

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

**RECEIVED**

**Jun 06 2022**

---

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Jean H. Toal, Acting Circuit Court Judge

---

Appellate Case No. 2022-000272

---

Beverly Dale Jolly and Brenda Rice Jolly, ..... Respondents,  
v.  
General Electric Company, et al., ..... Defendants,  
Of whom Fisher Controls International LLC and Crosby  
Valve, LLC are the..... Petitioners.

---

REPLY IN SUPPORT OF AMENDED PETITION FOR A WRIT OF CERTIORARI

---

C. Mitchell Brown  
A. Mattison Bogan  
James B. Glenn  
Nicholas A. Charles  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, SC 29201  
(803) 799-2000

*Attorneys for Fisher Controls International LLC and  
Crosby Valve, LLC*

## Introduction

This Court should grant certiorari and reverse the Court of Appeals and trial court. Plaintiffs fail to offer support for the Court of Appeals rulings or meaningfully respond to a majority of the arguments raised by Petitioners Fisher Controls International LLC (“Fisher”) and Crosby Valve, LLC (“Crosby”) (together, “Petitioners”). The Court of Appeals’ and trial court’s rulings—and Plaintiffs’ arguments—are contrary to this Court’s precedents and must be reversed. If allowed to stand, the Court of Appeals’ opinion will, *inter alia*, create confusion in the law regarding the risk/utility test in products liability, whether a judge can “look behind” a general jury verdict, the law of *additur* and a judge’s powers related thereto as compared to the constitutional powers of the jury in deciding fact questions as to damages, as well as whether this Court’s “substantial factor” causation test adopted in *Henderson v. Allied-Signal, infra*, has been undermined. Certiorari should be granted.

## Argument

- I. **The Court of Appeals committed several errors in finding Petitioners were not entitled to JNOV on Plaintiffs’ design defect claims, and Plaintiffs fail to support the Court of Appeals’ rulings.**
  - A. **The trial court and Court of Appeals erred in finding Petitioners were not entitled to JNOV because Plaintiffs failed to present admissible specific causation expert testimony.**

The Court of Appeals’ decision to affirm the admissibility of Plaintiffs’ experts’ causation opinions—and Plaintiffs’ arguments in support of the Court of Appeals’ ruling—is incorrect on several grounds. First, as an initial matter, Plaintiffs assert that “Fisher/Crosby do not challenge” the Court of Appeals’ conclusion that the trial court acted within its discretion in admitting Plaintiffs’ experts’ testimony and do not “contend that [the trial court] abused her discretion in admitting the experts’ causation opinions.” (Return at 3). To the contrary, Petitioners argue

throughout their petition that the trial court erred in admitting the experts' testimony. *See generally* (Am. Pet. at 6–18).

Second, although Plaintiffs accuse Petitioners of incorrectly characterizing Dr. Frank's testimony, a proper analysis of his testimony, in context, reveals that he espoused the inadmissible "each and every exposure" or "cumulative exposure" causation opinion throughout his trial testimony. Plaintiffs largely repeat the Court of Appeals' characterization of Dr. Frank's testimony and claim the Court of Appeals reached the proper conclusion "[b]ased on the court's examination of what the experts actually stated to the jury." (Return at 4–5). As Petitioners explained in their petition, however, the Court of Appeals focused on certain statements of the experts while discounting other statements. (Am. Pet. at 14–17). Thus, the Court of Appeals' ruling was not based on what "the experts actually stated." A full analysis of Dr. Frank's testimony, in context, which Petitioners provided in their petition, reveals numerous examples of improper and inadmissible "each and every exposure" testimony. (*Id.*).

Moreover, the Court of Appeals' opinion was not based on what the experts "actually stated *to the jury*." (Return at 4–5) (emphasis added). The Court of Appeals relied heavily on statements in Dr. Frank's affidavit which were never presented to the jury. Rather than squarely address the Court of Appeals' error, Plaintiffs now argue, "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*." (Return at 6) (emphasis in original). This misleading statement is an incomplete account of how the evidence was presented at trial. Dr. Frank's affidavit was admitted as a demonstrative exhibit only. (R. 781–82). Thus, the jury (1) did not have the affidavit to review during deliberations *and* (2) only saw or heard *select portions* of the affidavit read aloud at trial. (*Id.*). The Court of Appeals held Petitioners "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.’” *Jolly v. Gen. Elec. Co.*, Op. No. 5858 (S.C. Ct. App. filed Sept. 1, 2021) (Howard Adv. Sh. No. 30 at 159) [hereinafter Op. 5858]. The Court of Appeals thus found statements in the affidavit cured any improper testimony. But the jury heard only the improper statements. It did not hear the purported clarifying statements<sup>1</sup> written in the affidavit, because those statements were never presented to the jury. Thus, the Court of Appeals’ reliance on the affidavit as somehow curing Dr. Frank’s improper and inadmissible opinion testimony for the jury is erroneous.

Third, the Court of Appeals’ reliance on *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016), improperly lowers the causation standard in mesothelioma cases. Plaintiffs acknowledge substantial factor causation is an alternative to the traditional but-for standard applicable to most tort claims. (Return at 12). Because a plaintiff might never recover under a but-for test, the

---

<sup>1</sup> The Court of Appeals repeatedly relied on statements in Dr. Frank’s affidavit that (1) his opinions were “medical and scientific” and (2) that he was “not offering legal opinions about whether an exposure is ‘significant’ or ‘substantial’ within the meaning of the law.” See Op. No. 5858 (Howard Adv. Sh. No. 30 at 148) (“Critically, Dr. Frank stated in his affidavit 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.’”); *id.* at 154 n.17 (“We decline to associate this isolated reference to the term ‘substantial’ with either an adoption of the each and every exposure theory or a rejection of the legal requirement that a plaintiff’s exposure to a particular defendant’s product must be frequent, ***especially given Dr. Frank’s previous statements in his affidavit that his opinions were medical and scientific and that he was not offering opinions about whether an exposure is substantial within the meaning of the law.***” (emphasis added)); *id.* at 159 (“To the contrary, 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.’”). However, these statements in Dr. Frank’s affidavit were never read to the jury.

substantial factor causation standard was adopted as a compromise which lowered the causation standard below the but-for standard but maintained an appropriate balance of fairness between plaintiffs and defendants. *See, e.g.,* David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 56 (2008). Despite this existing compromise, the Court of Appeals erroneously lowered the causation standard even further by adopting and applying the Pennsylvania Supreme Court’s analysis in *Rost*. *See* Op. 5858 (Howard Adv. Sh. No. 30 at 151–53, 156) (citing *Rost*, 151 A.3d at 1044–46, 1050–51). The Court of Appeals’ opinion will be argued to allow an asbestos plaintiff to meet his causation burden by showing only that his exposure from a particular defendant’s products was “above background,” and regardless of any other exposures. The Court of Appeals’ analysis thus appears to remove the requirement that an exposure be “substantial” from the “substantial contributing factor” standard. This standard could essentially render all defendants who exposed a plaintiff to any amount of asbestos automatically liable and effectively eliminate the plaintiff’s burden to prove that exposures attributable to a particular defendant were a *probable* cause of his mesothelioma, rather than a *possible* cause. *See McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016).

This weakening of the causation standard is inconsistent with *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007), and *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162–63 (4th Cir. 1986), and allows plaintiffs to evade the required proof by only presenting evidence that a plaintiff was generally exposed to asbestos and that the defendant’s products were a component of the exposures. In *Connor v. Covil Corp.*, 996 F.3d 143, 155 (4th Cir. 2021), the Fourth Circuit applied North Carolina law which, like South Carolina law, requires application of the *Lohrmann* substantial factor causation test, and rejected a plaintiff’s reliance on generalizations about his alleged asbestos exposures. *Id.* The plaintiff in *Connor* alleged that he

developed mesothelioma from insulation products supplied by the defendant, Covil. *Id.* at 151. He claimed that he passed by Daniel International workers on occasion and saw the workers “several times a day,” but the evidence did not establish with clarity how often he did so. *Id.* The plaintiff also alleged that the Daniel International workers were often working with insulation products supplied by the defendant, Covil, and therefore when he passed the Daniel International workers, he must have passed them while they were working with Covil products. *Id.* However, the Fourth Circuit found this evidence was insufficient to create a jury question under the *Lohrmann* standard:

Lacking any direct evidence, Appellant contends that Mr. Connor’s encounters with Daniel International workers *must* have occurred when the workers were using or maintaining [Covil’s] asbestos products, since this kind of work was Daniel International’s primary responsibility and most frequent task at Fiber Industries. But even if insulation work was Daniel International’s primary responsibility, it was not all the company did at Fiber Industries. As a result, we cannot conclude that there is a genuine dispute of fact regarding whether Mr. Connor was exposed to [Covil’s] asbestos products merely from the fact that he came across Daniel International crews while they were working in the production plant.

*Id.* Similarly, in this case, Mr. Jolly claimed that he stood near other tradesmen who used tools to grind gasket material from valve flanges. (R. 497–500). However, he did not testify as to how many of those valves were Petitioners’ valves rather than valves made by ten other manufacturers. (R. 503–04, 530, 877, 1062–63). Plaintiffs’ expert causation opinions as to Petitioners are therefore based on the same generalizations found insufficient by the Fourth Circuit in *Connor*. *See* (R. 719–22, 1014–15, 1546–48) (testifying generally that all exposures to asbestos cause mesothelioma and answering lengthy hypotheticals posited by Plaintiffs’ counsel that asked them to assume certain amounts of asbestos exposure and inevitably ended with the experts opining that, in those hypothetical scenarios not directly based on actual exposure evidence, Petitioners caused Mr. Jolly’s mesothelioma). For example, Dr. Frank reported his understanding that, from 1980-

84, Mr. Jolly was regularly within 10 feet of, and exposed to asbestos from, flange gaskets *associated with valves generally*. (R. 730–31). He said this exposure would be a significant contributing cause of Jolly’s mesothelioma. (R. 731). Asked to assume that Crosby was one of the valves “and that the asbestos-containing gaskets were supplied or specified by Crosby with its valve,” Dr. Frank said “*to the extent that Mr. Jolly was exposed to asbestos, that it was connected in some way with a Crosby valve, that would have been a substantial contributing cause to his mesothelioma.*” (R. 732) (emphases added). He gave the same answer as to Fisher based on the same assumptions. (R. 733). Consistent with that “every fiber/no threshold” opinion, he said that either the Crosby or Fisher exposure alone would have been sufficient for causation. (R. 734). Like the evidence in *Connor*, these opinions are insufficient to satisfy the *Lohrmann* standard.

The New York Court of Appeals also recently found testimony similar to Dr. Frank’s inadmissible and unresponsive of liability. *See Nemeth v. Brenntag N. Am.*, No. 24, 2022 WL 1217464 (N.Y. Apr. 26, 2022). In that case, the court found expert testimony that “‘brief or low level exposures of asbestos’ could cause [peritoneal mesothelioma], but that ‘there are some exposures to asbestos that are trivial and don’t increase a person’s risk of developing mesothelioma’ and that exposure to twice the amount of asbestos in ambient air would not cause mesothelioma,” was “plainly insufficient.” *Id.* at \*4. Because the expert relied on “studies” but “failed to provide ‘a specific comparison sufficient to show how the plaintiff’s exposure level related to those of the other subjects,’” her testimony was unreliable to establish specific causation, which requires a plaintiff to prove the level of exposure sufficient to cause mesothelioma and that her exposures to the defendant’s products surpassed that threshold. *Id.* at \*5; *see also Fisher v. Pelstring*, 817 F. Supp. 2d 791, 814 (D.S.C. 2011).

Under a proper application of *Lohrmann*, such as the one performed by the Fourth Circuit in *Connor*, Plaintiffs' evidence fails to prove substantial factor causation as a matter of law.

Fourth, Plaintiffs' policy argument about avoiding "the risk of absolving culpable defendants merely because there were other concurrent causes of the disease," (Return at 13), 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). But this is *not* the causation standard this Court has adopted. 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 by Plaintiffs 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. Substantial factor causation thus requires a plaintiff to prove the probability that his exposures from a particular defendant were a substantial factor in causing his disease. Other exposures and other circumstances existing with respect to the plaintiff, and not hypothetical abstract concepts, must be considered in this regard.

Finally, the fact that Mr. Jolly has mesothelioma, not asbestosis, does not affect the evidentiary analysis. Plaintiffs rely on statements by the district court in *Finch v. Covil Corp.*, 388 F. Supp. 3d 593, 619 (M.D.N.C. 2019). (Return at 8–9). However, as the Fourth Circuit explained in an appeal from the district court's order, the issue in that case was whether the district court was required to repeat the *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 v. Covil Corp.*, 972 F.3d 507, 512 (4th Cir. 2020) (“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 9). 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. Further, *Henderson*,

which adopted *Lohrmann*, was a mesothelioma case. This Court should grant certiorari and clarify that the evidentiary standard under *Henderson* is the same in all asbestos cases, regardless of the disease at issue, and that its standard was not met in this case by Plaintiffs.

**B. Plaintiffs failed to make the required presentation of evidence to satisfy the risk-utility test as to their design defect claims, and the Court of Appeals improperly shifted the burden of proof to Petitioners.**

Plaintiffs assert that, because gaskets could theoretically be made of metal rather than asbestos, they have satisfied their burden to present evidence of a reasonable alternative design. (Return at 15). However, contrary to Plaintiffs' suggestion, they cannot satisfy their burden of proof as a matter of law by pointing to the mere existence of an alternative material or the mere fact that Fisher valves or Crosby valves could have been made safer in some manner. The risk-utility test requires Plaintiffs to make a particular evidentiary showing as to their purported alternative design. Plaintiffs failed to make the required showing.

This Court articulated the risk-utility test for design defect claims in *Claytor v. General Motors Corp.*, 277 S.C. 259, 265, 286 S.E.2d 129, 132 (1982). The Court explained any plaintiff pursuing a design defect claim must prove the product was unreasonably dangerous and noted that while, “[a]cademically, it may be argued that all products are defective because they can be made more safe, . . . it does not automatically follow that the products are deemed ‘unreasonably dangerous.’” *Id.* at 262, 265, 286 S.E.2d at 131, 132. Instead, “numerous factors must be considered, including the usefulness and desirability of the product, the cost involved for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger.” *Id.* at 265, 286 S.E.2d at 132.

This Court reaffirmed the requirement that a plaintiff satisfy the risk-utility test in *Branham v. Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (2010). In *Branham*, the Court explained

the *plaintiff* “must present evidence of a reasonable alternative design,” and the *plaintiff’s* presentation must include evidence proving the risk-utility factors: “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.***” *Id.* at 225, 701 S.E.2d at 16 (emphasis added).

The Court of Appeals’ 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 Petitioners. *See* Op. No. 5858 (Howard Adv. Sh. No. 30 at 168). Rather than point to evidence supporting their claims, Plaintiffs only 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 design to asbestos gaskets.” (Return at 15–16). 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. Plaintiffs point to the existence of other materials from which gaskets can theoretically be made, but they fail to point to any evidence from which a jury could find the risk-utility test is satisfied as to those materials. (Return at 15–16). Their failure to present or identify any such evidence is fatal to their design defect claims.

Plaintiffs also repeat the Court of Appeals’ 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 16). Neither the Court of Appeals nor Plaintiffs 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 provide only the elements of the reasonable alternative design test. *See Branham*, 390 S.C. at 225, 701 S.E.2d at 16; *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 546, 462 S.E.2d 321, 330 (Ct. App. 1995). *Branham* requires **Plaintiffs** to present evidence satisfying the risk-utility test. Plaintiffs failed to present evidence from which a jury could find the risk-utility test is satisfied as to any potential alternative design. The Court of Appeals improperly shifted the burden of proof to Petitioners, in conflict with binding precedent. Accordingly, this Court should grant certiorari and reverse the denial of JNOV.

**C. Plaintiffs failed to satisfy their burden of proof on their design defect claims based on an alleged failure to warn.**

Plaintiffs failed to present evidence from which a jury could find in their favor on their design defect claims based on the lack of a warning about the hazards of asbestos. Plaintiffs now imply that Petitioners are raising a new argument not previously presented to the Court of Appeals. (Return at 16–17). Contrary to Plaintiffs’ representation, Petitioners expressly argued in their primary brief to the Court of Appeals that “Plaintiffs presented no evidence regarding what information a warning should have contained, how that warning could have been effectively communicated to Duke’s employees, or whether a warning would have prevented Mr. Jolly from contracting mesothelioma,” and “Mr. Jolly also did not testify that he would have heeded a warning had he received one from Fisher and Crosby.” (App. Br. 27–28). Petitioners raised the issue again in their petition for rehearing. *See* (Pet. for Rehearing at 26). Thus, the issue is properly before this Court. As Petitioners explained in their petition, Plaintiffs failed to meet their burden to prove a warning would have been effective, and Petitioners were therefore entitled to JNOV. *See* (Am. Pet. at 20–21).

**III. The trial court abused its discretion in granting *additur*, and the Court of Appeals failed to review the trial court’s decision using the proper standard.**

The Court of Appeals failed to properly review the trial court’s *additur* ruling, instead holding the trial court had near absolute discretion to grant *additur*, including the discretion to speculate as to the composition of the jury’s general verdict. The trial court and Court of Appeals erred, and their decisions conflict with this Court’s precedent. The constitutional right to a jury trial is guaranteed in every case and includes the right to have the jury determine damages. S.C. CONST. art. I, § 14 (“The right of trial by jury shall be preserved inviolate.”); *Hatchell v. McCracken*, 243 S.C. 45, 51, 132 S.E.2d 7, 10 (1963). Because a trial court’s power to grant an *additur* motion conflicts with this constitutional right to trial by jury as to the amount of damages, trial courts must “offer compelling reasons for invading the jury’s province.” *See Riley v. Ford Motor Co.*, 414 S.C. 185, 193, 777 S.E.2d 824, 829 (2015).

Despite the preeminence of the constitutional right to trial by jury, the Court of Appeals in this case effectively held a trial court has near absolute discretion to change a jury’s damages award based on its own subjective view of the evidence. Rather than requiring “compelling reasons for invading the jury’s province,” the Court of Appeals held a recitation of some damages evidence by the trial court—which the trial court improperly construed in the light most favorable to the *moving* party—justifies substituting the trial court’s damages opinion in place of the jury’s determination. The standard of review applied by the Court of Appeals improperly elevates deference to the trial court above the required substantial deference to the jury’s verdict.

This Court should clarify South Carolina jurisprudence regarding the review of trial court decisions granting *additur* to reaffirm its prior precedents that trial courts do not have absolute discretion to invade the province of the jury. If a trial court commits an error of law in granting *additur*—for example, by speculating as to the composition of the jury’s verdict, by making

witness credibility determinations, by construing disputed evidence in the light most favorable to the moving party, or by offering only its own subjective view of the evidence as its only purported compelling reason—its *additur* ruling must be reversed.

The trial court committed an error of law by speculating as to the composition of the jury's verdict. Contrary to the Court of Appeals' efforts to re-state the trial court's ruling and find the *additur* was based on a general finding that the verdict was inadequate, the trial court expressly separated the \$200,000 award to Mr. Jolly into two separate "awards" for medical expenses and pain and suffering, then granted *additur* based on its conclusion that the awards were inadequate. (R. 17) ("[T]he Jollys' verdict is inadequate and should be increased to more accurately reflect the extent of their losses. ***The jury only awarded Mr. Jolly medical expenses in the amount of \$142,000, plus \$58,000 for pain and suffering.***").

Plaintiffs' arguments defending the trial court's speculation and the Court of Appeals' affirmance are unavailing. Although the *Stoneledge* case may be distinguishable on its facts, the principle that courts cannot speculate as to the intent behind a jury's damages award is well-settled and binding in this case. *See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 132, 866 S.E.2d 542, 554 (2021). The only thing certain about the jury's verdict in this case is that it awarded \$200,000 in damages to Mr. Jolly and \$100,000 to Mrs. Jolly. How it reached those damages awards is unknown and, now that the jury has been discharged, can never be known. The trial court speculated that the jury intended to award \$142,000 in economic damages and \$58,000 in noneconomic damages based solely on its speculation as to the jury's intent. This speculation is improper and is an error of law. This Court should thus grant certiorari, reverse the *additur* ruling, and reinstate the jury's damages verdict.

**IV. The Court of Appeals and trial court erred in failing to apply the plain language of the setoff statute.**

Plaintiffs focus solely on a single clause in South Carolina Code section 15-38-50 as purported support for their private, unilateral allocation of settlement proceeds which was not agreed to by other settling parties. (Return at 23–24). Although they accuse Petitioners of selectively reading the statute, they ignore a critical statutory limitation—a release “given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death” reduces the claim against other defendants “*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). Plaintiffs’ releases did not stipulate the allocation of settlement proceeds to any particular cause of action, and the consideration was paid in a lump sum to settle all causes of action. Plaintiffs invented their purported allocation unilaterally and after the fact.

Plaintiffs cite no law upholding a private, unilateral allocation by one party to a settlement agreement which was not agreed to or stipulated by the other settling party. *See* (Return at 23–25). They argue only that “[s]uch 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.”’” (Return at 24) (citing the Court of Appeals’ opinion in this case as purported authority). However, the statute contains no such permission, and a general statement of public policy cannot override the plain language of a statute. Courts in other jurisdictions applying similar setoff statutes have properly held that unilateral allocations are unfair and not permitted, and a lump-sum setoff is required where the settling parties did not agree to any allocation. *See Dionese v. City of W. Palm Beach*, 500 So. 2d 1347, 1349 (Fla. 1987); *see also Knox v. Los Angeles Cty.*, 167 Cal. Rptr. 463, 469 (Cal. Ct. App. 1980); *Anderson v. Ewing*, 768

So. 2d 1161, 1164 (Fla. Dist. Ct. App. 2000).<sup>2</sup> Although Plaintiffs attempt to distinguish *Dionese*, the distinctions are immaterial to the question at issue—whether a plaintiff may unilaterally allocate settlement proceeds. Far from being “inapposite,” *see* (Return at 26), *Dionese* interpreted a setoff statute that is *identical* to South Carolina’s statute. *See* Fla. Stat. Ann. § 768.31(5). *Dionese* is therefore directly on point. This Court should follow *Dionese*, reverse the Court of Appeals and trial court, and order a lump-sum setoff in accordance with the plain language of section 15-38-50.

### **Conclusion**

This Court should grant certiorari to review the Court of Appeals’ erroneous substantial factor causation analysis, the improper burden-shifting on Plaintiffs’ design defect claims, the erroneous *additur* analysis, and the improper denial of a complete setoff. The Court should reverse the Court of Appeals and trial court.

*(signature page attached)*

---

<sup>2</sup> Plaintiffs imply that the *Dionese* case should not be considered because Petitioners cited it for the first time in their petition for rehearing, *see* (Return at 25), but nothing prohibits a party from citing additional case law in a petition for rehearing in support of an argument it properly raised in its briefing.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ C. Mitchell Brown

C. Mitchell Brown

SC Bar No. 012872

E-Mail: [mitch.brown@nelsonmullins.com](mailto:mitch.brown@nelsonmullins.com)

A. Mattison Bogan

SC Bar No. 72629

E-Mail: [matt.bogan@nelsonmullins.com](mailto:matt.bogan@nelsonmullins.com)

James B. Glenn

SC Bar No. 77731

E-Mail: [jase.glenn@nelsonmullins.com](mailto:jase.glenn@nelsonmullins.com)

Nicholas A. Charles

SC Bar No. 101693

E-Mail: [nick.charles@nelsonmullins.com](mailto:nick.charles@nelsonmullins.com)

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Fisher Controls International LLC and Crosby  
Valve, LLC

Columbia, South Carolina

June 6, 2022