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.

REPLY IN SUPPORT OF PETITION FOR REHEARING

This Court should grant rehearing and reverse the trial court's rulings. Plaintiffs primarily argue in their return that the Court should not apply a "but-for" causation test, that mesothelioma cases involve a different standard or proof as compared to asbestosis cases, and that courts should not analyze all the plaintiff's exposures in determining whether a particular exposure is a substantial factor in causing the plaintiff's disease. Plaintiffs' arguments are contrary to the law. Further, Appellants Fisher Controls International LLC ("Fisher") and Crosby Valve, LLC ("Crosby") do not advocate a "but-for" causation standard; rather, they argue the Court must apply the substantial factor causation standard adopted by the South Carolina Supreme Court for use in mesothelioma cases. Such a standard requires a comparative analysis to determine which exposures are substantial factors and which are insubstantial, and the standard is the same for all asbestos-related disease cases.

As for the remaining issues, rather than respond to the arguments raised by Fisher and Crosby, Plaintiffs largely repeat the findings in this Court's opinion. *See Jolly v. Gen. Elec. Co.*, Op. No. 5858 (S.C. Ct. App. filed Sept. 1, 2021) (Howard Adv. Sh. No. 30 at 139). As Fisher and Crosby explained in their petition for rehearing, this Court, respectfully, overlooked and misapprehended the facts and applicable law. The Court should grant rehearing and reverse the trial court's rulings.

ARGUMENT

I. The substantial factor causation standard requires the same level of proof in asbestosis and mesothelioma cases and requires a comparative exposure analysis.

Plaintiffs assert that their proximate causation burden is satisfied because they presented some evidence that Mr. Jolly worked around valves and that the valves he worked around included Fisher valves and Crosby valves. Plaintiffs also assert that a comparative analysis—in which exposures to Fisher valves and Crosby valves are considered in the context of other exposures—is somehow incompatible with substantial factor causation. The Court should reject Plaintiffs' arguments. The substantial factor causation test adopted by the Fourth Circuit in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), and the South Carolina Supreme Court in *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007), requires more than the "any exposure" evidence presented by Plaintiffs in this case. Moreover, a comparative analysis is essential to determine which factors among many are "substantial factors" in disease causation. Accordingly, this Court should grant rehearing and reverse the trial court's denial of judgment notwithstanding the verdict ("JNOV").

A. The substantial factor causation standard regarding asbestos-related diseases is already a reduced evidentiary burden which should not be lowered further on the ground that mesothelioma purportedly develops from lower exposures than asbestosis.

Plaintiffs make a straw-man argument, contending "but-for" causation does not apply in asbestos litigation. (Return at 5–9). However, Fisher and Crosby have not argued the Court should apply a "but-for" causation standard. Rather, the Court should recognize that the substantial factor causation test created by the Fourth Circuit in *Lohrmann* and adopted by the South Carolina Supreme Court in *Henderson* was a compromise which maintained the requirement that asbestos plaintiffs prove substantial factor causation, but lowered the ordinary evidentiary burden for showing causation in asbestos-related disease cases. *Lohrmann* and *Henderson* require asbestos plaintiffs to present sufficient evidence from which a juror may find a reasonable probability that exposures attributable to a particular defendant were a substantial factor in causing the plaintiff's disease. Plaintiffs failed to meet their burden here. Instead, they rely on vague evidence that Mr. Jolly "regularly and consistently" worked around "valves" in general and that the valves included, for example, a "good many Crosby valves." (Return at 2, 12). Plaintiffs' arguments and the trial court's and this Court's rulings improperly lower an asbestos plaintiff's burden to prove causation to a mere possibility of causation due to "any exposure." These arguments and rulings are inconsistent with the requirement that Plaintiffs prove substantial factor causation.

The general substantial factor causation standard is not exclusively an asbestos litigation-specific standard. It is a widely-used tort causation standard applied where two or more forces combine to cause an injury. *See, e.g.*, *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006) (discussing substantial factor causation in a case arising from a train accident); *see also* Restatement (Second) of Torts §§ 431–33. The traditional substantial factor causation standard requires consideration of "the number of other factors which contribute in

producing the harm and the extent of the effect which they have in producing it" to "determin[e] whether the actor's conduct is a substantial factor in bringing about harm to another." Restatement (Second) of Torts § 433. It further requires a plaintiff to prove that a defendant's conduct was a *probable* cause of his injury, not merely a *possible* cause. *See Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 (4th Cir. 1982); *see also State v. Exxon Mobil Corp.*, 406 F. Supp. 3d 420, 453 (D. Md. 2019) ("Under the substantial factor test, the requisite causation may be found if it is 'more likely than not' that the defendant's conduct was a substantial factor in producing the plaintiff's injuries.").

Recognizing that asbestos plaintiffs cannot prove their claims under traditional substantial factor causation requirements (since they cannot identify which fibers started the disease process), the Fourth Circuit created the "frequency, regularity, and proximity" test in *Lohrmann*. 782 F.2d at 1162–63. In doing so, the Fourth Circuit maintained the requirement under Maryland substantial factor causation law that a plaintiff prove a defendant was a *probable* cause of his disease: "[t]o establish proximate causation in Maryland, the plaintiff must introduce evidence which allows the jury to reasonably conclude that it is *more likely than not* that the conduct of the defendant was a *substantial factor* in bringing about the result." *Id.* at 1162 (emphases added).[1] The Fourth Circuit elaborated that *reasonable probability* is the proper test for assessing the sufficiency of circumstantial evidence in establishing proximate causation in asbestos cases. *Id.* at 1163 (explaining a causation finding must be based on "evidence of a reasonable and rational nature

[1] Maryland has adopted the traditional substantial factor causation standard in tort cases. *See Lohrmann*, 782 F.2d at 1162 ("To establish proximate causation in Maryland, the plaintiff must introduce evidence which allows the jury to reasonably conclude that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. This is the standard set forth in the Restatement (Second) of Torts § 431 . . . ." (citing *Robin Express Transfer, Inc. v. Canton R.R.*, 338 A.2d 335, 343 (Md. Ct. Spec. App. 1975))).

upon which a jury can make the necessary inference there is a causal connection between a defendant's action and a plaintiff's injury" (citations omitted)).

The evidentiary standard advocated by Plaintiffs in this case—that evidence of "regularly and consistently" working around "a good many" Crosby valves is sufficient—reduces the causation standard to a mere possibility.[2] This proposed standard would impose "not just strict liability but absolute liability against any company whose asbestos-containing product crossed paths with the plaintiff throughout his entire lifetime," *Bostic v. Georgia-Pacific Corp*., 439 S.W.3d 332, 339 (Tex. 2014). Indeed, Plaintiffs' arguments effectuate strict or absolute liability: because Mr. Jolly worked around valves in general and some unidentified portion of those valves were Crosby valves (only 15% of which had any asbestos-containing components[3]), they argue Crosby must be liable for causing Mr. Jolly's mesothelioma. But Plaintiffs have not shown that Crosby (or Fisher) was a *probable* cause of Mr. Jolly's disease.

The fact that Mr. Jolly has mesothelioma, not asbestosis, does not affect the evidentiary analysis. Plaintiffs mischaracterize the issue before the Fourth Circuit in *Finch v. Covil Corp.*, 972 F.3d 507, 512 (4th Cir. 2020). (Return at 3) (arguing the appellant in *Finch* "contend[ed] '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***." (emphasis added)). As the Fourth Circuit explained in its opinion, the issue raised by the appellants was whether the district court was required to repeat the

[2] Plaintiffs had the burden to prove their claims against Fisher *and* against Crosby. Fisher and Crosby are different companies and separate defendants in this case. "Fisher/Crosby" is not an entity or a defendant, and the evidence must be evaluated as to each, not jointly as "exposure to Fisher/Crosby valves." *See* (Return at 2).

[3] (R. 1504) (Crosby's corporate representative testifying that "probably 85 percent" of Crosby valves sold to Duke "did not have" asbestos-containing components).

Lohrmann "frequency, regularity, and proximity" test ***verbatim*** in its jury instruction—not whether the jury instruction allowed the jury to consider whether mesothelioma may be caused by low exposures. *Finch*, 972 F.3d at 512 ("Covil maintains that in *Lohrmann* . . . , this court articulated a jury instruction that must be repeated verbatim in instructing a jury as to substantial factor causation in any case concerning diseases caused by asbestos.").

Moreover, contrary to Plaintiffs' arguments, the Fourth Circuit did not "acknowledge[] the difference between the exposure levels needed for asbestosis and mesothelioma." (Return at 4). Rather, the Fourth Circuit explained the district court's description of the purported different exposure requirements for each disease in a footnote but concluded, "***We need not reach this consideration because the instruction given in this case clearly comports with* Lohrmann, *regardless of the disease***." *Finch*, 972 F.3d at 514 n.2 (emphasis added). Thus, neither the Fourth Circuit nor any South Carolina appellate court has ever recognized a different evidentiary burden in mesothelioma cases compared to asbestosis cases, and this Court should not do so here. Further, *Henderson*, which adopted *Lohrmann*, was a mesothelioma case.

Finally, Plaintiffs' policy argument about avoiding "the risk of absolving culpable defendants merely because there were other concurrent causes of the disease," (Return at 7–8), is immaterial to substantial factor causation. That policy underlies an alternative causation standard applied by the Fifth Circuit in *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973). The *Borel* court considered whether each defendant's conduct was a substantial factor in bringing about the plaintiff's injury and held, "Where several defendants are shown to have each caused some harm, the burden of proof . . . shifts to each defendant to show what portion of the harm he caused. If the defendants are unable to show any reasonable basis for division, they are jointly and severally liable for the total damages." 493 F.2d at 1094–95. The court recognized the

impossibility of proving "with absolute certainty which particular exposure to asbestos dust resulted in injury to [the plaintiff]," *id.* at 1094, and, in a later case, articulated that the policy choice underlying this theory "seems to be that in the extreme case where one or more of a defined group unquestionably caused an injury and the choice is between exonerating all because the plaintiff cannot show which did so and holding all liable who cannot prove their innocence, the latter result is preferable." *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581, 583 (5th Cir. 1983).

The *Borel* test existed at the time the Fourth Circuit decided *Lohrmann*. By applying substantial factor causation and adopting the "frequency, regularity, and proximity" test, the Fourth Circuit necessarily rejected the *Borel* burden-shifting standard. Moreover, this argument exposes Plaintiffs' true motive—their proposed causation analysis imposes strict liability for all *possible* exposures to avoid the "risk" of "absolving culpable defendants." Plaintiffs' preferred policy of ensuring all possibly culpable defendants are held liable is antithetical to the requirement that they prove a particular defendant's actions were a *probable* cause of their injuries. Regardless, the choice is not simply between a standard which risks absolving culpable defendants and one which protects innocent defendants from possible liability. A proper application of the substantial factor causation standard allows the jury to determine which defendants substantially contributed to the plaintiff's injuries and which did not. Substantial factor causation thus requires a plaintiff to prove that his exposures from a particular defendant were a substantial factor in causing his disease, taking into account the context of other exposures.[4]

[4] If this Court disagrees with this point about other context exposures, and if this Court believes it is nonetheless following *Lohrmann* and *Henderson*, it should nevertheless excise and eliminate its differential treatment of causation evidence with respect to mesothelioma as compared to asbestosis. This differential treatment, and the following of *Rost v. Ford Motor Co.*, 151 A.3d

B. A comparative analysis is required to determine whether a causative factor is substantial.

Plaintiffs also incorrectly maintain that a comparative analysis of Mr. Jolly's exposures is "contrary to the substantial factor test." (Return at 7). Despite claiming this Court did not rely on other states' law in rejecting a comparative analysis, Plaintiffs cite only the law of other states—primarily the same cases based upon Pennsylvania and Illinois law which this Court incorrectly relied upon in its opinion. *See* (Return at 7–8) (citing *Tragarz v. Keene Corp.*, 980 F.2d 411, 425 (7th Cir. 1992), and *Rost*, 151 A.3d at 1051 n.13); *see also* (Petition for Rehearing at 2–6) (explaining that *Rost* and *Tragarz* are incompatible with South Carolina law).[5] Plaintiffs' arguments are incorrect in several respects. First, a comparison of exposures is not incompatible with the substantial factor causation standard. A court or jury cannot determine an exposure is a ***substantial*** factor in causing a disease without considering the other factors. *See Haskins v. 3M Co.*, No. 2:15-CV-02086-DCN, 2017 WL 3118017, at *7 (D.S.C. July 21, 2017) ("If the total cumulative exposure causes mesothelioma, the court fails to see how a single exposure or set of exposures could be considered a 'substantial cause' of the disease unless that exposure or set of exposures had a substantial impact on the total cumulative exposure."). Second, although some courts have declined a comparative approach under the law of other states, federal courts in the Fourth Circuit require a contextual analysis. *See Connor v. Covil Corp.*, 996 F.3d 143, 155 (4th Cir. 2021) (applying North Carolina law which, like South Carolina law, requires application of

1032 (Pa. 2016), and *Bobo v. Tennessee Valley Authority*, 855 F.3d 1294 (11th Cir. 2017), is inconsistent with South Carolina law for the reasons set forth in the petition and this reply.

[5] Plaintiffs also cite *John Crane, Inc. v. Linkus*, 988 A.2d 511 (Md. Ct. Spec. App. 2010), which, far from rejecting a comparative analysis, recognized that whether a defendant's product is a substantial factor depends on context, including other exposures. *See id.* at 522 (recognizing "the proposition that the defendant's product is not a substantial factor may be made more probable by evidence tending to prove that the claimant's disease was caused by the products of one or more non-parties." (quoting *ACandS, Inc. v. Asner*, 686 A.2d 250, 260 (Md. Ct. App. 1996))).

the *Lohrmann* substantial factor causation test); *see also 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.").

In *Connor*, the Fourth Circuit found that the disparity between the plaintiff's asbestos exposures attributable to the defendant and his comparatively greater exposures attributable to a non-party was "material to [the Court's] assessment of causation." 996 F.3d at 155. The court held, "Because the record demonstrates that Mr. Connor was exposed to comparatively little asbestos at Fiber Industries versus his asbestos exposure at Norfolk Southern, Appellant cannot establish more than a *mere possibility* that Appellee's asbestos products were a substantial cause of Mr. Connor's mesothelioma." *Id.* Similarly, in *Haskins*, the district court found "the level of exposure necessary to establish 'substantial causation' in a multiple defendant asbestos case may depend on the other defendants' contributions to the total exposure" because a "brief, low level exposure may not be substantial if the plaintiff was also subjected to longer, more substantial exposures on a more frequent basis." 2017 WL 3118017, at *8. However, a "brief, low level exposure" may be substantial "if it was one of only a few exposures that made up the plaintiff's total cumulative exposure." *Id.* Thus, the district court recognized the common-sense notion that determining whether a particular exposure is "substantial" depends on how it compares to other exposures. *See id.* The district court grounded its conclusion in the required showing of *probability* to satisfy the substantial factor causation standard: "even if a plaintiff may show substantial causation by establishing some particular level of exposure in a vacuum, it is clear that

this threshold level cannot be defined as the level of exposure that may cause mesothelioma. This would render the substantial causation rule meaningless." *Id.*[6]

Other courts have similarly recognized the need to consider a particular exposure in context. *See, e.g.*, *Moeller v. Garlock Sealing Techs., LLC*, 660 F.3d 950, 955 (6th Cir. 2011) ("Given that the Plaintiff failed to quantify Robert's exposure to asbestos from Garlock gaskets and that the Plaintiff concedes that Robert sustained massive exposure to asbestos from non-Garlock sources, there is simply insufficient evidence to infer that Garlock gaskets probably, as opposed to possibly, were a substantial cause of Robert's mesothelioma. On the basis of this record, saying that exposure to Garlock gaskets was a substantial cause of Robert's mesothelioma would be akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume." (citations omitted)); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009) ("[O]ne measure of whether an action is a substantial factor is 'the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it.'" (quoting Restatement (Second) of Torts § 433(a))); *Laney v. Celotex Corp.*, 901 F.2d 1319, 1321 (6th Cir. 1990) ("The substantial factor analysis cannot be made in a vacuum.").[7] Accordingly, a comparative analysis is required. Plaintiffs' experts failed

[6] *Cf. Krik v. Crane Co.*, 76 F. Supp. 3d 747, 752 (N.D. Ill. 2014) ("[T]he notion that it is theoretically possible that any amount of exposure could cause injury is different from an opinion that the particular level of dosage experienced by a plaintiff was sufficient to cause his or her particular injury."); *Smith v. Ford Motor Co.*, No. 2:08-CV-630, 2013 WL 214378, at *3 (D. Utah Jan. 18, 2013) ("Dr. Hammar wants to be allowed to tell a jury that all of the plaintiff's *possible* exposures to asbestos during his entire life were contributing causes of the plaintiff's cancer, and, therefore, sufficient to support a finding of legal liability as to the manufacturer of each asbestos containing product, without regard to dosage or how long ago the exposure occurred. Just because we cannot rule anything out does not mean we can rule everything in.").

[7] *See also Schwartz v. Honeywell Int'l, Inc.*, 102 N.E.3d 477, 482 (Ohio 2018) ("[A] major failing of the cumulative-exposure theory is that it does not consider the relationship that different exposures may have to the overall dose to which an individual is exposed. . . . When causation is

to provide any comparative analysis. The Court should grant rehearing and reverse the trial court's rulings to the contrary.

II. Dr. Frank's opinions, in his own words, espouse the "each and every exposure" opinion and are therefore inadmissible.

Plaintiffs' arguments about Dr. Frank's testimony largely repeat the Court's opinion and fail to meaningfully respond to Fisher and Crosby's arguments. *See* (Return at 9–11). Fisher and Crosby have fully explained in their briefing and their petition for rehearing the manner in which Dr. Frank's opinions are untethered from the facts of this case and from reliable science. *See* (Petition for Rehearing at 9–12; App. Br. 13–22; Reply Br. 4–10). Moreover, contrary to Plaintiffs' argument, Fisher and Crosby have not mischaracterized Dr. Frank's testimony. In fact, rather than characterizing Dr. Frank's testimony at all, Fisher and Crosby simply quoted Dr. Frank's opinions which, in his own words, espouse the unreliable and inadmissible "every exposure" opinion. *See* (Petition for Rehearing at 10–11). Plaintiffs and this Court improperly rely on a few key words to recharacterize Dr. Frank's opinions while failing to acknowledge the inadmissible opinions laced throughout his testimony. The trial court abused its discretion in admitting Dr. Frank's testimony—as Fisher and Crosby have argued throughout the trial court proceedings and this appeal—and the exclusion of Plaintiffs' expert's specific causation opinions leaves Plaintiffs with no evidence of specific causation, thus entitling Fisher and Crosby to JNOV. *See* (Petition for Rehearing at 9–12).

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premised on the total cumulative exposure, a single exposure or set of exposures cannot be 'considered a "substantial cause" of the disease unless that exposure or set of exposures had a substantial impact on the total cumulative exposure.'" (quoting *Haskins*, 2017 WL 3118017, at *7)); *Allen v. Owens-Corning Fiberglas Corp.*, 571 N.W.2d 530, 533 (Mich. Ct. App. 1997) ("[I]n order to determine whether a particular factor was a substantial factor in causing a plaintiff's injury, a jury should be permitted to weigh evidence of other contributing factors.").

Plaintiffs also assert the Court properly considered Dr. Frank's affidavit because the admissibility of expert testimony is for the court, not the jury, and Dr. Frank's affidavit "was, in fact, an exhibit at trial." (Return at 11). However, as Fisher and Crosby explained in their petition, this Court held Fisher and Crosby "failed to show there is a reasonable probability the jury's verdict was influenced by any testimony that could be reasonably characterized as espousing the each and every exposure theory" because "Dr. Frank's affidavit explicitly stated that his opinions were his 'medical and scientific opinions' and that he was 'not offering legal opinions about whether an exposure is "significant" or "substantial" within the meaning of the law.'" Op. No. 5858 (Howard Adv. Sh. No. 30 at 159). Dr. Frank's opinions misled the jury, as Fisher and Crosby explained in their briefing and petition. *See* (Petition for Rehearing at 9–12; App. Br. 13–21; Reply Br. 11–12). The existence of statements in the affidavit did not clarify his misleading testimony to the jury because the jury never saw or heard the purported clarifications.

Further, while Plaintiffs assert the affidavit "was, in fact, an exhibit at trial," and point to the affidavit in the record on appeal, *see* (Return at 11), the record is clear that the affidavit was deemed a "learned treatise" and admitted as a demonstrative exhibit only, and the jury never saw or heard the statements relied upon by this Court. (R. 781–82). Accordingly, the Court erred in relying on Dr. Frank's affidavit and should grant rehearing and reverse the trial court.

III. The Court improperly shifted the burden of proof on Plaintiffs' design defect claims.

The Court misapprehended the burden of proof in finding a jury question existed as to Plaintiffs' design defect claims. Plaintiffs have the burden of proving the elements of their design defect claims, including the element requiring consideration of the cost of any proposed alternative design. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 225, 701 S.E.2d 5, 16 (2010); *Newbern v. Ford Motor Co.*, 428 S.C. 310, 318–19, 833 S.E.2d 861, 866 (Ct. App. 2019); *see also Hulsizer v.*

Magline, Inc., No. 4:17-CV-00415-RBH, 2018 WL 5617873, at *4 (D.S.C. Oct. 29, 2018). This Court's finding that "there was no evidence that a metal gasket was more expensive than an asbestos gasket," properly construed in the context of the Court's holding, is an acknowledgement that Plaintiffs failed to prove their case, and instead the burden of proving a feasible alternative design was shifted improperly to Fisher and Crosby. *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 168). Rather than point to evidence supporting their claims, Plaintiffs defend the burden shifting: "the Court merely observed that there was nothing, such as cost, to prevent the jury from considering metal gaskets to be a reasonable alternative to asbestos gaskets." (Return at 14). Plaintiffs' argument ***is*** burden shifting. They suggest the jury is free to decide an alternative design is reasonable unless the defendants present evidence to "prevent the jury" from doing so. Plaintiffs bore the burden to present evidence proving the existence of a reasonable alternative design. Their failure to do so is fatal to their design defect claims.

Plaintiffs also repeat the Court's statement that even in the absence of any cost 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." (Return at 14). Like the Court, Plaintiffs fail to cite any South Carolina law supporting the proposition that cost evidence is not required if the danger is "grave" enough. The cases they rely upon, *Branham* and *Bragg*, provide the elements of the reasonable alternative design test, and do ***not*** allow a plaintiff to avoid consideration of the cost of a proposed alternative. *See Branham*, 390 S.C. at 225, 701 S.E.2d at 16 ("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)); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 546, 462 S.E.2d 321, 330 (Ct. App. 1995). Comment f to section 2 of the Restatement (Third) of Torts: *Products Liability* has not been adopted by any South Carolina court and conflicts with binding precedent. *See* (Petition for Rehearing at 15–16) (citing cases refuting the Court's finding). Regardless, it does not support Plaintiffs' argument. The Court should grant rehearing, reverse the trial court, and grant JNOV in favor of Fisher and Crosby on Plaintiffs' design defect claims.

IV. The trial court does not have unlimited discretion to grant *additur* in violation of well-settled law prohibiting speculation as to the composition of a verdict.

The trial court's *additur* ruling is not shielded from appellate review. Plaintiffs advocate a framework in which a trial court has absolute discretion to grant *additur* so long as the trial court states that its ruling is "based on the evidence." (Return at 15–17). While a trial court has discretion to grant *additur*, discretion can be abused. The trial court abused its discretion here.

Contrary to Plaintiffs' arguments, the trial court's *additur* ruling was not based solely on "the evidence," and contrary to this Court's holding, the "essence" of the trial court's ruling was not simply that the verdict was inadequate. *See* (Return at 16–17); Op. No. 5858 (Howard Adv. Sh. No. 30 at 174). Rather, the express basis for the ruling was the trial court's improper speculation as to the components of the verdict and its improper finding that the jury was required to believe Dr. Frank's estimate that Plaintiffs incurred $1,000,000 in medical expenses, despite the requirement that it construe the evidence in the light most favorable to Fisher and Crosby. *See* (R. 14–20); *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989).

Although Plaintiffs and this Court attempt to distinguish clear precedent forbidding speculation as to the composition of a general verdict in *Jenkins v. Few*[8] and *Moore v. Moore*,[9] the Supreme Court recently clarified that "it is not for the trial court to say what it thinks the verdict should be." *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co.*, Op. No. 28071 (S.C. Sup. Ct. filed December 8, 2021) (Howard Adv. Sh. No. 43 at 34). In *Stoneledge*, confusion arose as to the jury's allocation of damages among three causes of action. *Id.* at 30. The trial court determined the jury intended to award $5,000,000 (the aggregate of the amounts written on the verdict form for the three causes of action) for each cause of action and entered its judgment accordingly. *Id.* at 31. The Supreme Court found no authority supporting "the trial court's reformation of the jury's verdict" and repeated the well-settled principle that courts cannot speculate what a jury intended:

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

Id. at 34 (emphasis added).

The reaffirmation of this principle in *Stoneledge* is dispositive of the question whether the trial court in this case had the authority to guess that the jury's $200,000 award to Mr. Jolly included $142,000 in medical expenses and $58,000 for pain and suffering. As the Supreme Court observed in *Stoneledge*, perhaps the jury intended for its verdict in this case to break down as the

[8] 391 S.C. 209, 221, 705 S.E.2d 457, 463 (Ct. App. 2010).

[9] 360 S.C. 241, 257, 599 S.E.2d 467, 475 (Ct. App. 2004).

trial court guessed, but perhaps not. "There [is] simply no way for the trial court to tell without speculating what the jury intended." *Id.*

The trial court committed errors of law by speculating about the composition of the jury's verdict and granting *additur* based on that speculation and by improperly construing the evidence in the light most favorable to the moving party. An error of law is an abuse of discretion. *See Ellis v. Davidson*, 358 S.C. 509, 524, 595 S.E.2d 817, 825 (Ct. App. 2004) ("An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support."). The trial court therefore abused its discretion in granting a new trial *nisi additur*. This Court should grant rehearing and reverse the *additur* ruling.

V. This Court misapprehended several issues related to setoff and the service of Plaintiffs' trial subpoenas.

A. Setoff

Plaintiffs misconstrue the plain language of section 15-38-50 and the setoff issue before this Court. The statute provides,

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others ***to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it***, whichever is the greater . . . .

S.C. Code Ann. § 15-38-50 (emphasis added). Although setoff applies to "the same injury or the same wrongful death," it does so only "to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it." *Id.* Thus, an allocation must be proper—i.e., stipulated by the release—before an analysis of whether the settlement was for the "same injury" is necessary. Plaintiffs and the settling defendants did not agree to allocate

settlement funds in this case. (R. 44–47, 2501). Rather, Plaintiffs admitted they created an "internal" allocation after the verdict. (*Id.*). Although Plaintiffs argue "internal allocations are permitted under section 15-38-50," (Return at 18), they cite no supporting authority, and the plain language of the statute contradicts their argument. A unilateral, non-binding, "internal" allocation is not permitted by the plain language of section 15-38-50.

As Fisher and Crosby explained in their petition, other jurisdictions with similar statutes interpret the statutes to require that the settling ***parties*** agree to a particular allocation. (Petition for Rehearing at 23–24) (citing *Dionese v. City of W. Palm Beach*, 500 So. 2d 1347, 1349 (Fla. 1987), *Knox v. Los Angeles Cty.*, 167 Cal. Rptr. 463, 469 (Cal. Ct. App. 1980), and *Anderson v. Ewing*, 768 So. 2d 1161, 1164 (Fla. Dist. Ct. App. 2000)). If the settling parties do not agree to an allocation, the plaintiffs cannot unilaterally create an allocation for purposes of avoiding setoff.[10] *See id.* Although Plaintiffs attempt to distinguish *Dionese* on the grounds that it did not involve a future wrongful death claim and that the attempted allocation was lopsided, those distinctions are immaterial to the key point: section 15-38-50, by its plain language, requires that an allocation be agreed to by the settling parties.

Plaintiffs also rely on a vague policy argument that South Carolina case law "favors a plaintiff's ability to apportion settlement proceeds 'in the manner most advantageous to it.'" (Return at 18). However, a statute is the General Assembly's expression of public policy, *see Ackerman v. S.C. Dep't of Corr.*, 415 S.C. 412, 420, 782 S.E.2d 757, 761 (Ct. App. 2016); *Perpetual Fed. Sav. & Loan Ass'n v. Willingham*, 296 S.C. 24, 28 n.2, 370 S.E.2d 286, 288 n.2 (Ct. App. 1988), and a general judicial policy favoring a plaintiff's ability to apportion settlement

[10] Fisher and Crosby's citation to *Dionese* and other cases is properly before the Court. Fisher and Crosby are not making a new argument, they are offering further support for their prior arguments.

proceeds does not supersede the plain language of section 15-38-50. Plaintiffs' unilateral allocation is improper and should be disregarded. This Court should grant rehearing and reverse the trial court's setoff ruling.

B. Trial Subpoenas

Plaintiffs defend the Court's incorrect use of the abandonment doctrine to evade material facts. (Return at 21). Plaintiffs seek to avoid consideration of the practical consequences of this Court's ruling by casting aside the key fact illuminating the problem. A person must be authorized to accept service and must affirmatively accept the service. *See* Rule 4, SCRCP. The Court's ruling turns these principles on their heads by changing South Carolina law to now provide that if any attorney (even if she does not have her client's authorization to accept service) signs for a FedEx package without knowing the package contains a subpoena or other document for service, she has "accepted" service on her client's behalf despite never having authority to do so and never agreeing to accept service. This common-sense fact requires no citation to authority. The Court should grant rehearing, reverse the trial court's setoff ruling, and eliminate the negative, widespread, practical ramifications of its ruling.

CONCLUSION

This Court should grant rehearing and reverse the trial court. Fisher and Crosby further request that the Court consider this petition *en banc* for the reasons stated in their petition for rehearing.

(signature page attached)

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December 20, 2021

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' Reply In Support of Petition for Rehearing

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Subject: Beverly Jolly v. General Electric Company - Appellate Case No. 2017-002611
Attachments: 2021.12.20 Jolly - Reply in Support of Petition for Rehearing.pdf

Counsel,

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

Thank you,

NELSON MULLINS

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