis comparing Mr. Jolly's exposures from Fisher or Crosby with his exposures from other sources is necessary to determine whether Fisher or Crosby exposures were a substantial factor in Mr. Jolly's cumulative dose which caused his disease. *See* (App. Br. 11–12, 20); (Reply Br. 8) ("Appellants are not arguing that Plaintiffs had to exactly quantify Mr. Jolly's exposure to asbestos."); *Haskins*, 2017 WL 3118017, at *8. Plaintiffs' experts cannot reliably opine that exposure to Fisher valves or Crosby valves was a substantial factor in causing Mr. Jolly's disease by pretending the Fisher or Crosby exposures were Mr. Jolly's only exposures and ignoring context.[5] The Court's ruling and Plaintiffs' expert testimony, in effect, creates strict liability for any above-background exposures. The substantial factor test was designed to avoid this unbounded liability. *See McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016).

---

case comment argues, in circular fashion, that courts should ignore the legal causation standard adopted by the South Carolina Supreme Court in *Henderson* and, instead, allow plaintiffs to tell the jury it is "feasible" that a defendant caused the plaintiff's mesothelioma if there is any evidence of exposure to the defendant's product. 131 HARV. L. REV. at 665. The case comment's suggestion is incompatible with South Carolina law.

[5] Finally, the Court's footnote suggesting the admissibility of Plaintiffs' experts may be the law of the case is erroneous. Op. No. 5858 (Howard Adv. Sh. No. 30 at 157 n.18). A party is not required to set forth every single *argument* in the statement of issues on appeal. Fisher and Crosby's statement of *issues* is broad enough encompass the sub-arguments that they are entitled to JNOV because, if the experts' testimony is inadmissible, Plaintiffs lack specific causation evidence and cannot satisfy their burden of proof as a matter of law. *See Johnson v. Roberts*, 422 S.C. 406, 411, 812 S.E.2d 207, 210 (Ct. App. 2018), *aff'd*, 427 S.C. 258, 830 S.E.2d 910 (2019).

Rost was, apart from being wrongly decided, grounded in the differences between South Carolina law and the law of other states. Thus, by applying *Rost*, this Court is applying a different standard than that adopted by the South Carolina Supreme Court, and the Court's holding in this case therefore conflicts with binding precedent.[6]

Lastly, *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 her burden under *Lohrmann* by simply showing that general asbestos exposure cumulatively caused her disease. *See, e.g.*, *Schwartz v. Honeywell Int'l, Inc.*, 102 N.E.3d 477, 482 (Ohio 2018) (collecting cases from across jurisdictions); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009) (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); Mark Behrens & William Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 SW. U. L. REV. 479, 480 (2008).

B. The Court misconstrued Dr. Frank's testimony.

The Court also misapprehended the testimony and legal standard when it relied on the word "contributing" as somehow distinguishing Dr. Frank's testimony. Op. No. 5858 (Howard Adv. Sh. No. 30 at 154 n.17). "Substantial factor" and "substantial contributing factor" have the same

[6] The Court also relied on *Bobo* but overlooked the distinguishing facts in that case. The *Bobo* court, in a "take home" exposure case against the Tennessee Valley Authority, noted the plaintiff wife was exposed an estimated two thousand times to asbestos dust from the Tennessee Valley Authority which she inhaled in visible "fog[]" like quantities by cleaning her husband's clothes, which were covered with asbestos dust from his job. 855 F.3d at 1298. The evidence of exposure in this case is categorically different. Further, the South Carolina Supreme Court has not had occasion to consider "take home" exposure liability, and for this further reason this Court should not rely on *Bobo*.

meaning. Courts regularly refer to the standard as requiring proof that a defendant's product was a "substantial contributing factor"—including the *Betz* case this Court quoted and relied upon in its opinion. *See Betz*, 44 A.3d at 30 ("The civil action underlying this appeal was selected as a test case for the admissibility of expert opinion evidence to the effect that each and every fiber of inhaled asbestos is a *substantial contributing factor* to any asbestos-related disease." (emphasis added)); *see also, 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)); *Pace v. John Crane, Inc.*, No. 2:11-CV-02688-BM, 2014 WL 12638334, at *1 (D.S.C. Nov. 25, 2014) ("The exposure to John Crane, Inc. products was a *substantial contributing factor* in the development of William Pace's mesothelioma." (emphasis added)), *aff'd sub nom. Pace v. Air & Liquid Sys. Corp.*, 642 F. App'x 244 (4th Cir. 2016); Op. No. 5858 (Howard Adv. Sh. No. 30 at 152) (quoting *Betz*). Thus, Dr. Frank testified about the legal standard, and the Court must evaluate his testimony as he gave it, rather than focusing in on certain key words.

The Court emphasized Dr. Frank's testimony that mesothelioma is caused by a person's cumulative dose. The question for Dr. Frank at trial, therefore, was which exposures were *substantial* contributors to the cumulative dose and which exposures were *insubstantial* contributors. Dr. Frank repeatedly testified that ***every*** 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).

When asked to assume a person was exposed to removal of an asbestos-containing gasket one time, Dr. Frank used an analogy to reinforce his opinion that every exposure to asbestos is a substantial factor in causing a person's mesothelioma:

> 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. So I could give you, you know, an analogy about small amounts of things. If we argue, for example, that one cigarette won't give you lung cancer and somebody decides to -- and there is a million brands of cigarettes. Now, there aren't. But let's say there is a million brands of cigarettes. Somebody decides to smoke. They smoke one each of the million cigarettes and they get lung cancer. Do you throw out one cigarette because each cigarette is inconsequential, or do you say the totality is what gave someone their lung cancer? 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 their disease. So all of them have to be included.

(R. 715–16).

Respectfully, the Court's casting of Dr. Frank's testimony as something different—namely that each exposure was a contributing factor to Mr. Jolly's cumulative dose but not, in the Court's view, a substantial contributing factor in causing Mr. Jolly's disease—is contradicted by Dr. Frank's plain testimony. Dr. Frank testified that every exposure to asbestos was a substantial

contributing factor in causing Mr. Jolly's disease, and thus offered the inadmissible and unreliable "each and every exposure" opinion.[7]

The Court also erred by repeatedly relying on Dr. Frank's affidavit, particularly for the proposition that Dr. Frank was not applying a legal causation standard, as a critical factor separating his opinions from the "each and every exposure" opinion. Op. No. 5858 (Howard Adv. Sh. No. 30 at 148–49, 154 n.17, 158–59); (R. 2944–45). Importantly, Dr. Frank's affidavit was admitted as demonstrative evidence only and was not supplied to the jury for use during deliberations. (R. 781–82). Thus, any statement in the affidavit not read aloud at trial was never presented to the jury. The Court overlooked this fact, instead holding 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. No. 5858 (Howard Adv. Sh. No. 30 at 159). Contrary to the Court's misapprehension, Dr. Frank never told the jury he was not applying a legal causation standard, and the jury never saw or heard the statements in the affidavit this Court relies upon as distinguishing his "medical and scientific" opinions from legal causation opinions. The issue here is what Dr. Frank told the jury, not what Dr. Frank wrote in a "learned treatise" that he prepared in 2016 which contained no opinions specific to Mr. Jolly's case or any case. *See generally* (R. 781–82, 2734–2949). The affidavit is not a specific causation opinion at all and, therefore, is not relevant to the issue before the Court. The Court overlooked and misapprehended the evidence presented at trial. It should grant rehearing and reverse the trial court's JNOV ruling.[8]

---

[7] The opinions of Plaintiff's other expert witnesses are also inadmissible "every exposure" opinions for the reasons stated above and the reasons Fisher and Crosby explained in their briefing and at oral argument.

[8] Contrary to the Court's holding, Fisher and Crosby's Rule 403 argument is preserved. The trial court ruled on the argument at trial. (R. 783–84) (denying Fisher and Crosby's renewal of their motion to exclude Dr. Frank's testimony based on the grounds stated in their written motion, which

C. The Court misapprehended the factual evidence and overlooked causation requirements to the extent it found Mr. Jolly's testimony alone is sufficient to establish substantial factor causation.

The Court appears to hold that Mr. Jolly's testimony alone establishes specific causation such that exclusion of the experts' testimony may not be fatal to his case. *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 147). In so holding, the Court both misapprehends the fact testimony and overlooks the requirement of expert medical causation testimony.

The Court's misapprehension of the fact testimony pervades its analysis. Although the Court acknowledges that Fisher and Crosby were just two of a dozen valve brands present at the Duke facilities where Mr. Jolly worked, the Court fails to recognize that if Fisher and Crosby valves each accounted for less than 10% of the valves, then Fisher and Crosby valves may account for less than 10% of Mr. Jolly's valve-related exposure. *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 156). Instead, the Court recites several paragraphs' worth of general "valve" testimony before concluding that all such general valve-related testimony was in fact evidence of exposure to Fisher valves and Crosby valves. *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 146–47). This is simply not what the evidence reflects. By repeating Plaintiffs' and the trial court's error in reciting testimony about valves generally, then making a logical leap and assuming all of the valve testimony related to Fisher or Crosby valves, the Court overlooked and misapprehended the evidence.

---

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 Fisher and Crosby's Rule 403 argument. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, *confusion of the issues*, or *misleading the jury* . . . ." (emphases added)).

The Court also misapprehended the use of the term "flange gasket." Participants in asbestos litigation, including witnesses, commonly use "flange gaskets" to refer to gaskets applied to the external flange connecting a valve to piping and use "internal gaskets" or "internal components" to refer to gaskets inside the valve. *See, e.g.*, (R. 1487) (showing the trial court cross-examining Crosby's corporate representative and differentiating between "internal gaskets" and "flange gaskets," which Crosby did not sell to Duke). Thus, this Court's statement that "the term 'flange gasket' should encompass these internal gaskets that [Fisher and Crosby] undoubtedly sold to Duke," Op. No. 5858 (Howard Adv. Sh. No. 30 at 146), is inconsistent with common usage and the parties' and even the trial court's usage in this case. Hence, to the extent this Court construed "flange gaskets" to include internal gaskets in holding that Mr. Jolly's testimony alone satisfied the substantial factor test, the Court misapprehended the record and common usage of those terms in asbestos litigation.

Finally, and regardless, Plaintiffs still must present reliable, admissible medical causation testimony to assist the jury in understanding whether exposures from Fisher and Crosby valves caused Mr. Jolly's mesothelioma. *See* Rule 702, SCRE; *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012); *Watson v. Ford Motor Co.*, 389 S.C. 434, 446–47, 699 S.E.2d 169, 175–76 (2010). The Court itself acknowledged the need for expert testimony in its opinion. Op. No. 5858 (Howard Adv. Sh. No. 30 at 144). Plaintiffs failed to present reliable, admissible expert testimony, for the reasons Fisher and Crosby have stated throughout this appeal. This failure is fatal to their claims, and the Court should grant rehearing and reverse the trial court's denial of JNOV.

II. This Court incorrectly shifted the burden to Fisher and Crosby in several respects.

This Court erroneously shifted the burden of proof on Plaintiffs' design defect claim, finding the claim was a jury question because "there was no evidence that a metal gasket was more expensive than an asbestos gasket." Op. No. 5858 (Howard Adv. Sh. No. 30 at 168). The Court is correct that the record contains no evidence as to the cost of using a metal gasket as a purported alternative design. However, *Plaintiffs* bore the burden of proving the costs of the alternative design. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 225, 701 S.E.2d 5, 16 (2010) ("In sum, in a product liability design defect action, *the plaintiff must present evidence of a reasonable alternative design*. The *plaintiff* will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous. *This presentation of an alternative design must include consideration of the costs*, safety and functionality *associated with the alternative design*." (emphases added)).

Fisher and Crosby do not bear the burden to prove a supposed alternative is more expensive in the absence of any proof supporting Plaintiffs' claims. *See id.* Thus, the absence of any evidence showing the cost of a metal gasket 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"); *see also Hulsizer v. Magline, Inc.*, No. 4:17-CV-00415-RBH, 2018 WL 5617873, at *4 (D.S.C. Oct. 29, 2018) ("[T]he district court must determine whether there is evidence tending to create genuine issues of material fact on *each of the factors (safety, costs, and functionality)* relevant to the risk-utility analysis and its required showing of an alternative feasible design, in accordance with *Branham*."). To the extent the Court relies on section 2 of the Restatement (Third)

of Torts: *Products Liability* for the proposition that a plaintiff is not required to prove each factor of the risk-utility test, that proposition conflicts with binding precedent, and is erroneous. *Branham*, 390 S.C. at 225, 701 S.E.2d at 16.

While improperly shifting the burden to Fisher and Crosby, the Court acknowledged the lack of any evidence supporting an element of Plaintiffs' design defect claim. The Court overlooked or misapprehended these facts and Plaintiffs' burden of proof. Accordingly, the Court should grant rehearing, reverse the trial court, and find Fisher and Crosby are entitled to JNOV on Plaintiffs' design defect claim.

III. The Court's *additur* ruling overlooks and misapprehends binding precedent.

This Court failed to properly apply binding precedent in affirming the trial court's erroneous new trial *nisi additur* ruling. Based on this Court's holding, a trial court considering a new trial *nisi additur* motion in the future may now (1) accept disputed evidence as true in favor of the *moving* party, and (2) *speculate* about the formulation of the jury's verdict. The Court's holding conflicts with South Carolina law. Moreover, by finding the trial court's own basis for the *additur* award was "inconsequential" or not "critical," this Court substituted its own basis for the *additur* award and exercised power it does not have.

First, a trial court reviewing a new trial motion must construe the evidence and all reasonable inferences in the light most favorable to the *nonmoving* party. *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989). Thus, the trial court (and this Court) was required to construe the evidence in the light most favorable to Fisher and Crosby when it considered Plaintiffs' Motion for New Trial *Nisi Additur*. Instead, both the trial court and this Court characterized, then accepted as true, Dr. Frank's testimony regarding Mr. Jolly's medical bills, and then increased the actual damages award based on that improper construction of the

evidence. But as this Court acknowledges, the jury was not required to believe Dr. Frank's testimony. Op. No. 5858 (Howard Adv. Sh. No. 30 at 178 & n.1) (citing *Steele v. Dillard*, 327 S.C. 340, 343–44, 486 S.E.2d 278, 280 (Ct. App. 1997)). If the jury was not required to believe the testimony, a construction of the evidence in the light most favorable to the *nonmoving* party compels a determination that the jury found Dr. Frank's testimony was not credible, and precludes an *additur* award based on a finding that Mr. Jolly's medical bills were $1,000,000.

Second, in rejecting consideration of *Jenkins v. Few*, 391 S.C. 209, 221, 705 S.E.2d 457, 463 (Ct. App. 2010), and *Moore v. Moore*, 360 S.C. 241, 257, 599 S.E.2d 467, 475 (Ct. App. 2004), this Court overlooked a key principle of law espoused by both opinions: a court cannot speculate, assume, or even "reasonably infer" any allocation from or within a general verdict because it is *impossible* to determine such an allocation, as this Court held in opinions authored by Chief Judge Lockemy, current Chief Justice Beatty, and former Chief Judge Anderson. *Jenkins*, 391 S.C. at 221, 705 S.E.2d at 463 ("Few contributed to drafting and agreed to use a general verdict form that did not include a separate damages award for each cause of action. Because the verdict was a general verdict, *it is impossible to determine how the jury allocated damages* between civil conspiracy, conversion, and trespass to personal property. We will not speculate as to how the jury allocated damages." (emphasis added)); *Armstrong v. Collins*, 366 S.C. 204, 227, 621 S.E.2d 368, 379 (Ct. App. 2005) ("Further, the jury's verdict of $1.8 million was declared a general verdict by the trial court and was well within the range of damages shown by Armstrong. Because the verdict was a general verdict, we cannot now speculate as to how the jury allocated damages."); *Moore*, 360 S.C. at 257, 599 S.E.2d at 475 ("The jury in this case returned a general verdict for Respondent in the amount of $30,000.00. Appellant did not request the trial court to submit a special verdict form to determine whether the actual damages were for lost profit or some other

measure. *Without a special verdict form, we cannot speculate as to what portion of the award the jury attributed to lost profit as opposed to other tort damages.* Accordingly, the trial court committed no error in submitting the claim to the jury." (emphasis added)).[9] The Court's incorrect attempt to distinguish the principle from *Jenkins* and *Moore* as case-specific is a misapprehension of both cases.

This Court relies on a dictionary definition of "speculate," but overlooks the application of that definition to the facts of the trial court's ruling. If it is impossible to determine the allocation of the verdict, any attempt to do so is "to take to be true on the basis of insufficient evidence." *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 173) (relying on the Merriam-Webster Dictionary). However one defines "speculation," the trial court's ruling—and this Court's opinion—satisfies the definition. For example, *Black's Law Dictionary* defines "speculation" as "the practice or an instance of theorizing about matters over which there is no certain knowledge." *Speculation*, BLACK'S LAW DICTIONARY (11th ed. 2019). The trial court and this Court theorized about the allocation of the verdict without any certain knowledge. The *Cambridge English Dictionary* provides the following definition of "speculate": "to guess possible answers to a question when you do not have enough information to be certain."[10] The trial court and this Court guessed a possible verdict allocation when neither court has enough information to be certain.

Although the record may contain some evidence that Mr. Jolly incurred $142,000 in medical bills, the Plaintiffs chose not to submit the medical bills into evidence. Regardless, it is

---

[9] *See also D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 153, 810 S.E.2d 41, 46 (Ct. App. 2018) (comparing an arbitrator's general award to a jury's general verdict and finding "it is impossible to determine whether, and to what extent, the arbitrator's award included damages for D.R. Horton's own negligence").

[10] *Speculate*, Cambridge English Dictionary, https://dictionary.cambridge.org/us/dictionary/english/speculate.

speculation that the jury allocated $142,000 of its $200,000 award to medical expenses. Any such conclusion is not a "reasonable inference" based on "concrete information," Op. No. 5858 (Howard Adv. Sh. No. 30 at 174); it is an unfounded guess which is not permitted under South Carolina law. *See Jenkins*, 391 S.C. at 221, 705 S.E.2d at 463; *Armstrong*, 366 S.C. at 227, 621 S.E.2d at 379; *Moore*, 360 S.C. at 257, 599 S.E.2d at 475. It is impossible to know how the jury allocated its general verdict. Thus, this Court and the trial court are prohibited from speculating as to the allocation of the verdict.

Finally, this Court misapprehended its own scope of review. The Court stated, despite the trial court expressly grounding its *additur* award on its finding that the jury awarded only $142,000 in medical bills, that this Court "do[es] not view [that] particular observation as critical to the circuit court's discretionary determination that the jury verdict was inadequate." Op. No. 5858 (Howard Adv. Sh. No. 30 at 174–75). By referring to the language in the trial court's order as "inconsequential language" and performing a lengthy analysis of the trial evidence (an analysis the trial court did ***not*** perform, *see* (R. 14–20)), this Court affirmed the *additur* ruling on a basis not stated by the trial court. However, as this Court acknowledged, it has no power to grant *additur*. Op. No. 5858 (Howard Adv. Sh. No. 30 at 171) (citing several cases for the proposition that "the [circuit court] ***alone*** has the power to [alter] the verdict by the granting of a new trial nisi" (alterations in original) (emphasis added)).

The trial court's ruling was either proper or improper according to the reasons it stated in its order, which—like a contract—must be interpreted according to its plain meaning. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 135, 754 S.E.2d 494, 498 (2014) ("As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment

itself. Hence, in construing a judgment, it should be examined and considered in its entirety. If the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used." (quoting *Weil v. Weil*, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct. App. 1989))); *City of N. Myrtle Beach v. E. Cherry Grove Realty Co., LLC*, 397 S.C. 497, 503, 725 S.E.2d 676, 679 (2012) (same). 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 its ruling. The trial court expressly separated that verdict into a $142,000 verdict for medical expenses, which it increased to $1,000,000, and a $58,000 verdict for noneconomic damages, which it increased to $580,000. (R. 18–19) ("Given this undisputed evidence of Mr. Jolly's past and future medical needs and expenses, the Court will increase *the medical expenses award* to $1,000,000. The Court also finds that the jury's *award of $58,000 for pain and suffering* [is] inadequate. . . . The Court will increase Mr. Jolly's noneconomic damages award by a factor of ten, and award $580,000." (emphases added)).

Any suggestion that the trial court's improper 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. By ignoring the trial court's express statement that it granted *additur* *based on its allocation of the general verdict* and affirming the *additur* award on grounds not stated by the trial court, this Court exceeded its powers of review by supplying its own reasoning in place of the trial court's express basis for its ruling. The Court therefore misapprehended its scope of review and exceeded its powers. The Court should grant rehearing and reverse the *additur* ruling.

The trial court is not permitted to resolve conflicts in evidence and use that resolution as a "compelling" reason to alter the jury's verdict. *See Luchok v. Vena*, 391 S.C. 262, 265, 705 S.E.2d 71, 73 (Ct. App. 2010) ("We interpret the judge's order to set forth two reasons for invading the jury's province. First, the verdict did not cover all the chiropractic bills. In the face of the sharply conflicting evidence, this is not a compelling reason to grant the motion. Second, the 'charges for chiropractic treatment of Plaintiff's injuries were reasonable and necessary.' The judge is not entitled to make that determination as a matter of law when the evidence is conflicting. Therefore, there is no compelling reason and the trial judge's improper invasion of the province of the jury amounts to an abuse of discretion."). This Court credited the trial court's "determination that the verdict should adequately reflect Dr. Frank's reliable opinion on the enormous past and future expenses of [Mr. Jolly's] disease" as a "compelling" reason to invade the jury's province and revoke the jury's power to determine the amount of damages. Op. No. 5858 (Howard Adv. Sh. No. 30 at 178). But this is not what the trial court said was its reason for the *additur*, and even if it was, such would have been improper. This Court's decision thus overlooked precedent and misapprehended the trial court's, and its own, *additur* power. Neither the trial court nor this Court is empowered to find Dr. Frank's testimony was "reliable" as a matter of law and thus require the damages award to reflect his testimony. *See Luchok*, 391 S.C. at 265, 705 S.E.2d at 73; *Umhoefer*, 298 S.C. at 224, 379 S.E.2d at 297. As Fisher and Crosby explained in their briefs and at oral argument, Dr. Frank's testimony was speculative and in any event the jury was not required to believe it. Although this Court acknowledges the jury was not required to believe Dr. Frank's testimony, the Court allowed the trial court to form its own belief as to Dr. Frank's credibility and impose that belief on the parties as a purported "compelling" reason to take the damages

calculation away from the jury. The Court should grant rehearing and reverse the trial court's granting of new trial *nisi additur*.

IV. The Court of Appeals should grant rehearing and reverse the trial court's setoff and subpoena rulings.

Finally, the Court of Appeals overlooked or misapprehended Fisher and Crosby's arguments as to the setoff and trial subpoena rulings, and it should reverse both rulings for the reasons stated by Fisher and Crosby in their briefing and at oral argument and the reasons stated below.

A. Setoff

The Court rightly questioned "whether section 15-38-50 contemplates the 'internal allocation' that was merely claimed by [Plaintiffs] post-settlement rather than designated by all parties to the settlement agreement." Op. No. 5858 (Howard Adv. Sh. No. 30 at 181). Despite acknowledging the statute, the Court approved the unilateral allocation because 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 this holding: "[A] release or a covenant not to sue or not to enforce judgment . . . 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*." S.C. Code Ann. § 15-38-50 (emphases added). The Court recognized elsewhere in its opinion that 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. No. 5858 (Howard Adv. Sh. No. 30 at 188) (quoting *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). Yet, the Court failed to apply that governing principle to its review of the setoff statute.

Courts in other jurisdictions applying setoff statutes similar to section 15-38-50 have 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. *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 figures); *Anderson v. Ewing*, 768 So. 2d 1161, 1164 (Fla. Dist. Ct. App. 2000) (finding plaintiffs cannot unilaterally allocate settlement proceeds to avoid a full setoff). These cases are consistent with South Carolina law and policy.

In *Dionese*, two plaintiffs—a husband and wife—sued various defendants for the wife's personal injuries and the husband's loss of consortium arising from a motor vehicle accident. 500 So. 2d at 1348. The plaintiffs settled with the at-fault driver and his insurer, but the settlement agreement did not allocate the money between the two plaintiffs. *Id.* at 1348, 1349. The plaintiffs then proceeded to trial and obtained a verdict against a non-settling defendant. *Id.* at 1348. When the non-settling defendant moved to set off the settlement funds received by the plaintiffs, the plaintiffs "notified the court of a private unilateral agreement to apportion $10,000 of the $45,000 settlement proceeds to [the wife's] claim for personal injuries, and the remaining $35,000 to [the husband's] claim of loss of consortium." *Id.* The Florida Supreme Court held the plaintiffs' private, unilateral allocation of settlement proceeds should be ignored by a court in determining setoff. *Id.*

The court distinguished cases in which plaintiffs and defendants agree 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,

> The 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. . . . The rights of both the settling and non-settling joint tort-feasors would be adversely affected if we were to allow plaintiffs to privately and unilaterally apportion the proceeds of a settlement agreement containing a general release.

Id.

The same analysis applies to this case. 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 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. This allocation and the trial court's denial of a complete setoff undercuts the jury's role and duty to determine the total damages suffered by a plaintiff. The law does not give plaintiffs a right to unilaterally manipulate settlement allocations to minimize setoff and obtain a double recovery. Rather, to effectuate the policy against double recovery and give meaning to the language of section 15-38-50,[11] the Court should reverse the trial court and direct a complete setoff against the total jury award.

[11] *See Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("[T]he legislature intends to accomplish something by its choice of words, and would not do a futile thing.").

B. Subpoenas

The Court overlooked or misapprehended several points in affirming the trial court's subpoena rulings. First, the Court appears to approve the trial court's finding that Fisher and Crosby "submitted to the court's jurisdiction by making a general appearance and litigating the case to trial." Op. No. 5858 (Howard Adv. Sh. No. 30 at 186–87). A "general appearance" is an antiquated concept which is no longer recognized by South Carolina law. Under prior law, a party who made a general appearance waived his right to challenge the court's personal jurisdiction or raise any defects in service of process. *Stickland v. Consol. Energy Prod. Co.*, 274 S.C. 554, 555, 265 S.E.2d 682, 683 (1980) ("A general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process."). However, Rule 12 of the South Carolina Rules of Civil Procedure abrogated the former process in which a party challenging the court's personal jurisdiction was required to make a "special appearance" for the limited purpose of challenging jurisdiction. *See* Rule 12(b), SCRCP, Note ("This important Rule 12(b) . . . eliminates the necessity of the awkward 'special appearance to object to jurisdiction' under present State practice."). Thus, Fisher and Crosby did not "submit[] to the court's jurisdiction by making a general appearance."

Second, Fisher and Crosby did not abandon any arguments. Fisher and Crosby's assertion that its counsel did not know what was in the FedEx packages when he signed for them is a ***fact*** supporting the argument that acknowledging receipt of a FedEx package, without knowing the package contains a subpoena for service, cannot be acceptance of service under Rule 4(j). Fisher and Crosby included a record cite supporting that fact. (R. 332). The abandonment doctrine allows the Court to avoid ruling on an ***issue*** raised by a party in a conclusory statement unsupported by any authority. *See, e.g.*, *S.C. Dep't of Soc. Servs. v. Mother ex rel. Minor Child*, 375 S.C. 276,

283, 651 S.E.2d 622, 626 (Ct. App. 2007) ("[W]e note this issue is abandoned because Mother makes a conclusory argument without citation of any authority to support her claim."). It does not allow the Court to ignore a ***fact*** supported by the record. Thus, the Court should not overlook this fact. Nor should the Court overlook the effect of the new rule it endorses. Pursuant to this Court's ruling, all attorneys are authorized to accept service on behalf of their clients, and if an attorney signs for a FedEx package, she risks accepting service on behalf of her client regarding the unknown contents of the package, regardless of whether she has her client's authorization to do so. The Court should grant rehearing and reverse the trial court's failure to quash the trial subpoenas.

V. The Court should grant rehearing and reverse the trial court on Fisher and Crosby's arguments regarding whether the dangers to Mr. Jolly were open and obvious, the sophisticated intermediary doctrine, and lack of evidence of the standard of care.

The Court overlooked or misapprehended Fisher and Crosby's arguments regarding the open and obvious doctrine, the sophisticated intermediary doctrine, and the lack of evidence of the standard of care. First, the Court overlooked or misapprehended evidence showing the alleged dangers posed by asbestos-containing gaskets were open and obvious to Mr. Jolly. The only reasonable inference is that Mr. Jolly knew asbestos was hazardous but did not heed warnings about asbestos hazards. *See* (App. Br. 27–28; Reply Br. 14–15). Moreover, "[t]he plaintiff has the burden of showing that a warning would have made a difference in the conduct of the person warned." *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 432, 505 S.E.2d 354, 359 (Ct. App. 1998). The Court speculates that Mr. Jolly may have heeded a warning different than the ones he received, had he received one. But no evidence supports this conclusion. Accordingly, the Court overlooked the evidence and misapprehended the issue.

Second, the Court overlooked or misapprehended the burden of proof as to Fisher and Crosby's sophisticated intermediary doctrine defense. Although the Court correctly observes that the sophisticated intermediary doctrine is an affirmative defense and defendants generally have the burden of proof for affirmative defenses, Fisher and Crosby cannot be required to identify and disprove at trial every possible method of warning. It is unreasonable for this Court to affirm on the ground that Fisher and Crosby failed to refute a manner of warning devised by Plaintiffs and the Court during the appeal, which was not raised at trial. *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 163–64). This Court may affirm on any ground in the record, Rule 220(c), SCACR, but the record contains no evidence that Fisher and Crosby could have effectively warned end users like Mr. Jolly by placing a warning on the outside of their valves. The only reasonable inference in the record is that Fisher and Crosby reasonably relied on Duke to warn its employees and are therefore protected from liability by the sophisticated intermediary doctrine.

Finally, the Court overlooked or misapprehended Plaintiffs' failure to present evidence showing the standard of care for negligence or evidence that Fisher or Crosby deviated from that standard of care. The Court's analysis is based entirely on the existence of OSHA and Dr. Frank's opinions. The scientific community's establishment, according to Dr. Frank, of a "causal connection between asbestos exposure and mesothelioma" is not evidence of a tort standard of care. Op. No. 5858 (Howard Adv. Sh. No. 30 at 170). Dr. Frank's theorizing that Fisher and Crosby "could have advised Duke to caution employees," *id.*, is not evidence that tort law imposed a duty on Fisher and Crosby to do so. Moreover, federal health and safety regulations—enacted based on forward-looking evaluations performed by regulatory agencies—are not related to the standard of care for tort claims. *See Yates*, 113 F. Supp. 3d at 847; *see also, e.g.*, *In re Garlock Sealing Tech., LLC*, 504 B.R. 71, 81 (Bankr. W.D.N.C. 2014); *Glastetter v. Novartis Pharm.*

Corp., 252 F.3d 986, 991 (8th Cir. 2001). OSHA regulations and Dr. Frank's opinions therefore do not establish a tort standard of care. This Court overlooked Plaintiffs' failure to establish the required standard of care for their negligence claim (and, consequently, their failure to establish a deviation from the standard of care), and the Court should therefore grant rehearing and reverse the trial court.

Conclusion

Fisher and Crosby request that the Court grant rehearing and reverse the trial court. Fisher and Crosby further request that the Court consider this petition *en banc* because consideration by the full court is necessary to secure or maintain uniformity in its decisions and the proceeding involves a question of exceptional importance.

(signature page attached)

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: *s/ C. Mitchell Brown*

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

October 18, 2021

RECEIVED
Oct 18 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean H. Toal, Acting Circuit Court Judge

Appellate Case No. 2017-002611

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.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified via electronic mail, pursuant to Supreme Court Order 2021-08-25-02, and a copy of the sent electronic mail is attached to this certificate:

Pleadings: Appellants' Petition for Rehearing

Counsel Served:

Theile B. McVey, Esq.
John D. Kassel, Esq.
KASSEL McVEY ATTORNEYS AT LAW
Post Office Box 1476
1330 Laurel Street (29201)
Columbia, SC 29201
tmcvey@kassellaw.com

jkassel@kassellaw.com

Jonathan M. Holder, Esq.
Lisa White Shirley, Esq. (*Pro Hac Vice)*
DEAN OMAR BRANHAM, LLP
302 North Market Street, Suite 300
Dallas, TX 75202
jholder@dobslegal.com
lshirley@dobslegal.com

Eileen Hindman
Administrative Assistant

October 18, 2021

Eileen Hindman

From: Eileen Hindman
Sent: Monday, October 18, 2021 10:58 AM
To: 'tmcvey@kassellaw.com'; 'jkassel@kassellaw.com'; 'jholder@dobllp.com'; 'lshirley@dobslegal.com'
Cc: Mitch Brown; Matt Bogan; Jase Glenn; Nick Charles
Subject: Beverly Jolly v. General Electric Company - Appellate Case No. 2017-002611
Attachments: Jolly - Petition for Rehearing with proof of service.pdf

Counsel,

Attached for service upon you in the above matter please find Appellants' Petition for Rehearing**.** Service is made via email pursuant to the Supreme Court Order 2021-08-25-02.

Thank you,

NELSON MULLINS

EILEEN HINDMAN SENIOR ADMINISTRATIVE ASSISTANT
eileen.hindman@nelsonmullins.com
MERIDIAN | 17TH FLOOR
1320 MAIN STREET | COLUMBIA, SC 29201
T 803.255.9204 F 803.256.7500
NELSONMULLINS.COM