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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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

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

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

vs.

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

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

RETURN TO PETITION FOR REHEARING

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INTRODUCTION

Appellants Fisher Controls International LLC and Crosby Valve, LLC have requested rehearing on every single issue decided unanimously by the panel in its 57-page opinion. *Jolly v. Gen. Elec. Co.*, ---- S.E.2d ----, No. 2017-002611, 2021 WL 3889962 (S.C. Ct. App. Sept. 1, 2021). Although Fisher/Crosby contend that the Court overlooked or misapprehended virtually every point raised on appeal, they have only succeeded in identifying their many disagreements with the Court. They do not show that the Court was incorrect or offer any compelling reasons for the Court to reconsider its reasoning and conclusions.

Fisher/Crosby have also asked for rehearing *en banc*, but they have made no effort to meet the standard for *en banc* review set forth in Appellate Court Rule 219(b). They have not identified any contradiction between the panel's opinion and the prior opinions of this Court. Nor have they explained how any of the legal issues presented are of exceptional importance. As Fisher/Crosby have failed to offer any legitimate basis for the Court to rehear this case, their petition should be denied.

ARGUMENT

I. The Court properly decided the causation issues in this case.

A. The Court did not lower the standard of proof in mesothelioma cases.

i. The Court properly applied the Henderson/Lohrmann *causation standard while also distinguishing* Lorhmann *on its facts.*

Fisher/Crosby mischaracterize the Court's opinion regarding the "frequency, regularity, proximity" causation standard applicable in asbestos cases. The Court

did not depart from this standard, nor did it "lower" this standard in asbestos cases involving the disease mesothelioma. The Court cited and followed the Supreme Court's decision in *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007), which in turn adopted the substantial factor standard utilized in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162–63 (4th Cir. 1986). *Jolly*, 2021 WL 3889962, at *4. To wit: "'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.'" *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727 (quoting *Lohrmann*, 782 F.2d at 1162-63).

The panel found that Dale Jolly's exposure to Fisher/Crosby valves met the *Henderson/Lohrmann* substantial factor test because his duties as a mechanical inspector "regularly brought him within close proximity to his co-workers' removal of asbestos gaskets from valves," including "a 'good many' Crosby valves and '[a] lot of' Fisher valves." *Jolly*, 2021 WL 3889962, at *5. Dale saw and inhaled visible asbestos dust from Fisher/Crosby valves and those exposures occurred regularly and consistently over 4 years at three Duke power stations where Dale worked shutdowns. *Id.*

Fisher/Crosby urged the Court to find that Dale's asbestos exposure from their valves was comparable to the 10 to 15 exposures that failed to establish substantial factor causation in *Lohrmann*, but the panel noted that the facts of this case are distinguishable from *Lohrmann*. *Id.* at *5 n.11. *Lorhmann* involved

asbestosis, which, according to the Jollys' evidence, requires much higher exposures:

> [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.

Id.

This factual distinction between the exposure levels that can cause asbestosis and mesothelioma has been recognized by the Fourth Circuit, which decided *Lohrmann*. During the pendency of this appeal, the Middle District of North Carolina acknowledged that the nature of the disease process was a consideration in *Lohrmann*. In *Finch v. Covil Corp.*, 388 F. Supp. 3d 593 (M.D.N.C. 2019), *aff'd*, 972 F.3d 507 (4th Cir. 2020), the district court noted that "*Lohrmann* stated the test in light of the evidence in that case about asbestosis and the requisite level of exposure, evidence which was quite different from the evidence in this mesothelioma case." *Id.* at 618. *Lohrmann* "upheld a sufficiency of the evidence standard that was tailored to the specific disease at issue in the case, the medical testimony on the degree of exposure required to produce that disease, and the characteristics of the place where the plaintiff was exposed to asbestos that bore on causation of the disease." *Id.* at 619.

In *Finch*, the defendant appealed to the Fourth Circuit, contending "that the district court's jury instruction on substantial factor causation impermissibly reduced Mrs. Finch's evidentiary burden" because it allowed the jury to consider that mesothelioma is caused by relatively low exposure levels. 972 F.3d at 512. The

Fourth Circuit disagreed. *Id.* at 513-14. It found that the causation instruction gave proper guidance to the jury in that it "required the jury to consider how much asbestos-containing insulation 'sold by Covil' was in close proximity to Mr. Finch's daily work, whether this insulation actually created significant amounts of asbestos dust, and how long Mr. Finch worked at the plant." 972 F.3d at 514. In a footnote, the Fourth Circuit acknowledged the difference between the exposure levels needed for asbestosis and mesothelioma:

> As the [trial] court detailed, asbestos exposure can result in two distinct diseases: asbestosis and mesothelioma. Greater exposure to asbestos is required to contract asbestosis as compared with mesothelioma. Therefore, an evidentiary instruction on asbestosis theoretically requires proof of greater exposure than mesothelioma.

Id. at 514 n.2. The Fourth Circuit found, however, that the jury instructions "clearly comport[ed] with *Lohrmann*, regardless of the disease." *Id.*

Indeed, *Lohrmann* upheld a sufficiency of the evidence standard that was tailored to the specific disease at issue in the case (asbestosis), the medical testimony on the degree of exposure required to produce that disease (substantial), and the characteristics of the place where the plaintiff was exposed to asbestos (a shipyard), that bore on causation of the disease:

> 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. **Such a rule is in keeping with the opinion of the plaintiff's medical expert who testified that even thirty days exposure, more or less, was insignificant as a causal factor in producing the plaintiff's disease.**

782 F.2d at 1162-63 (emphasis added).

The panel's opinion is in absolute alignment with the substantial factor causation standard of *Henderson/Lohrmann*. The jury, the circuit court, and all three members of the panel agreed that that standard was met by the facts of Dale's exposure to asbestos gaskets from Fisher/Crosby valves. The panel's acknowledgement of the factual distinctions between *Lohrmann* and this case do not undermine its causation analysis. Rather, the panel's conclusions are consistent with the principles set forth in *Lohrmann* and recent cases like *Finch*. This Court's affirmance of the trial court should not be disturbed.

ii. The Court properly declined to conduct a comparative analysis of Dale Jolly's asbestos exposures.

Fisher/Crosby complain about the Court's determination that substantial factor causation does not require the Court to consider and compare Dale's exposures to other asbestos products. While they accuse the Court of adopting Pennsylvania law, the Court has once again followed *Lohrmann* itself.

The frequency, regularity, and proximity factors were adopted as the standard for demonstrating substantial factor causation in a multiple-defendant asbestos case. *Lohrmann*, 782 F.2d at 1158 (the plaintiff "claims that he now has asbestosis resulting from exposure to various asbestos-containing products of nineteen named defendants"); *see also id.* at 1162 (explaining that asbestos cases typically involve a lot of defendants that are resolved through settlement, summary judgment, and trial). *Lohrmann* therefore provides the standard for a plaintiff "[t]o

support a reasonable inference of substantial causation from circumstantial evidence" when there are many defendants alleged to have caused the plaintiff's disease. *Id.* That standard does not involve counting up the number of defendants or comparing exposures to different types of asbestos products. Rather, it is that "there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." *Id.* at 1162-63.

As noted by the panel, Fisher/Crosby's comparative exposure argument is "based on the faulty premise that a 'but-for' standard of causation applies to mesothelioma cases when all *Lohrmann* requires is substantial causation shown by frequent, regular, and proximate exposure to the defendant's products." *Jolly*, 2021 WL 3889962, at *10. Indeed, the substantial factor test is an alternative to the but-for causation standard. Under the but-for standard, "[t]he defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it." Keeton, *Prosser and Keeton on The Law of Torts* 266, § 41 (5th ed. 1984); *see also Goodman v. Wenco Foods, Inc.*, 423 S.E.2d 444, 452 (N.C. 1992) ("The cause producing the injurious result must be in a continuous sequence, without which the injury would not have occurred . . . ."); *Bramlette v. Charter-Med.-Columbia*, 393 S.E.2d 914, 916 (S.C. 1990) ("Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence.").

The "but-for" test fails, however, where "the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them . . .." Prosser & Keeton, at 268. Therefore, when there are multiple causes, a "defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about." *Id.* at 267.

There are typically multiple sources of asbestos exposure that combine to produce a single asbestos-related disease, making the but-for causation test unworkable in the asbestos context. "Certainly, if the traditional but-for definition of proximate cause was invoked, the injured party would virtually never be able to recover for damages arising from mesothelioma in the context of multiple exposures, because injured parties would face the difficult if not impossible task of proving that any one single source of exposure, in light of other exposures, was the sole but-for cause of the disease." *Ford Motor Co. v. Boomer*, 736 S.E.2d 724, 729 (Va. 2013). Accordingly, the substantial factor test is used "in order that no supplier enjoy a causation defense solely on the ground that the plaintiff probably would have suffered the same disease from inhaling fibers originating from the products of other suppliers." *Mavroudis v. Pittsburgh-Corning Corp.*, 935 P.2d 684, 689 (Wash. App. 1997).

It is contrary to the substantial factor test to compare exposures in the manner advocated by Fisher/Crosby. A comparison of exposures from different products and different defendants creates a risk of absolving culpable defendants

merely because there were other concurrent causes of the disease. This same problem led courts to reject the but-for causation standard when there are multiple causes that combine to produce a single injury. Under Fisher/Crosby's preferred approach, the more asbestos exposures a person has, the less likely that *any* asbestos product manufacturer will be held responsible.

The panel correctly held that the "frequency, regularity, and proximity" test should not be used as a comparative test to distinguish between causative exposures. The panel did not follow other states' law in coming to this conclusion. Rather, the panel followed the logic of *Lohrmann*, as have other courts that have similarly concluded that comparing exposures is contrary to *Lorhmann*'s substantial factor standard. *See, e.g., Tragarz v. Keene Corp.*, 980 F.2d 411, 425 (7th Cir. 1992) (use of a comparative approach "does not promote the purposes of the substantial factor test, which is aimed at alleviating the inequities that result when applying the but-for test in a multi-defendant case, not at creating such inequities"); *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1051 n.13 (Pa. 2016) (the "frequency, regularity, and proximity" test is not "part of a comparative assessment of differing exposures"); *Robertson v. Doug Ashy Bldg. Materials, Inc.*, 168 So. 3d 556, 564 (La. App. 2014) ("Simply because a plaintiff suffered asbestos exposure while working only a short period for an employer and had longer exposures while working for others, it cannot be said the relatively short asbestos exposure was not a substantial factor in causing his mesothelioma."); *John Crane, Inc. v. Linkus*, 988 A.2d 511, 521 (Md. App. 2010) ("It is clear … that substantial factor causation does not turn on

comparative faults. The question is whether each contributing cause, standing alone, is a substantial factor.").

B. The Court properly upheld the admission of Dr. Frank's causation testimony.

In protesting the panel's decision to uphold the admission of Dr. Frank's causation testimony, Fisher/Crosby fail to acknowledge the trial court's considerable discretion to admit or exclude expert testimony. Under South Carolina law, "[a] trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support, or "when the ruling is manifestly arbitrary, unreasonable, or unfair." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

The panel concluded that "the circuit court acted well within its discretion in admitting the experts' testimony into evidence." *Jolly*, 2021 WL 3889962, at *13. Fisher/Crosby do not challenge this conclusion or contend that Judge Toal abused her discretion in admitting Dr. Frank's causation opinions. They ignore the standard of review completely. Fisher/Crosby do not address the factual and scientific foundation for Dr. Frank's opinions or argue that it is lacking. Instead, they reiterate the same mischaracterizations of his testimony that the Court has already rejected, and fault the panel for relying on Dr. Frank's affidavit to evaluate his scientific methodology.

The panel correctly rejected Fisher/Crosby's inaccurate depictions of Dr. Frank's testimony. The panel examined Fisher/Crosby's contentions at length and found that they consistently mischaracterized his testimony. For example, the Court noted that while "Appellants alleged that under cross-examination, Dr. Frank testified each of approximately 60 exposures was a substantial cause of Dale's mesothelioma . . .. [w]e disagree with Appellant's characterization of Dr. Frank's testimony." *Jolly*, 2021 WL 3889962, at *9 n.17. The Court found that in context "[i]t is clear that Dr. Frank rejected the 'any' characterization and was clarifying that collectively, all of the exposures substantially caused Dale's mesothelioma." *Id.* The Court further determined that Dr. Frank distinguished between exposures that contributed to Dale's total dose of asbestos and exposures that were substantial factors in causing his mesothelioma. *Id.*

In addition, as the panel noted, "Respondents' experts were guided by the facts specific to Dale's exposure to Appellants' products in forming their opinions concerning causation." *Id.* at *10.[1] Indeed, Dr. Frank's scientific method focuses on evaluating all factual details of the plaintiff's exposure to the defendant's product, including the level, duration, frequency, and proximity of exposure. *Id.* As noted, those factors are remarkably similar to the *Henderson/Lohrmann* factors. *Id.* Dr. Frank also relied on "numerous peer-reviewed, published epidemiological studies, case series, and case reports," as well as other scientific criteria impacting

[1] To the extent Fisher/Crosby complain about Dr. Maddox's methodology and conclusions, the panel correctly found that his opinions were reliably based on the exposure evidence in this case and accepted criteria for attributing mesothelioma to asbestos exposure. *Id.* at *10-11.

causation of disease, and follows the weight-of-the-evidence methodology used by national and international public health organizations for evaluating the health effects of asbestos. *Id.* at *11-12.

The Court was entirely correct to consider Dr. Frank's explanation of his scientific approach in his affidavit. Fisher/Crosby suggest that this was improper because the jury did not rely on his affidavit during its deliberations. Dr. Frank's affidavit was, in fact, an exhibit at trial. (R. pp. 2734-2949). Moreover, the admissibility of Dr. Frank's causation opinion is a matter for the court, not the jury. Under Rule 702, SCRE, the trial court's gatekeeping function ensures that "the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *White*, 382 S.C. at 270, 676 S.E.2d at 686.

Fisher/Crosby have failed to show (or even contend) that there was any prejudicial abuse of discretion in the admission of Dr. Frank's testimony. The trial court properly analyzed the reliability of his opinion under the standards of Rule 702, SCRE, and *State v. Council*, 335 S.C. 1, 19-20, 515 S.E.2d 508, 517-18 (1999). This Court agreed that his opinion met the reliability criteria for expert testimony set forth in South Carolina law. *Jolly*, 2021 WL 3889962, at *11-13. Fisher/Crosby's complaints about Dr. Frank were properly rejected by the panel.

C. The Court properly looked to the exposure evidence in evaluating the *Henderson* causation factors.

Fisher/Crosby also contend that expert testimony is necessary to meet the *Henderson* causation factors, attacking the Court's conclusion that the factual

evidence regarding Dale's exposure to asbestos from Fisher/Crosby valves—consisting of testimony from Dale and his co-worker and documents—"by itself, meets *Henderson*'s substantial factor test." *Jolly*, 2021 WL 3889962, at *5. Fisher/Crosby entirely ignore the Court's corollary statement that "the expert testimony is sufficient to show both general and specific medical causation." *Id.* The Court did require expert causation evidence and was satisfied that the Jollys had provided such evidence.

In arguing that Dale's testimony is insufficient to meet the *Henderson* causation factors, Fisher/Crosby's primary complaint is a reiteration of its contention that Dale's exposure to asbestos from other brands of valves is relevant to the causation analysis. Fisher/Crosby argue that Dale's general testimony about his exposure to asbestos gaskets on valves is somehow deficient because their valves account for only part of his valve exposure. Petition, at 13. This argument fails to account for the evidence that Dale worked around a large number of Fisher/Crosby valves. As the Court observed, "Dale recounted that he regularly and consistently worked in the vicinity of other workers removing asbestos gaskets from a 'good many' Crosby valves and '[a] lot of' Fisher valves." *Jolly*, 2021 WL 3889962, at *5. This evidence easily meets the *Henderson/Lorhmann* requirement that the plaintiff "show 'more than casual or minimum contact with the product.'" *Jolly*, 2021 WL 3889962, at *4 (quoting *Lohrmann*, 782 F.2d at 1162). Fisher/Crosby have no answer to this.

Fisher/Crosby further complain that the panel "misapprehended the use of

the term 'flange gasket'" as referring to an internal component of its valves. Petition, at 14. The evidence established, however, that Fisher/Crosby valves utilized internal asbestos gaskets and that Dale was present when those internal gaskets were removed from the valves. (R. pp. 488, 874, 877). Fisher's corporate representative verified that the internal gasket needed to be removed and replaced whenever the valve was opened for inspection or repairs. (R. pp. 1213-1214). The Court accurately noted that Dale had exposure to both internal and external asbestos gaskets on Fisher/Crosby valves.

Once again, Fisher/Crosby disregard the standard of review. Its arguments advance its preferred view of the evidence, ignoring that upon review of the denial of JNOV the evidence must be viewed in the light most favorable to the Jollys, as they are the nonmoving party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). This Court will reverse the lower court's denial of directed verdict or JNOV only when there is no evidence to support the ruling below. *Creech v. South Carolina Wildlife and Marine Resources Dep't,* 328 S.C. 24, 491 S.E.2d 571 (1997) (citing *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994)). Fisher/Crosby certainly have not shown that the fact witness testimony and documents establishing Dale's regular exposure to asbestos from Fisher/Crosby valves amounts to "no evidence." The panel correctly upheld the jury's determination that Dale had regular, frequent, and proximate exposure to asbestos from Fisher/Crosby valves such that these exposures were a substantial factor in causing his mesothelioma.

II. The Court did not shift the burden to Fisher/Crosby on design defect.

Fisher/Crosby fault the Court for its comment that "there was no evidence that a metal gasket was more expensive than an asbestos gasket," contending that this amounts to improperly shifting the burden of proof on the design defect claim. *Jolly*, 2021 WL 3889962, at *17. This argument takes the Court's statement completely out of context. The Court upheld the circuit court's "conclu[sion] that the evidence created a fact issue for the jury as to the existence of a reasonable alternative design" on the basis of Fisher's own testimony. The Court found that "a metal gasket was a candidate for the jury's consideration of a reasonable alternative design, given that Dumistra seemed to consider its functionality and safety to be equivalent to that of asbestos gaskets." *Id.*

Far from shifting the burden, the Court merely observed that there was nothing, such as cost, to prevent the jury from considering metal gaskets to be a reasonable alternative design to asbestos gaskets. Furthermore, any evidence of increased cost of metal gaskets would not have made a difference to the Court's opinion. "Even if there had been such evidence, a juror 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." *Jolly*, 2021 WL 3889962, at *17 (citing *Branham v. Ford Motor Co.*, 390 S.C. 203, 225 n.16, 701 S.E.2d 5, 16 n.16 (2010); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 543, 462 S.E.2d 321, 328 (Ct. App. 1995); Restatement

(Third) of Torts: Prods. Liab. § 2 cmt. f (1998)). Fisher/Crosby do not dispute this legal conclusion.

The evidence of alternative reasonable design went even beyond metal gaskets and included gaskets made from graphite or Teflon. In fact, Dumistra agreed that there was *absolutely no reason* for Dale to be exposed to asbestos gaskets and packing from Fisher valves because "[s]omething else could have been selected." (R. p. 1134). Fisher/Crosby have failed to show that there was anything improper about the Court's opinion regarding the viability of the Jollys' design defect claim.

III. The Court properly determined that the circuit court did not abuse its discretion in granting a new trial *nisi additur*.

Fisher/Crosby again ignore the standard of review in arguing against a new trial *nisi additur*. This Court properly reviewed the circuit court's grant of a new trial *nisi* for abuse of discretion. *Jolly*, 2021 WL 3889962, at *19. Indeed, the panel quoted the Supreme Court's most recent guidance on this standard: "the court of appeals ignored the applicable abuse-of-discretion standard of review, instead focusing its inquiry on a de novo evaluation of whether, in its view, there was sufficient justification for 'invading the jury's province.' This was error." *Jolly*, 2021 WL 3889962, at *20 (quoting *Riley v. Ford Motor Co.*, 414 S.C. 185, 194, 777 S.E.2d 824, 829 (2015)).

Fisher/Crosby would have this Court commit the very reviewing error found in *Riley*. It asks the Court to second-guess the circuit court and find its conclusions

"speculative." This Court considered this argument and reviewed the circuit court's reasoning, particularly the reliance on Dr. Frank's undisputed testimony that he had seen partial medical bills of $142,000. The Court disagreed with Fisher/Crosby's characterization of the circuit court's reasoning as "speculative," and agreed with the circuit court that "[i]t is more likely that the jury awarded Dale $142,000 for medical expenses and the remainder of the $200,000 ($58,000) for non-economic damages" than that the jury simply ignored or failed to credit Dr. Frank's testimony. *Jolly*, 2021 WL 3889962, at *21.

As the panel discussed, the case law relied on by Fisher/Crosby does not establish that the circuit court speculated in analyzing the jury's damages award. The cases of *Jenkins v. Few*, 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2010) and *Moore v. Moore*, 360 S.C. 241, 257, 599 S.E.2d 467, 475 (Ct. App. 2004), are distinguishable on their facts and at most stand for "the time-honored rule that no factual or legal determination may be based on speculation." *Jolly*, 2021 WL 3889962, at *21. The Court concluded that "unlike the posture of this court in *Jenkins* and *Moore*, the circuit court in the present case possessed concrete information from the evidence on which it could base its observation about the jury's award of medical costs." *Id*.

Further, this Court properly looked at the entirety of the circuit court's reasons for granting a new trial *nisi*. *Jolly*, 2021 WL 3889962, at *22. It upheld that reasoning as grounded in the evidence, noting that the circuit court "thoroughly summarized the evidence supporting an increased verdict" and that "[t]he essence of the circuit court's ruling was the inadequacy of the overall verdict in light of the

evidence presented at trial." *Id.* This is consistent with *Riley*, where there was no abuse of discretion in granting a new trial *nisi* to triple the jury's award when the decision was based on the evidence. 414 S.C. at 189, 194, 777 S.E.2d at 827, 829-30.

The panel properly concluded that "the circuit court acted well within its discretion in granting Respondents' motion for new trial *nisi additur*." *Jolly*, 2021 WL 3889962, at *24. Fisher/Crosby's critiques of the Court's opinion on this issue do not break any new ground. Its continued disagreement with both the circuit court and this Court about the propriety of a new trial *nisi* does not provide a proper basis for rehearing.

IV. The Court properly upheld the circuit court's rulings on setoff and trial subpoenas.

A. Setoff

The Court rejected all of Fisher/Crosby's setoff arguments at length. *Jolly*, 2021 WL 3889962, at *24-28. As grounds for rehearing, Fisher/Crosby argue only that the Court's opinion "contradicts" the so-called "plain language" of S.C. Code Ann. § 15–38–50 that a release with one defendant "reduces the claim against the others to the extent of any amount stipulated by the release . . . ." They claim that section 15–38–50 mandates that the entire amount of the release be setoff against the verdict regardless of how the Jollys have chosen to allocate the release among their personal injury, wrongful death, and loss of consortium claims.

Fisher/Crosby's argument relies on a selective quotation of section 15–38–50 that omits the rather crucial language that a setoff may only be had for the "same

injury or the same wrongful death" as the claims brought against the trial defendant. Fisher/Crosby would therefore have this Court grant a setoff for release of the Jollys' wrongful death claims that *were not tried* against Fisher/Crosby, as only Dale's personal injury claim and his wife's loss of consortium claim were considered by the jury.

The Court disagreed with Fisher/Crosby's view, explaining that under established law "'[a] nonsettling defendant is entitled to credit for the amount paid by another defendant who settles *for the same cause of action*.'" *Jolly*, 2021 WL 3889962, at *25 (quoting *Riley*, 414 S.C. at 195, 777 S.E.2d at 830) (emphasis added by the Court)). Of course, "when the prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law." *Id.* (quoting *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012)).

The circuit court properly recognized the Jollys' internal allocation of their settlement proceeds as one-third each to their personal injury, loss of consortium, and wrongful death claims. *Jolly*, 2021 WL 3889962, at *25, *28. Such internal allocations are permitted under section 15–38–50 because "our case law favors a plaintiff's ability to apportion settlement proceeds 'in the manner most advantageous to it.'" *Id.* at *25 (quoting *Riley*, 414 S.C. at 197, 777 S.E.2d at 831).

The Court also "reject[ed] Appellants' argument that the amount Respondents allocated to a future wrongful death claim compensates for the same injuries at issue in the present case." *Id.* at *27. Recovery for personal injuries

sustained by the decedent during his lifetime (also recoverable through a survival claim after death) are distinct from wrongful death claims for damages sustained by the beneficiaries as a result of the death. *Id.* (citing S.C. Code Ann. § 15-5-90 (2005); *Scott v. Porter*, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000)). The Jollys' internal allocation did not result in a double-recovery because no damages suffered by Dale's beneficiaries were recovered from Fisher/Crosby at trial. *Id.* at *28.

Fisher/Crosby largely ignore the Court's reasoning and instead cite case law from Florida and California that they never cited in their opening or reply briefs. The Court should not consider Fisher/Crosby's new argument about the approach to setoff used in two other jurisdictions. "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)).

Predictably, the newly cited cases do not address the factual scenario presented here in which plaintiffs have released *different* claims than those brought against the trial defendant. The only case discussed by Fisher/Crosby, *Dionese v. City of W. Palm Beach*, 500 So. 2d 1347 (Fla. 1987), involved personal injury and loss of consortium claims brought by a husband and wife against multiple defendants. The wife's injuries were not fatal and there were no future or wrongful death claims released. Plus, the internal allocation of the settlements between the

husband's and wife's claims was unevenly divided and strangely weighted toward the husband's loss of consortium claims. *Id.* at 1348. This is not comparable to the Jollys' proportional allocation of one-third to each of their three claims. The holding of *Dionese* is also contrary to South Carolina's policy in favor of allowing plaintiffs to allocate settlement proceeds in accordance with their best interests. *Riley*, 414 S.C. at 196-97, 777 S.E.2d at 830-31.

The Court did not overlook or misapprehend arguments that Fisher/Crosby failed to make until now. In any event, their resort to other states' inapposite case law is unavailing and does not provide grounds for rehearing on the issue of setoff.

B. Subpoenas

Fisher/Crosby do not challenge the Court's opinion that the circuit court had authority to compel their corporate representatives to testify at trial under Rule 45, SCRCP. They merely complain that they did not make a "general appearance" by which they submitted to jurisdiction. While the Court mentioned that the circuit court had referenced their general appearance, the panel based its opinion on a close reading of the language of Rule 45 that only allows *non-parties* to quash a trial subpoena. *Jolly*, 2021 WL 3889962, at *29. The Court found that the subpoena power extends beyond South Carolina's borders with regard to parties in cases before the South Carolina circuit courts. *Id.* This conclusion is based on the text and the comments to Rule 45, which "confirms that the legislature intended for South Carolina circuit courts to have subpoena power over parties to proceedings over which those courts preside." *Id.* at *30. This power is not based on jurisdictional

principles, but on "the broad discretionary power a circuit court must exercise over parties to proceedings before it in order to effectively dispense justice." *Id.* (citing *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 103, 674 S.E.2d 524, 530 (Ct. App. 2009); *S.C. Dep't of Highways & Pub. Transp. v. Galbreath*, 315 S.C. 82, 85, 431 S.E.2d 625, 628 (Ct. App. 1993)).

With regard to service of the subpoenas, Fisher/Crosby protest that they did not abandon their argument that their counsel did not know that they were accepting subpoenas when they signed for the FedEx packages addressed to Fisher/Crobsy. The panel accurately noted, however, that this point was only raised in one sentence in a footnote, with no supporting authority, and that such cursory treatment amounts to abandonment under a long line of South Carolina authority. *Jolly*, 2021 WL 3889962, at *31. Fisher/Crosby contend that this point is only a "fact," not an argument, that their attorneys did not know the package contained trial subpoenas. This is a strange distinction given that they have, in their Petition, raised this point in an attempt to avoid effective service of the trial subpoenas. They still fail to explain the legal significance of this "fact," but to the extent that they complain that attorney signatures should not be sufficient to accept service when the contents of a package are unknown, this is an overlooked argument that cannot be raised on rehearing. *See* Toal et al., *supra*, at 309.

V. Fisher/Crosby have failed to show that the Court should grant rehearing on any of their points challenging the sufficiency of the evidence.

Fisher/Crosby raise three final issues under one heading, each of which have to do with the sufficiency of the evidence regarding the Jollys' failure-to-warn and negligence claims. They once again fail to acknowledge the deferential standard of review of JNOV rulings, which requires this Court to uphold the verdict "'unless no evidence reasonably supports the jury's findings.'" *Jolly*, 2021 WL 3889962, at *13 (quoting *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003)). "In other words, neither the circuit court nor this court may re-weigh the evidence in determining whether it is necessary to set aside a jury's verdict." *Id.*

First, Fisher/Crosby re-urge their view that the dangers of asbestos-containing gaskets were "open and obvious" to Dale. The jury disagreed and, as the circuit court and the panel found, the evidence supports their finding that the dangers of asbestos gaskets were not generally known in the early 1980s when Dale was around Fisher/Crosby valves at Duke. As the panel noted, "Duke distinguished between asbestos insulation, which it warned employees about, and asbestos gaskets, which Duke considered harmless." *Id.* at *15. Fisher/Crosby want the Court to hold that because Dale knew about some dangers of asbestos insulation, he would not have heeded a warning about asbestos gaskets. Not only does the evidence show that Duke was not warning about asbestos gaskets, *id.* at *15-16, and that Dale did not know about the dangers of asbestos gaskets, the jury also heard Dale's testimony that Dale *followed* Duke's warnings about asbestos

insulation and did not remove it himself. (R. p. 535, lines 1-8). The panel correctly held that the reasonable inferences supported the jury's findings and that "the circuit court properly upheld the jury's verdict on Respondents' failure-to-warn claims." *Jolly*, 2021 WL 3889962, at *16.

Second, with regard to their sophisticated intermediary defense, Fisher/Crosby claim that the Court imposed an unreasonable burden by requiring them to "identify and disprove at trial every possible method of warning" when there was supposedly no evidence that they could have warned on the outside of their valves. Petition, at 27. In fact, the evidence showed that there was already a place on the valve for the manufacturer name and serial number, *see* Respondents' Final Br., p. 29, raising a reasonable inference that an asbestos warning could have placed in the same location. However, this dispute over one method of warning is irrelevant given the Court's finding that Fisher/Crosby could have warned on the replacement gaskets and that "Dale would have seen a warning on a replacement gasket when verifying the number on that gasket." *Jolly*, 2021 WL 3889962, at *15. There were additional reasons that the panel found that Fisher/Crosby failed to prove that they "actually relied on the intermediary to convey warnings to end users." *Jolly*, 2021 WL 3889962, at *14. Because Fisher/Crosby "did not consider the gaskets in their valves to be dangerous[,] [t]his belies Appellants' claims that they relied on Duke to warn Dale of the dangers of asbestos gaskets." *Id.* at *15.

Third and finally, Fisher/Crosby contend that the Jollys lacked evidence to establish the standard of care for negligence. As discussed by the Court, Dr. Frank

testified that "by 1980, OSHA regulations required products containing asbestos to carry a warning label and Appellants were subject to these regulations." *Id.* at *19. While Fisher/Crosby challenge the use of OSHA regulations for establishing the standard of care, they rely on case law from other jurisdictions that contradicts South Carolina law that "'[e]vidence of industry standards, customs, and practices is 'often highly probative when defining a standard of care.'" *Id.* at *18 (quoting *Elledge v. Richland/Lexington Sch. Dist. Five*, 341 S.C. 473, 477, 534 S.E.2d 289, 290 (Ct. App. 2000)). Further, the standard of care is set by South Carolina law: "'A manufacturer who incorporates into his product a component made by another has a responsibility to test and inspect such component, and his negligent failure to properly perform such duty renders him liable for injuries proximately caused as a consequence.'" *Id.* at *19 (quoting *Duncan v. Ford Motor Co.*, 385 S.C. 119, 133, 682 S.E.2d 877, 884 (Ct. App. 2009)). Fisher/Crosby fail to acknowledge this controlling law. And they have failed to show any lack of evidence regarding the standard of care or their deviation therefrom.

CONCLUSION

Fisher/Crosby have provided no reason for the Court to reconsider any issue in this case. They have failed to demonstrate that the Court overlooked or misapprehended anything in its opinion affirming the circuit court on all issues. Accordingly, their petition for rehearing should be denied.

Dated: December 1, 2021

Respectfully submitted,

s/Theile B. McVey

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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

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

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

vs.

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

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

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I certify that I have served the Respondent's Return to Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on December 1, 2021, addressed to their attorneys of record as follows:

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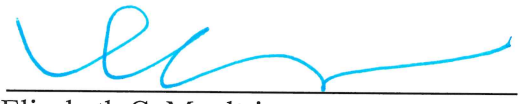

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December 1, 2021

The Honorable Jenny A. Kitchings
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Re: *Jolly v. General Electric; Crosby Valves and Fisher Controls are Appellants*
Case No.: 2016-002611

Dear Ms. Kitchings:

Enclosed herewith for filing please find Respondent's Return to Petition for Rehearing and my Proof of Service for same. By copy of this letter I am serving a copy of this filing on Appellants.

Thank you for your kind consideration and cooperation. If you have any questions or concerns, please do not hesitate to call.

Yours very truly,

Elizabeth Cason Moultrie
Senior Paralegal to John D. Kassel,
Theile B. McVey, and Jamie Rae Rutkoski

ECM:bmh

Enclosures

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