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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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

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Appellate Case No. 2022-000272

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 .... Petitioners.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW 2

ARGUMENT 2

I. The circuit court did not abuse its discretion in admitting the causation testimony of Plaintiffs' expert witnesses. 2

A. The Court of Appeals properly rejected Fisher/Crosby's mischaracterizations of Plaintiffs' expert testimony and found that it "easily meets" the *State v. Council* standard for reliability and admissibility. 4

B. The Court of Appeals did not lower the standard of proof in mesothelioma cases. 7

i. The Court properly applied the *Henderson/Lohrmann* causation standard while also distinguishing *Lohrmann* on its facts. 7

ii. The Court of Appeals did not "adopt Pennsylvania law" in declining to conduct a comparative analysis of Mr. Jolly's asbestos exposures. 11

II. The Court of Appeals correctly determined that Fisher/Crosby failed to meet the standard for JNOV. 14

A. The Court of Appeals did not shift the burden to Fisher/Crosby on design defect. 15

B. The evidence supports the failure-to-warn claim. 16

III. The Court of Appeals properly determined that the circuit court did not abuse its discretion in granting a new trial *nisi additur*. 19

IV. The Court of Appeals properly upheld the circuit court's setoff of settlement proceeds only for the two claims tried against Fisher/Crosby. 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Cases

Bragg v. Hi-Ranger, Inc.,
319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995) 15

Bramlette v. Charter-Med.-Columbia,
393 S.E.2d 914 (S.C. 1990) 12

Branham v. Ford Motor Co.,
390 S.C. 203, 701 S.E.2d 5 (2010) 15

Creech v. South Carolina Wildlife and Marine Resources Dep't,
328 S.C. 24, 491 S.E.2d 571 (1997) 14

Curcio v. Caterpillar, Inc.,
355 S.C. 316, 585 S.E.2d 272 (2003) 14, 19

Dionese v. City of W. Palm Beach,
500 So. 2d 1347 (Fla. 1987) 24, 25

Fields v. Reg'l Med. Ctr. Orangeburg,
363 S.C. 19, 609 S.E.2d 506 (2005) 3

Finch v. Covil Corp.,
388 F. Supp. 3d 593 (M.D.N.C. 2019), *aff'd*, 972 F.3d 507 (4th Cir. 2020) 8, 9

Ford Motor Co. v. Boomer,
736 S.E.2d 724 (Va. 2013) 12

Graham v. Whitaker,
282 S.C. 393, 321 S.E.2d 40 (1984) 22

Henderson v. Allied Signal, Inc.,
373 S.C. 179, 644 S.E.2d 724 (2007) .... *Passim*

Jenkins v. Few,
391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2010) 21

Jolly v. General Electric Co.,
435 S.C. 607, 869 S.E.2d 819 (Ct. App. 2021) .... *Passim*

Law v. S.C. Dep't of Corr.,
368 S.C. 424, 629 S.E.2d 642 (2006) 13

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

Mavroudis v. Pittsburgh-Corning Corp.,
935 P.2d 684 (Wash. App. 1997).. 13

Moore v. Moore,
360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004) 21

Proctor v. Dep't of Health & Envtl. Control,
368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006) 22

Riley v. Ford Motor Co.,
414 S.C. 185, 777 S.E.2d 824 (2015) .... *Passim*

Sapp v. Wheeler,
402 S.C. 502, 741 S.E.2d 565 (Ct. App. 2013) 19, 22

Scott v. Porter,
340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000) 24

Smith v. Widener,
397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012) 23

State v. Council,
335 S.C. 1, 515 S.E.2d 508 (1999) 4, 5, 6

State v. White,
382 S.C. 265, 676 S.E.2d 684 (2009) 2, 6

Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC,
435 S.C. 109, 866 S.E.2d 542 (2021) 21

Strange v. S.C. Dep't of Highways & Pub. Transp.,
314 S.C. 427, 445 S.E.2d 439 (1994) 14

Vinson v. Hatley,
324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996).. 19, 20, 22

Statutes

S.C. Code Ann. § 15–38–50 .... 22, 23

S.C. Code Ann. § 15-5-90 (2005) 24

Rules

Rule 242, SCACR 1, 25

Rule 702, SCRE 6

Other Authorities

Restatement (Third) of Torts: Prods. Liab. § 2 15

INTRODUCTION

Petitioners Fisher Controls International LLC and Crosby Valve, LLC ("Fisher/Crosby") ask this Court to review the unanimous opinion of the Court of Appeals in *Jolly v. General Electric Co.*, 435 S.C. 607, 869 S.E.2d 819 (Ct. App. 2021). The Court of Appeals found that the jury's verdict in favor of Respondent Brenda Jolly[1] was supported by the evidence and that Acting Circuit Court Judge Jean Hoefer Toal, Chief Justice of the Supreme Court of South Carolina (Retired), did not abuse her discretion in her rulings in this case.

Fisher/Crosby have given this Court no reason to review the Court of Appeal's opinion. They have not identified *any* factors meeting the review criteria of Rule 242, SCACR. There are no novel questions of law presented, there was no dissent in the Court of Appeals, the Court of Appeal's decision does not conflict with a prior decision of this Court, there are no constitutional issues involved, and no federal questions. Rule 242(b), SCACR. Nor have Fisher/Crosby explained how any of the legal issues presented are sufficiently important to warrant the time and attention of this Court. Instead, they merely set forth their numerous disagreements with the conclusions of the jury, Judge Toal, and the Court of Appeals panel. They ignore the deferential standard of review and make exaggerated and inaccurate claims about the law applied by the Court of Appeals. Given the total absence of any compelling reason for the Court to review the Court

[1] Beverly Dale Jolly died of mesothelioma during the pendency of this appeal.

of Appeals's opinion, Fisher/Crosby's petition should be denied.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals properly conclude that the circuit court did not abuse its discretion in admitting the causation testimony of the Jollys' expert witnesses?

2. Did the lower courts properly conclude that JNOV was not warranted because the evidence reasonably supports the jury's findings in favor of the Jollys?

3. Did the Court of Appeals properly conclude that the circuit court did not abuse its discretion in granting a new trial *nisi additur*?

4. Did the Court of Appeals properly affirm the circuit court's ruling, based on established South Carolina law, that only settlement proceeds allocated to claims tried to verdict against Fisher/Crosby may be set off from the verdict?

ARGUMENT

I. The circuit court did not abuse its discretion in admitting the causation testimony of Plaintiffs' expert witnesses.

Fisher/Crosby first contend that the lower courts "erred in finding Petitioners were not entitled to JNOV because Plaintiffs failed to present admissible specific causation expert testimony." Petition, at 6. In protesting the Court of Appeals's decision to uphold the admission of Dr. Frank and Dr. Maddox'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 Court of Appeals devoted a considerable portion of its opinion to an analysis of proximate cause and the causation testimony offered by Plaintiffs' three expert witnesses. *Jolly*, 435 S.C. at 623-42, 869 S.E.2d at 828-38. The court held that Plaintiffs must not only show both general causation and specific causation, but also substantial factor causation given that this is an asbestos case with multiple exposures. *Id.* at 624, 869 S.E.2d at 828-29. The causation testimony offered by Plaintiffs' experts cleared every hurdle and satisfied all of these criteria. *Id.* at 626, 869 S.E.2d at 829 ("The evidence in the present case satisfies general causation, specific causation, and the substantial factor test.").

The Court of Appeals concluded that "the circuit court acted well within its discretion in admitting the experts' testimony into evidence." *Jolly*, 435 S.C. at 641, 869 S.E.2d at 838. Fisher/Crosby do not challenge this conclusion or contend that Judge Toal abused her discretion in admitting the experts' causation opinions. They ignore the standard of review completely. Fisher/Crosby do not address the factual and scientific foundation for the experts' opinions or argue that it is lacking. Instead, they reiterate the same mischaracterizations of Dr. Frank's testimony that the circuit court and the Court of Appeals have rejected, falsely state that the Court

of Appeals "adopted Pennsylvania law," and fault the lower courts for relying on Dr. Frank's affidavit to evaluate his scientific methodology.

A. The Court of Appeals properly rejected Fisher/Crosby's mischaracterizations of Plaintiffs' expert testimony and found that it "easily meets" the *State v. Council* standard for reliability and admissibility.

The Court of Appeals 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, concluding that "[t]o the extent Appellants challenge the admissibility of Respondents' experts' testimony on the ground that it was unreliable, *they have failed to show any significant part of the testimony that could be reasonably characterized as espousing the 'each and every exposure' theory*." *Jolly*, 435 S.C. at 639, 869 S.E.2d at 836 (emphasis added). 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." *Id.* at 636 n.17, 869 S.E.2d at 834 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 Mr. Jolly's total dose of asbestos and exposures that were substantial factors in causing his mesothelioma. *Id.*

The Court of Appeals agreed with Mrs. Jolly that her "experts relied on the cumulative dose theory and that their reliance on basic science in reaching their opinion is not the equivalent of testifying that 'each and every exposure' was a substantial factor in causing Dale's mesothelioma." *Id.* at 634, 869 S.E.2d at 833-34. The Court of Appeals noted its disagreement with Fisher/Crosby's contention that "the cumulative dose theory conflicts with the *Henderson/Lohrmann* substantial factor standard." *Id.* at 635, 869 S.E.2d at 834. Rather, "[s]tating that a certain exposure *contributes* to an individual's cumulative dose does not espouse the view that 'each and every breath' of asbestos is 'substantially' causative of mesothelioma or imply that one exposure meets the legal requirement for causation." *Id.* at 635-36, 869 S.E.2d at 834. Further, "[w]e view the testimony concerning cumulative dose as background information essential for the jury's understanding of medical causation, which must be based on science. We do not interpret this presentation as an attempt to supplant the *Henderson/Lohrmann* test." *Id.* at 636, 869 S.E.2d at 834-35.

Based on the court's examination of what the experts actually stated to the jury, the Court of Appeals found their testimony to be reliable and admissible. It explained that "the cumulative dose theory on which Respondents' experts relied *easily meets* the standard for reliability set forth in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999)." *Id.* at 639, 869 S.E.2d at 836 (emphasis added). 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 637,

869 S.E.2d at 835. 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 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 640-41, 869 S.E.2d at 837.[2]

The lower courts correctly relied on Dr. Frank's explanation of his scientific approach in his affidavit. Fisher/Crosby suggest that this was improper because the jury did not have his affidavit during its deliberations. Dr. Frank's affidavit was, in fact, admitted as an exhibit at trial *without objection*. (R. 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

[2] 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 637, 869 S.E.2d at 835. Dr. Maddox's opinions were consistent with Dr. Frank's.

circuit court properly analyzed the reliability of his opinion under the standards of Rule 702, SCRE, and *Council*. The Court of Appeals agreed that his opinion meets the reliability criteria for expert testimony set forth in South Carolina law. *Jolly*, 435 S.C. at 633-42, 869 S.E.2d at 833-38. Fisher/Crosby's complaints about Dr. Frank were properly rejected by Judge Toal and the Court of Appeals.

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

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

Fisher/Crosby mischaracterize the Court of Appeals's opinion regarding the "frequency, regularity, proximity" causation standard applicable in asbestos cases. The Court of Appeals 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*, 435 S.C. at 625-26, 869 S.E.2d at 829. 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."' *Id.* at 626, 869 S.E.2d at 829 (quoting *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727) (emphasis added by the Court of Appeals).

The Court of Appeals found that Mr. 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*, 435 S.C. at 626-27, 869 S.E.2d at 829-30. Mr. Jolly 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 he worked shutdowns. *Id.*

Fisher/Crosby urged the Court to find that Mr. Jolly'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 628 n.11, 869 at 830 n.11. *Lohrmann* involved asbestosis, which, according to Mrs. 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 Court of Appeals's opinion is in absolute alignment with the substantial factor causation standard of *Henderson/Lohrmann*. The jury, the circuit court, and a unanimous Court of Appeals agreed that that standard was met by the facts of Mr. Jolly's exposure to asbestos gaskets from Fisher/Crosby valves. The Court of Appeals's acknowledgement of the factual distinctions between *Lohrmann* and this case do not undermine its causation analysis. Rather, the court's conclusions are consistent with the principles set forth in *Lohrmann* and recent cases like *Finch*.

ii. The Court of Appeals did not "adopt Pennsylvania law" in declining to conduct a comparative analysis of Mr. Jolly's asbestos exposures.

Fisher/Crosby complain about the Court of Appeals's determination that the court need not consider and compare Mr. Jolly's exposures to other asbestos products when evaluating whether his exposure to asbestos from Fisher/Crosby valves was a substantial factor in causing his mesothelioma. While they accuse the court of "adopting Pennsylvania law," this is not the case. The Court of Appeals followed *Henderson/Lohrmann*.

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* 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 Court of Appeals, 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*, 435 S.C. at 637, 869 S.E.2d at 835. 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 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. "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 Court of Appeals 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* in concluding that comparing exposures is contrary to *Lohrmann*'s substantial factor standard.

II. The Court of Appeals correctly determined that Fisher/Crosby failed to meet the standard for JNOV.

Once again, Fisher/Crosby disregard the standard of review. Their arguments advance their 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 Plaintiffs, who were the nonmoving parties below. *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)). The Court of Appeals followed this standard, acknowledging that a verdict should be affirmed "'unless no evidence reasonably supports the jury's findings.'" *Jolly*, 435 S.C. at 642, 869 S.E.2d at 838 (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.*

Fisher/Crosby have failed to show that there was "no evidence" to support the jury's verdict on negligence and breach of implied warranty. The Court of Appeals properly recognized that Plaintiffs had sufficient evidence of an alternative reasonable design as well as evidence of Fisher/Crosby's duty to warn about the hazards of asbestos exposure associated with the maintenance of their valves.

A. The Court of Appeals did not shift the burden to Fisher/Crosby on design defect.

The Court of Appeals agreed with the circuit court in "conclud[ing] that the evidence created a fact issue for the jury as to the existence of a reasonable alternative design." *Jolly*, 435 S.C. at 650, 869 S.E.2d at 842. The court discussed two reasons for this conclusion. First, Fisher's corporate representative, Ronald Dumistra, "admitted that Fisher had non-asbestos gaskets available for its customers." *Id.* Second, Mr. Dumistra admitted that "for high-pressure, high-temperature applications, a metal gasket could have been used." *Id.* Based on these admissions, the Court of Appeals 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.* at 650, 869 S.E.2d at 842.

Despite this, Fisher/Crosby fault the Court of Appeals 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. *Id.* at 651, 869 S.E.2d at 843. This argument takes the court's statement completely out of context. The Court of Appeals 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*.

Far from shifting the burden, the Court of Appeals 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." *Id.* at 651, 869 S.E.2d at 843 (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, Mr. Dumistra agreed that there was *absolutely no reason* for Mr. Jolly to be exposed to asbestos gaskets and packing from Fisher valves because "[s]omething else could have been selected." (R. 1134). Fisher/Crosby ignore the record evidence, which both the circuit court and the Court of Appeals found to be more than sufficient on the issue of alternative reasonable design.

B. The evidence supports the failure-to-warn claim.

With regard to Plaintiffs' failure-to-warn claim, Fisher/Crosby raise different arguments in this Court than they did below. Here, they contend that "Plaintiffs presented no evidence regarding how any warning could have been effectively communicated to Mr. Jolly or that Mr. Jolly would have heeded a warning."

Petition, at 20-21. In the Court of Appeals, however, they argued that there was a failure of proof on Plaintiffs' failure-to-warn claims "because (1) Appellants were protected by the sophisticated intermediary doctrine[3] and (2) the danger of asbestos gaskets was open and obvious." *Jolly*, 435 S.C. at 642, 869 S.E.2d at 838. The Court of Appeals rejected both of these arguments, concluding that "the circuit court properly upheld the jury's verdict on Respondents' failure-to-warn claims." *Id.* at 648, 869 S.E.2d at 841.

Fisher/Crosby's complaints against the Court of Appeals are taken completely out of context, as they barely refer to the sophisticated intermediary defense and completely omit reference to the open-and-obvious doctrine in their argument to this Court. Nevertheless, the Court of Appeals's discussion of these defenses, and their ultimate conclusion that these were jury issues, disposes of Fisher/Crosby's arguments here.

With regard to the evidence regarding how Fisher/Crosby could have effectively warned Mr. Jolly about asbestos, the Court of Appeals noted several methods supported by the evidence. The evidence showed that "[w]henever a worn gasket was replaced, Dale had to verify the number on the replacement gasket by the manufacturer's manual and document this verification." *Jolly*, 435 S.C. at 621, 869 S.E.2d at 826. Consequently, the jury could have reasonably concluded that "Dale would have seen a warning on a replacement gasket when verifying the

[3] This is an affirmative defense on which Fisher/Crosby bore the burden of proof. *Jolly*, 435 S.C. at 644, 869 S.E.2d at 839.

number on that gasket." *Id.* at 645, 869 S.E.2d at 840. Moreover, Plaintiffs argued that a warning could have been placed on the outside of the valve[4] and Fisher/Crosby did not refute that. *Id.* As it was Fisher/Crosby's burden under the sophisticated intermediary defense to show that a warning would have been ineffective or infeasible, the Court of Appeals properly rejected their contention that they could not have warned on their valves. *Id.* at 646, 869 S.E.2d at 840.

The evidence, in fact, supported a number of additional ways that Fisher/Crosby could have effectively warned. As the Court of Appeals noted, Mr. Jolly checked the Fisher/Crosby manuals when verifying the numbers on the gaskets. *Jolly*, 435 S.C. at 621, 869 S.E.2d at 826. The evidence showed that Fisher/Crosby placed other kinds of warnings in their valve manuals, raising the inference that they could have also placed an asbestos warning there. (R. 1076, lines 2-11; R. 1391, line 25- 1392, line 12; R. 1414, line 5-25; R. 3309-3316). There was also evidence that Fisher/Crosby could have provided material safety data sheets with information about the product composition, hazards, and recommended precautions. (R. 855, line 5- 856, line 1; R. 858, lines 8-17). Further, in their training and instructional classes and materials in which they gave directions about how to remove gaskets with wire brushes (R. 1207, line 6- 1209, line 11; R. 1212, line 9- 1215, line 1), they could have mentioned that the gaskets contained asbestos and were hazardous. Finally, there were Fisher/Crosby personnel on site at Duke (R.

[4] There was already a place on the valve for the manufacturer name and serial number. (R. 1160, lines 16-19; R. 1377, lines 5- 1378, line 17; R. 3954).

520, line 21- 521, line 8; R. 3944-3947), who could have provided warnings.

With regard to whether Mr. Jolly would have heeded a warning, the Court of Appeals found that the evidence supported a jury finding that he would have. *Jolly*, 435 S.C. at 648, 869 S.E.2d at 841. While Mr. Jolly may have known about the hazards of asbestos insulation, he testified that he *followed* Duke's warnings about asbestos insulation and did not remove it himself. (R. 535, lines 1-8). To the extent Fisher/Crosby argued that Mr. Jolly "did not heed Duke's warnings about asbestos," the Court of Appeals "disagree[d] with Appellants' characterization of the testimony in question." *Id.* The court declined to "interpret the testimony as an admission that Dale knowingly placed himself within proximity of dust from asbestos insulation." *Id.* In any event, this was "not the only reasonable inference." *Id.*

The Court of Appeals properly found that issues related to warnings were questions for the jury. *Id.* at 645-46, 648, 869 S.E.2d at 839-41; *see also Curcio*, 355 S.C. at 320, 585 S.E.2d at 274. The jury had ample evidence to determine that Fisher/Crosby failed to adequately warn and that Mr. Jolly would have heeded a proper warning. Fisher/Crosby's contentions to the contrary lack merit.

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

The jury awarded a total of $300,000 in damages for Mr. Jolly's pain and suffering from mesothelioma, a fatal cancer, as well as loss of consortium damages for Mrs. Jolly. (R. 53). In moving for a new trial *nisi additur*, Plaintiffs asked the circuit court to increase Mr. Jolly's damages award from $200,000 to $2,000,000,

and to increase Mrs. Jolly's damages award from $100,000 to $500,000. (R. 4697). The circuit court granted the motion for less than Plaintiffs' request, increasing the verdict to $1,580,000 for Mr. Jolly and $290,000 for Mrs. Jolly. (R. 47).

The Court of Appeals properly reviewed the circuit court's grant of a new trial *nisi additur* for abuse of discretion. *Jolly*, 435 S.C. at 654-55, 869 S.E.2d at 845. Under such review, the circuit court's "'decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.'" *Id.* at 655, 869 S.E.2d at 845 (quoting *Sapp v. Wheeler*, 402 S.C. 502, 512, 741 S.E.2d 565, 571 (Ct. App. 2013)). "'Great deference'" is given to the circuit court because "'[t]he [circuit court] who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than'" the reviewing court. *Id.* (quoting *Vinson v. Hatley*, 324 S.C. 389, 405-06, 477 S.E.2d 715, 723 (Ct. App. 1996)).

The Court of Appeals noted that this Court clarified the abuse-of-discretion standard of review in *Riley v. Ford Motor Co.*, 414 S.C. 185, 194, 777 S.E.2d 824, 829 (2015), finding that "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*, 435 S.C. at 655, 869 S.E.2d at 845. Fisher/Crosby wanted the Court of Appeals to commit the very reviewing error found in *Riley*. It asked the Court of Appeals, and now this Court, to second-guess the circuit court and find its conclusions "speculative."

The Court of Appeals considered Fisher/Crosby's arguments and reviewed the circuit court's reasoning, particularly its reliance on Dr. Frank's undisputed testimony that he had seen partial medical bills of $142,000. The Court of Appeals 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*, 435 S.C. at 657, 869 S.E.2d at 846.

The Court of Appeals followed precedent in affirming the new trial *nisi*. The court emphasized that "'[t]he consideration of a motion for a new trial nisi additur requires [the circuit court] to consider the adequacy of the verdict *in light of the evidence presented*.'" *Id.* (quoting *Vinson*, 324 S.C. at 405, 477 S.E.2d at 723) (emphasis added by Court of Appeals). As the court discussed, the case law relied on by Fisher/Crosby does not establish that the circuit court speculated in analyzing the jury's damages award. This case is "unlike" *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) because "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." *Jolly*, 435 S.C. at 658, 869 S.E.2d at 846.[5]

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[5] Fisher/Crosby's reliance on this Court's recent decision in *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 866 S.E.2d 542 (2021), is also misplaced. *Stoneledge* did not involve the grant of a new trial *nisi additur*, but a "reformation" of the jury's verdict by the trial court that was not

Far from affirming based on a different basis than the circuit court, the Court of Appeals reviewed the entirety of the circuit court's reasons for granting a new trial *nisi*. *Jolly*, 435 S.C. at 658-64, 869 S.E.2d at 847-50. 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.* at 658, 869 S.E.2d at 847. This is consistent with *Riley*, where there was no abuse of discretion in a new trial *nisi* to triple the jury's award when based on the evidence. 414 S.C. at 189, 194, 777 S.E.2d at 827, 829-30.

In arguing that the circuit court "substituted" its judgment for that of the jury, Fisher/Crosby fundamentally misunderstand the case law. Circuit courts are empowered to grant a new trial *nisi* when finding, based on the evidence, that the jury's verdict is inadequate. *Sapp*, 402 S.C. at 512, 741 S.E.2d at 571; *Vinson*, 324 S.C. at 405, 477 S.E.2d at 723; *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006). Judge Toal accorded due deference to the jury, and granted a new trial *nisi* in an amount less than requested by the Jollys. Under this Court's precedent, she did not substitute her judgment for that of the jury in giving Fisher/Crosby the option between a *nisi additur* and a new trial. *Graham v. Whitaker*, 282 S.C. 393, 401, 321 S.E.2d 40, 45 (1984). This Court has explained that "the import of a new trial nisi additur or nisi remittitur is a

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requested by any party and that was not based in the evidence. *Id.* at 109, 866 S.E.2d at 555 ("The court of appeals correctly held the trial court invaded the province of the jury by reforming the verdicts on its own.").

suggestion on the part of the judge of a settlement figure." *Id.* Fisher/Crosby was free to accept or reject the new trial *nisi additur*. *Id.*

The Court of Appeals correctly concluded that "the circuit court acted well within its discretion in granting Respondents' motion for new trial *nisi additur*." *Jolly*, 435 S.C. at 664, 869 S.E. 2d at 850. Fisher/Crosby's vehement disagreement about the propriety of a new trial *nisi* does not provide a basis for certiorari review.

IV. The Court of Appeals properly upheld the circuit court's setoff of settlement proceeds only for the two claims tried against Fisher/Crosby.

The Court of Appeals rejected all of Fisher/Crosby's setoff arguments at length. *Jolly*, 435 S.C. at 664-71, 869 S.E.2d at 850-854. As grounds for review, Fisher/Crosby argue only that the Court of Appeals' 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 set off 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 reading of section 15–38–50 that ignores the 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 have a setoff granted for release of the Jollys' wrongful death

claims that *were not tried* against Fisher/Crosby, as only Mr. Jolly's personal injury claim and Mrs. Jolly's loss of consortium claim were considered by the jury.

The Court of Appeals 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*, 435 S.C. at 665, 869 S.E.2d at 850 (quoting *Riley*, 414 S.C. at 195, 777 S.E.2d at 830) (emphasis added by the Court of Appeals)). 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.* at 666, 869 S.E.2d at 851 (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. *Id.* at 664, 671, 869 S.E.2d at 850, 854. 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 666-67, 869 S.E.2d at 851 (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 670, 869 S.E.2d at 853. 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 Mr. Jolly's beneficiaries were recovered from Fisher/Crosby at trial. *Id.* at 671, 869 S.E.2d at 854.

Fisher/Crosby largely ignore the Court of Appeals's reasoning and instead cite case law from Florida and California that they raised for the first time in their petition for rehearing. 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 case of *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 of Appeals thoroughly evaluated Fisher/Crosby's arguments and properly determined that the circuit court's setoff ruling was correct given that the Jollys' trial recovery was not for all the same claims that they settled with other

defendants. Fisher/Crosby's resort to other states' inapposite case law is unavailing and does not provide grounds for certiorari review on the issue of setoff.

CONCLUSION

Fisher/Crosby have not met the review criteria of Rule 242, SCACR. They have failed to demonstrate that the Court of Appeals erred in its opinion affirming the circuit court on all issues, or that there are any important issues for this Court's review. Accordingly, their petition for certiorari should be denied.

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Respectfully submitted,

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