2017 WL 10672343 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Seventh Judicial Circuit
Spartanburg County

Beverly Dale JOLLY, et al.,
v.
GENERAL ELECTRIC COMPANY, et al.

No. 2016CP4201592.
December 15, 2017.

Order Denying Defendants' Post-Trial Motions and Granting Plaintiffs' Motion for New Trial Nisi Additur

Jean Toal, Judge.

*1 In this asbestos case, each of the parties has sought relief from the jury's August 3, 2017 verdict. For the reasons set forth below, Plaintiffs Dale and Brenda Jolly's motion for new trial *nisi additur* is GRANTED, the joint motions of Defendants Fisher Controls International LLC ("Fisher") and Defendant Crosby Valve, LLC ("Crosby") for judgment notwithstanding the verdict, election of remedies, and discovery of settlements are DENIED, and Defendants' joint motion for set-off under S.C. Code § 15-38-50 is GRANTED in part.

I. The Evidence at Trial

Dale Jolly was diagnosed with mesothelioma at the age of 71. (TT 7/25 at 58-59; TT 7/26 at 100). Mr. Jolly and his wife, Brenda, brought this action against companies that made asbestos products Mr. Jolly worked with during his career working at Duke Power as a mechanical inspector. Evidence at trial indicated that between 1980 and 1984, Mr. Jolly was exposed to asbestos gaskets and packing while inspecting pumps and valves, including valves manufactured by Fisher and Crosby. (TT 7/25 at 61-63, 72-76, 84-94).

Mr. Jolly worked at three of Duke's nuclear power plants: Oconee, McGuire, and Catawba. (TT 7/25 at 66-67). His job put him alongside mechanics that were changing asbestos gaskets and/or asbestos packing on valves, particularly during outages at the plant, and he recalled that the use of grinders and brushes created dust. (TT 7/25 at 74-76, 84-94). He recalled that there were a lot of Fisher and Crosby valves present at those plants. (TT 7/25 at 72-73, 90-91). At times, engineers from Fisher or Crosby were present to assist with the maintenance of the valves. (TT 7/25 at 107).

Exposure testimony was also provided by Mr. Jolly's co-worker, David Taylor, who worked at the same Duke nuclear plants where Mr. Jolly was stationed, particularly Oconee. (TT 7/25 at 198-201). As a pipefitter, it was Mr. Taylor's job to connect and disconnect valves and pumps to and from pipe systems. ((TT 7/25 at 201), He explained that he bolted valves to pipe flanges, and that there was a gasket between the pipe and the valve to seal the connection. (TT 7/25 at 201). He had to remove valve gaskets about once a week. (TT 7/25 at 204). He removed asbestos gaskets from valve flanges with a scraper or wire brush, which created a lot of dust. (TT 7/25 at 202, 204-05). Mr. Jolly was nearby when Mr. Taylor and other workers removed asbestos flange gaskets. (TT 7/25 at 207-09, 220).

Fisher and Crosby sold valves to Duke that were connected to the pipeline with a flange connection that utilized flange gaskets. (TT 7/25 at 74; TT 7/27 at 187-89; 7/31 at 122-23, 125, 164-65). Those flanged connections utilized asbestos gaskets. (TT 7/25 at 210). Fisher and Crosby valves also had internal asbestos gaskets and packing. (TT 7/25 at 210-13).

The original and replacement asbestos valve gaskets came from Fisher and Crosby. (TT 7/25 at 214-15; TT 7/26 at 214-15; TT 7/27 at 104-05). Most of the valve flange gaskets sold by Fisher and Crosby were asbestos gaskets. (TT 7/26 at 202, 210-13; Pl's Ex. 1012.6). Asbestos gaskets contain up to 90% asbestos. (TT 7/26 at 51-52).

*2 The evidence at trial also established that at least some of the gaskets and packing sold by Defendants contained crocidolite, or Blue African asbestos. (Pl's Ex. 1008.10670; Pl's Ex. 1008.10665). Fisher also had a specification for crocidolite packing. (TT 7/27 at 201-02, 206; Pl's Ex. 2006.037). Defense expert Dr. Oury testified that gaskets and packing were known to contain crocidolite. (TT 8/2 at 188-89; Crosby Ex. 533). Crocidolite is known to be by far the most potent type of commercial asbestos fiber. (TT 8/1 at 114; TT 8/2 at 179).

There was testimony that Mr. Jolly's exposures to asbestos from Fisher and Crosby valves were many orders of magnitude above background levels. (TT 7/26 at 76-77). Dr. Frank testified that Mr. Jolly's exposures were extensive and repetitive. (TT 7/26 at 71).

Both of Plaintiffs' medical experts, Dr. Arthur Frank and Dr. John Maddox, testified that Mr. Jolly's exposure to asbestos from Fisher and Crosby valves was a substantial factor in the development of his mesothelioma. (TT 7/26 at 72-73; TT 7/31 at 180-82). They testified that mesothelioma can be caused by briefer low level cumulative exposures. (TT 7/26 at 41-43, 52-53; TT 7/31 at 179-80, 184-85). Even Defense expert Dr. Crapo admitted that a "very low" level of exposure to crocidolite can cause mesothelioma. (TT 8/1 at 114).

Experts on both sides agreed that Mr. Jolly's mesothelioma would most likely be fatal. (TT 7/26 at 99; TT 8/2 at 190). Dr. Frank testified that Mr. Jolly would likely die in a year or less. (TT 7/26, at 99-100). Mesothelioma was described as an unusually painful disease. (TT 7/26 at 98; TT 8/1 at 150-53). Dr. Frank and defense expert Dr. Crapo indicated that Mr. Jolly will continue to require medical care until his death. (TT 7/26 at 101-02; TT 8/1 at 153).

A jury trial was held against Fisher and Crosby in July and August 2017. The jury considered Plaintiffs' claims of negligence, strict products liability, and breach of implied warranty. They returned a verdict for Plaintiffs on the negligence and breach of implied warranty claims, and awarded $200,000 in compensatory damages to Mr. Jolly and $100,000 in compensatory damages to Mrs. Jolly.

II. Ruling on Motion for New Trial *Nisi Additur.*

A. Standard of Review

A new trial *nisi additur* may be granted when the trial court finds the amount of the verdict to be "merely inadequate" in light of the evidence presented at trial. *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (2003); *Vinson v. Hartley*, 324 S.C. 389, 406, 477 S.E.2d 715, 723 (Ct. App. 1996). When granting a motion for *additur*, the court must offer compelling reasons. *Green*, 356 S.C. at 570, 590 S.E.2d at 41; *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). "Great deference is given to the trial judge .... [because] the trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than [the appellate courts]." *Waring v. Johnson*, 31 S.C. 248, 257, 533 S.E.2d 906, 911 (2000).

"A new trial *nisi* is one in which a new trial will be granted unless the party opposing it complies with a condition set by the court." *Waring*, 31 S.C. at 257, 533 S.E.2d at 911. The trial court has the authority grant a new trial to the plaintiff unless the defendant agrees to the payment of an additional amount. *Id.* at 258, 533 S.E.2d at 911.

B. Additur

A new trial *nisi additur* is warranted when a jury has awarded medical damages for injuries caused by the defendant but has failed to consider the plaintiff's pain and suffering associated with those injuries. *See* *Waring v. Johnson*, 31 S.C. 248, 260, 533 S.E.2d 906, 912 (2000). In *Waring*, the jury only awarded the exact amount of the plaintiff's medical expenses, $23,237.28, associated with her injuries from a car wreck. The Supreme Court found that it was proper to grant a *nisi additur* of $40,000 given the evidence that the plaintiff's pain was caused by her injury and that she was unable to continue her previously active lifestyle. *Id.* at 260, 533 S.E.2d at 912; *see also* *id.* at 258-59, 533 S.E.2d at 911-12 (collecting South Carolina cases upholding trial court orders granting new trial *nisi additur* under the abuse of discretion standard).

*3 In *Riley v. Ford Motor Co.*, 414 S.C. 185, 188, 777 S.E.2d 824, 826 (2015), the Supreme Court held that the trial court had not abused its discretion in granting a *nisi additur* in the amount of $600,000. This was a product liability case against Ford brought by the estate of a man who was killed when his door latch failed in a car accident. *Id.* at 189, 777 S.E.2d at 826-27. The uncontradicted evidence was that the family had $228,000 in economic damages, plus a number of witnesses testified about the significant noneconomic damages suffered by his family. *Id.* at 193, 777 S.E.2d at 829. The trial court found the jury's verdict of $300,000 to be inadequate, granted a *nisi additur* of $600,000, and entered judgement for $900,000. *Id.* at 189, 777 S.E.2d at

In upholding the grant of a new trial *nisi additur*, the Supreme Court clarified that a *nisi additur* may be appropriate even when the jury has awarded some amount for noneconomic damages. *Id.* at 194, 777 S.E.2d at 829-30. The trial court had articulated compelling reasons for granting the *nisi additur*, including "a thorough recitation of the 'uncontested, and emotionally compelling' evidence, including testimony and supporting exhibits that demonstrated both the pecuniary losses suffered by the Riley family and also the noneconomic compensable elements of loss that are recoverable in a wrongful death action." *Id.*; *see also* *Graham v. Whilaker*, 282 S.C. 393, 405, 321 S.E.2d 40, 45 (1984) (upholding new trial *nisi additur* of several times the jury verdict, increasing actual damages from $10,000 to $67,500).

When considering a new trial *nisi*, it is proper to compare the jury's verdict to damages awards in comparable cases. *See Lucht v. Youngblood*, 266 S.C. 127, 136, 221 S.E.2d 854, 858 (1976); *see also* *Kapuschinsky v. U.S.*, 259 F. Supp. 1, 8 (D.S.C. 1966) ("Admittedly not controlling, but worthy of note are treatments of verdicts from all over this country").

Damages awards for pain and suffering in comparable mesothelioma cases range from $1.5 million to more than $20 million. *See, e.g., Keene v. CNA Holdings, LLC*, No. 2013-CP-42-03915 (S.C. Ct. Comm. Pleas Jan. 8, 2016) (upholding award of $2 million in survival damages, $5 million in loss of consortium damages, and $5 million in wrongful death damages); *Garvin v. Agco Corp.*, No. 2012-CP-40-6675 (S.C. Ct Comm. Pleas Nov. 14, 2014) (remitting the jury verdict to award $1.5 million for the plaintiff's pain and suffering and upholding the loss of consortium award of $1 million); *see also* *Bobo v. Tennessee Valley Authority*, 855 F.3d 1294 (11th Cir. 2017) (affirming in relevant part the district court's award of $3 million in pain and suffering damages for woman with asbestos-related mesothelioma); *Romano v. Metropolitan Life Ins. Co.*, -- So.3d --, 2017 WL2265424 (La. Ct. App. 2017) (increasing pain and suffering award from $500,000 to $1.5 million in mesothelioma case where plaintiff had endured invasive surgery and was expected to die from his disease); *John Crane, Inc. v. Linkus*, 190 Md. App. 217, 988 A.2d 511 (Md. Ct. App. 2010) (upholding $15,335,274 verdict for living shipyard worker diagnosed with mesothelioma at the age of 70, of which $335,000 was medical expenses and $15 million was noneconomic loss); *In re New York City Asbestos Litigation (Re D'Ulisse)*, 16 Misc.3d 945, 842 N.Y.S.2d 333 (N.Y. Sup. Ct. 2007) (denying motion to reduce award of $20 million in past and future pain and suffering to mesothelioma victim and $5 million to his wife of 51 years); *Williams v. CSX Transp., Inc.*, 176 N.C.App. 330, 626 S.E.2d 716 (N.C. Ct. App. 2006) (affirming verdict in which railroad worker with mesothelioma was awarded $7.5 million in pain and suffering damages); *Goede v. Aerojet Gen. Corp.*, 143 S.W.3d 14, 17, 27-28 (Mo. Ct. App. 2004) (upholding award of $2 million for pre-death pain, suffering and emotional distress where 43-year-old had survived one year with mesothelioma).

*4 The South Carolina Supreme Court has held that the goal of compensatory damages is "to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred."

Clark v. Cantrell, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000).

Under this case law, it is clear that the 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.

The jury was instructed that, "[a]ctual damages are designed to compensate a party for their loss and to make that party as whole as near as money can do and to put him or her in the same position they were in before the accident or incident occurred. Actual damages would be the actual losses and expenses the Plaintiffs have incurred." (TT 8/3 at 139). The jury was instructed on four categories of actual damages – medical expenses, pain and suffering, loss of enjoyment of life, and mental anguish. (TT 8/3 at 139-40). The jury was also instructed that future damages should be awarded for the duration of Mr. Jolly's life expectancy, which is a little more than eleven (11) years given his age of 73. (TT 8/3 at 141-42).

The evidence supported damages in all of these categories, and for future damages. The jury's award of only $200,000 was not sufficient to make Mr. Jolly whole for the magnitude of his losses resulting from his mesothelioma diagnosis, treatment, and expected death.

Testimony bearing on damages was offered by Plaintiffs Dale and Brenda Jolly, their daughter, Tracy Pavlish, Plaintiffs' expert Dr. Arthur Frank, and defense expert Dr. James Crapo. As noted, Dr. Frank testified that all of the medical treatment received by Mr. Jolly was medically necessary. (TT 7/26 at 100). Dr. Frank testified, *without dispute*, that the total cost of Mr. Jolly's past and future medical care, from the time of his diagnosis to the time of his death, would reasonably be $1,000,000. (TT 7/26 at 101, 179). This undisputed testimony took into account some of Mr. Jolly's past medical bills of $142,000, plus the cost of his surgery that was hundreds of thousands of dollars. (TT 7/26 at 101, 193).

The jury heard evidence that Mr. Jolly is currently undergoing an experimental therapy that requires him to go for treatments and doctor visits several times a week. (TT 7/25 at 145, 162-63, 172; TT 7/26 at 100). Experts on both sides agreed that Mr. Jolly's would likely die from mesothelioma and that his medical needs would increase as he got sicker and closer to death. (TT 7/26 at 101-02; TT 8/1 at 153).

Given this undisputed evidence of Mr. Jolly's past and future medical needs and expenses, The Court will increase the medical expenses award to $1,000,000.

The Court also finds that the jury's award of $58,000 for Mr. Jolly's pain and suffering in inadequate. There was evidence that after his diagnosis Mr. Jolly suffered greatly through three rounds of chemotherapy, and endured surgery that involved removing his rib and scraping out the tumor. (TT 7/25 at 145, 159-60, 175; TT 7/26 at 96-97, 102). He lost 45 pounds. (TT 7/25 at 60). His recovery from the surgery required months of rehabilitation to help him regain his ability to walk and to breathe without oxygen. (TT 7/25 at 161-62). At the time of trial, he was on an experimental treatment that he said "brings you to your knees." (TT 7/25 at 145). Dr. Frank and defense expert Dr. Crapo both confirmed that the pain associated with mesothelioma is quite bad. (TT 7/26 at 98; TT 8/1 at 150-53).

***5** This is not to mention Mr. Jolly's expected death, which Dr. Crapo described at length as "in no way ... a comfortable death [because it is] a very bad tumor," "not a very good death," and "a bad death." (TT 8/1 at 151, 152, 153). Mr. Jolly will continue to waste away and by the end of his life will likely require feeding by a feeding tube or intravenously, and will be on hospice care. (TT 7/26 at 102).

There was also substantial evidence of Mr. Jolly's loss of enjoyment of life. The evidence is that he was a very healthy, active person prior to his diagnosis and that because of his mesothelioma he can no longer do any of the things that bring him joy. (TT 7/25 at 157). The testimony was that his life "came to a halt" after his diagnosis. (TT 7/25 at 156-57). He was still working at Duke at the time of his diagnosis, at the age of 71, because he "loved" his work. (TT 7/25 at 64). He had to stop because of his illness. (TT 7/25 at 59). He used to keep a vegetable garden and spend a lot of time gardening and mowing the grass, which he can no longer do. (TT 7/25 at 165). He cannot go to church or have friends over for dinner. (TT 7/25 at 173). They used to go to the beach for a every year and they can no longer do that. (TT 7/25 at 173).

Mr. Jolly has also suffered mental anguish. His daughter testified that he was "heartbroken" by the diagnosis, (TT 7/25 at 157), and became "depressed" after going through chemotherapy. (TT 7/25 at 159, 175). She explained that he was "devastated" by the recent news that his cancer had come back. (TT 7/25 at 162). Mr. Jolly's mental anguish was evident for the jury to witness, as he became overwhelmed with emotion. (TT 7/25 at 107-08).

The Court will increase Mr. Jolly's noneconomic damages award by a factor of ten, and award $580,000.

The Court will also increase Mrs. Jolly's loss of consortium damages. The evidence established that Mr. and Mrs. Jolly have been married for 51 years. (TT 7/25 at 170). Mrs. Jolly has turned into Mr. Jolly's caregiver and has witnessed him in a lot of pain. (TT 7/25 at 167, 173). Her own health has been neglected to the point that she had a heart attack a few weeks before trial. (TT 7/25 at 163-64). Her daughter described her as "really scared" by the return of the cancer. (TT 7/25 at 162).

Given everything that the Jollys have endured, and that her time with Mr. Jolly will be cut short by at least ten years, the jury's award of $100,000 in loss of consortium damages is inadequate to compensate Mrs. Jolly for her losses. The evidence supports a loss of consortium award of $290,000.

The Court therefore grants a new trial *nisi additur* and orders an addited verdict of $ 1,580,000 to Mr. Jolly and $290,000 to Mrs. Jolly.

III. Ruling on Defendants' Joint Motion for Judgment Notwithstanding the Verdict

Fisher and Crosby have raised nine separate points of error in support of their motion for judgment notwithstanding the verdict. The Court denies Defendants' motion on all grounds.

A. Standard of Review

In ruling on a JNOV motion, the Court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Swicegood v. Lott*, 379 S.C. 346, 351, 665 S.E.2d 211, 213 (Ct. App. 2008); *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 287, 356 S.E.2d 123, 127 (Ct. App. 1987). The court must deny the motion for JNOV when the evidence yields more than one inference or its inference is in doubt. *Id.*; *Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). The jury's verdict may not be overturned if *any evidence* sustains the factual findings implicit in its decision. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.W.2d 408, 419 (Ct. App. 2000); *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000).

B. Open and Obvious Danger.

*6 Fisher and Crosby first contend that they had no duty to warn Jolly because the danger was open and obvious. This is contradicted by the fact that Fisher and Crosby took the position at trial that asbestos gaskets and packing are not dangerous. (TT 7/27 at 145-46). The jury could have concluded that neither Duke, nor Mr. Jolly, knew that the asbestos gaskets and packing used in Fisher and Crosby valves were dangerous because Fisher and Crosby completely denied that.

"'A seller is not required to warn of dangers or potential dangers that are generally known and recognized.'" *Moore v. Barony House Rest., LLC*, 382 S.C. 35, 41—12, 674 S.E.2d 500, 504 (Ct. App. 2009) (quoting *Anderson v. Green Bull, Inc.*, 322 S.C. 268, 270, 471 S.E.2d 708, 710 (Ct. App. 1996). The jury was instructed to this effect in this case. It was told that there is no duty to warn of a danger that is "obvious" or that is "generally known and recognized." (TT 8/3 at 124).

In arguing that Mr. Jolly was aware of the danger, Defendants rely entirely on his testimony regarding warnings that Duke provided about asbestos insulation. (TT 7/25 at 119-20, 124-25, 130, 135). There was evidence that Duke did not know that asbestos gaskets were hazardous, and thus was not warning its employees. (Pl's Ex. 136). A Duke document from September

1984 instructing employees how to protect themselves from asbestos insulation, states that asbestos used in gasket material is "bonded, which means it produces virtually no dust." (Pl's Ex. 136 at Script, p. 3). Mr. Jolly explained that he was only warned by Duke about asbestos hazards that Duke knew about. (TT 7/25 at 142). Mr. Jolly's co-worker, David Taylor, testified that when Duke gave its employees information about asbestos hazards, Duke made a distinction between insulation and gaskets. (TT 7/27 at 126). Employees did not know there was a danger from asbestos gaskets until several years after Duke started warning that precautions needed to be taken around asbestos insulation. (TT 7/27 at 127).

Fisher's representative, Ronald Duimstra, contended at trial that, with regard to asbestos components sold with Fisher valves and as replacement parts "there's no health risk and therefore there would be no reason to warn." (TT 7/27 at 146; *see also id.* at 148). Duimstra testified that there was no action for Duke to take with respect to warning about asbestos gaskets and packing. (TT 7/27 at 148-49, emphasis added). Crosby's representative, Robert Martin (TT 7/31 at 2, 4), similarly testified that "[w]e saw no danger from the gasket and the way we use them." (TT 7/31 at 33).

Not only do Fisher and Crosby contend there was no health hazard from working with asbestos gaskets and packing, they did not always inform Duke that these materials contained asbestos. Some of Fisher's asbestos-containing packing specifications did not describe the material as containing asbestos, and instead referred to it as metallic or plastic. (TT 7/27 at 208-09). Mr. Duimstra agreed that a reference to a metal packing ring would not alert people that the product contained asbestos. (TT 7/27 at 210). Duke purchase orders to Fisher stated the Fisher part number and a brief description, but oftentimes in order to determine if the part contained asbestos one would have to reference Fisher's own material specification for that part number. (TT 7/27 at 215-16, 221-22, 225; Pl's Ex. 1012.5). Jolly's co-worker, David Taylor, testified that the only way to know if a gasket had asbestos was whether it was marked as asbestos-containing on the gasket packaging. (TT 7/27 at 115).

***7** The Court finds that it is not possible to conclude, as a matter of law, that asbestos gaskets and packing were obviously dangerous to Mr. Jolly when Fisher and Crosby completely deny that they were dangerous at all and did not consistently notify Duke and its employees that valve gaskets and packing were asbestos-containing. The question of whether Mr. Jolly knew about the danger of working around asbestos gaskets and packing was for the jury, which it decided in Plaintiffs' favor.

C. Sophisticated Intermediary Defense

The South Carolina Supreme Court has observed that the sophisticated intermediary defense has not been adopted in South Carolina. *See Lowing v. Univar, USA, Inc.*, 415 S.C. 209, 226, 781 S.E.2d 548, 557 (2015), *reh'g denied* (Feb. 12, 2016). The Court nevertheless determined that the jury should be instructed on this defense under the facts of this case. This is an affirmative defense for which Defendants had the burden of proof. *See Webb v. Special Elec. Co.*, 63 Cal. 4th 167, 187, 370 P.3d 1022, 1034 (2016).

The jury decided this issue in Plaintiffs' favor. The Court finds that their verdict is supported by the evidence and that Fisher and Crosby are not entitled to judgment as a matter of law on this defense. Fisher and Crosby did not show that they warned Duke; the evidence was that Fisher and Crosby provided no warnings to Duke. (TT 7/27 at 144; TT 7/31 at 64-65). Fisher and Crosby also failed to show that they knew Duke was aware or should have been aware of the danger from asbestos gaskets. The evidence was that Duke distinguished asbestos gaskets as non-hazardous because it was thought they did not release asbestos fibers when disturbed. (Pl's Ex. 136 at Script, p. 3; TT 7/27 at 126). There was no evidence that Fisher and Crosby were relying on Duke to inform its employees of those hazards. The record thus supports the jury's rejection of this defense.

D. Product in Same Condition.

Fisher and Crosby contend that they are not liable for Mr. Jolly's exposure to asbestos flange gaskets because the flange gaskets "were placed between piping and the Defendants' valves *after* they were sold and sent to Duke." JNOV Motion at 10. Because the flange gaskets were applied to the flange during the installation of the valve at the power plant, Fisher and

Crosby argue that the valve was not in the same condition as when they sold it.

The Court does not agree that connecting flanged valves to a pipeline in the field is an alteration of the valve. Fisher and Crosby sold valves that were connected to the pipeline with a flange connection that utilized flange gaskets. (TT 7/27 at 187-89; 7/31 at 18-19, 122-23, 125). The evidence was that Fisher and Crosby intended that flange gaskets would be used to connect their valves to the pipe line. (TT 7/27 at 188-89). Mr. Martin agreed that "the design was a flange that would have to have a gasket." (TT 7/31 at 123).

Fisher and Crosby knew that asbestos flange gaskets would sometimes be used. (TT 7/31 at 122-23). Defendants' engineers determined what materials the flange gaskets were made of to create the right seal under different conditions. (TT 7/27 at 189). Mr. Taylor recalled that the Fisher and Crosby valves present at Duke had flange connections that utilized asbestos flange gaskets. (TT 7/26 at 210-13).

Fisher and Crosby did not simply sell valves, they both also sold replacement asbestos flange gaskets to Duke. Mr. Taylor testified that all of the valve flange gaskets were supplied by the valve manufacturers. (TT 7/26 at 214-15; TT 7/27 at 104-05). Most of those valve flange gaskets were asbestos gaskets. (TT 7/26 at 202, 210-13). Duke purchase orders corroborate his recollection, as they show asbestos flange gaskets being sold by Fisher. (Pi's Ex. 1012.6). The evidence supports a jury finding that Mr. Jolly was exposed to asbestos flange gaskets sold directly by Defendants.

***8** To the extent that the use of a flange gasket on a flanged valve could be considered an "alteration" of the valve, it was an entirely foreseeable and expected modification. "Liability may be imposed on a manufacturer or seller notwithstanding subsequent alteration of the product when the alteration could have been anticipated by the manufacturer or seller." *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 466, 494 S.E.2d 835, 844 (Ct. App. 1997). Only "if it can be shown that the product was (1) materially altered before it reached the injured user and (2) such alteration could not have been expected by the manufacturer or seller, then the manufacturer or seller is not liable." *Fleming v. Borden, Inc.*, 316 S.C. 452, 457, 450 S.E.2d 589, 592-93 (1994).

Fisher and Crosby did not show that the "alteration" of their valves by placing a flange gasket in the valve flange was unexpected. The valves could not be placed in service without use of a flange gasket, and, as noted, Fisher and Crosby sold asbestos flange gaskets to Duke. The jury declined to find an unexpected alteration to the valves simply from application of a flange gasket in the field that was called for by Defendants' flanged valve design. Their determination is supported by the record.

E. Proximate Causation

Fisher and Crosby next contend that Plaintiffs did not show that Defendants' failure to warn about the dangers of asbestos exposure from their valves was a proximate cause of Jolly's mesothelioma. They contend that there is no evidence that Jolly would have heeded such a warning if it had been given. The Court disagrees.

Defendants rely on *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998), which does state the basic rule that the failure to warn must be the proximate cause of the plaintiff's injuries. *Allen* makes clear, however, that the issues of proximate cause, and the adequacy of the defendant's warning, are for the jury to decide. *Id.* at 432-33, 505 S.E.2d at 360. In *Allen*, the product manufacturer did warn and the plaintiff did not follow the warning. But because there was evidence that the warning was inadequate, that created a fact issue as to whether a different warning would have caused the plaintiff to behave differently. *Id.*

Here, there was a fact issue for the jury. There was evidence that Mr. Jolly followed every asbestos warning he was given. He testified that when he saw asbestos warnings at Duke, he heeded them and avoided touching asbestos insulation. (TT 7/25 at 120). He did not go into areas that were cordoned off for asbestos abatement. (TT 7/25 at 125). When he was in a zone that required a respirator, he wore a respirator. (TT 7/25 at 121, 127). There was also evidence that Jolly checked for any applicable warnings on Fisher and Crosby products. (TT 7/25 at 142).

There was evidence that Fisher and Crosby did not warn about the hazards of asbestos on the asbestos-containing products they sold to Duke. (TT 7/25 at 209-10, 218-19; TT 7/27 at 143- 44, 232; TT 7/31 at 64-65). Plaintiffs' expert, Dr. Frank, testified that product warning labels were required by OSHA as of 1972 and that Fisher and Crosby's products should have contained asbestos warnings. (TT 7/26 at 110-11, 189).

The record therefore supports the jury's conclusion that Mr. Jolly would have followed an adequate warning if one had been present on Fisher and Crosby products. Under *Allen*, the mere fact that an adequate warning was missing from the products was sufficient to create a jury question regarding whether an adequate warning would have changed Jolly's behavior. 332 S.C. at 432-33, 505 S.E.2d at 360. The evidence supports the jury's determination that Fisher and Crosby's failure to warn was a proximate cause of Jolly's mesothelioma.

F. Design Defect

*9 Fisher and Crosby contend that Plaintiffs failed to prove their design defect claims because, they argue, there was no evidence of a reasonable alternative design. While a reasonable alternative design must be shown, this is part of the risk-utility test for design defect that is a matter for the jury to decide. *See* *Branham v. Ford Motor Co.*, 390 S.C. 203, 219, 701 S.E.2d 5, 13 (2010). The jury weighs the availability of a feasible alternative design, as well as the associated costs, safety, and functionality. *Id.* at 225, 701 S.E.2d at 16.

Evidence at trial showed that Fisher and Crosby had alternative feasible designs available to them at the time they were selling asbestos gaskets and packing with their valves and as replacement parts. Mr. Duimstra agreed that non-asbestos gasket and packing materials were always available. (TT 7/28 at 141). Mr. Martin also agreed that "one of the standards at that time would be asbestos but there are other materials they could have used." (TT 7/31 at 122-23).

Mr. Duimstra and Mr. Martin both testified that there were a variety of non-asbestos gasket materials available, including graphite, metal, and Teflon. (TT 7/28 at 100; TT 7/31 at 125). Defendants both sold some valves to Duke that did not contain asbestos materials. (TT7/31 at 139, 163).

With regard to packing, Mr. Duimstra testified that Teflon had been available since the 1950s, and could have been sold instead of asbestos packing. (TT 7/28 at 100-01, 140-41). He acknowledged that there was no reason for Mr. Jolly to be exposed to asbestos gaskets and packing because of the availability of alternative materials. (TT 7/28 at 145-46).

The record showed that there were multiple non-asbestos materials that were available to Fisher and Crosby and that they have could have sold gaskets and packing to Duke that were made exclusively out of graphite, metal, or Teflon. Defendants did, in fact, sell gaskets and packing to Duke that were made out of these alternative materials. The evidence created a fact issue for the jury on reasonable alternative design, and supports their finding in Plaintiffs' favor on this issue.

G. Standard of Care

The Court does not agree with Fisher and Crosby's contention that there was a lack of evidence as to the standard of care and their deviation from that standard. A product manufacturer is held to the skill of an expert in its business and to an expert's knowledge of the materials and processes in its industry. *Carolina Home Builders, Inc.*, 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972); *see also Humphries v. Mack Trucks, Inc.*, 198 F.3d 236 (4th Cir. 1999); § 32-20 Products Liability - Standard of Care - Manufacturer, Anderson, S.C. Requests to Charge - Civil, 32-20. The manufacturer is therefore required to keep abreast and aware of current standards and scientific knowledge in his industry. *Id.* Because the manufacturer is held to the knowledge and skill of an expert, "[t]his is relevant in determining (1) whether the manufacturer knew or should have known the danger, and (2) whether the manufacturer was negligent in failing to communicate this superior knowledge to the user or

consumer of its product." *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089-90 (5th Cir. 1973). Industry knowledge may be established through expert testimony. *Reed v. Tiffin Motor Homes, Inc.*, 697 F.2d 1192 (4th Cir. 1982).

Manufacturers have a duty to test and inspect their products. *Nelson v. Coleman Co.*, 249 S.C. 652, 657, 155 S.E.2d 917, 920 (1967). "A manufacturer who incorporates into his product a component made by another has a responsibility to test and inspect such component, and his negligent failure to properly perform such duty renders him liable for injuries proximately caused as a consequence." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 133, 682 S.E.2d 877, 884 (Ct. App. 2009). In addition, "[s]afety standards promulgated by government or industry organizations [] are relevant to the standard of care for negligence." *Elledge v. Richland/Lexington Sch. Dist. Five*, 341 S.C. 473, 477-78, 534 S.E.2d 289, 290-91 (Ct. App. 2000), *aff'd*, 352 S.C. 179, 573 S.E.2d 789 (2002) (collecting cases).

***10** The evidence supports the jury's finding that Fisher and Crosby failed to meet the standard of care. There was evidence that they did not keep aware of the health hazards caused by the asbestos products they were selling, they failed to test their products to determine whether they were exempt from OSHA labeling regulations, they failed to comply with OSHA labeling requirements, and did not warn about asbestos hazards.

Plaintiff's expert Dr. Frank established that the dangers of asbestos exposure became known in industry around the turn of the century. (TT 7/26 at 86-89). In the early twentieth century, there were a number of publicly available publications about the dangers of asbestos exposure. (TT 7/26 at 88-89). In 1930, researchers Meriwether and Price published a paper that not only described the risk of lung diseases from asbestos exposure, but set forth the precautions that could be taken to reduce exposures and reduce the risk. (TT 7/26 at 86). Crosby received such inforfmation in the 1930s through its membership in the National Safety Council. (TT 7/31 at 91-92; Pl's Ex. 102).

By 1955, it was established that occupational asbestos exposure could cause lung cancer. (TT 7/26 at 89-90). By 1960, it was known that asbestos exposure could cause mesothelioma. (TT 7/26 at 91-93).

In the 1950s, the U.S. Department of Labor established workplace safety regulations for government contractors, called the Walsh-Healey Act, that required employers to take steps to control asbestos exposure levels below a certain threshold. (TT 7/26 at 83-85; Pl's Ex. 149.) As government contractors, Fisher and Crosby were required to comply with the Walsh-Healey Act. (TT 7/26 at 83-84; 7/31 at 85-86).

Although Fisher maintained a library at its manufacturing facility and corporate offices, it contained no publications regarding the hazards of asbestos. (TT 7/27 at 149). Crosby did not even maintain a library of health and safety materials. (TT 7/31 at 71, 99). Nor did it have an industrial hygiene or a medical department. (TT 7/31 at 71). Mr. Martin admitted that he did not know of anything that Crosby had done to keep up with the dangers of the asbestos products it was selling. (TT 7/31 at 99).

Plaintiffs presented evidence that by 1980, when Mr. Jolly began working around asbestos gaskets and packing associated with Fisher and Crosby valves, Defendants should have known that the only safe level of asbestos exposure is zero. (TT 7/26 at 109). In Dr. Frank's opinion, Fisher and Crosby should have been warning users about the dangers of asbestos exposure from their valves. (TT 7/26 at 108-09, objections omitted).

In 1972, OSHA promulgated asbestos regulations, some of which applied to product manufacturers. (TT 7/26 at 81, 110-11; Pl's Ex. 155). As of that time, product manufacturers were required to place warning labels on any asbestos-containing products. (TT 7/26 at 81-82, 110-11). The OSHA asbestos regulations applied to Fisher and Crosby as sellers of asbestos-containing products. (TT 7/26 at 83).

The only exemption from OSHA's warning label requirement was if the manufacturer could demonstrate that the asbestos in the product was encapsulated and would not be released during the normal use of the product. (TT 7/26 at 111). In order to determine if a product releases asbestos dust during normal use, the manufacturer was required to conduct tests under normal working conditions to measure any fiber release from the product. (TT 7/26 at 112).

***11** Fisher and Crosby claim that asbestos gaskets and packing were not friable. Dr. Frank testified, however, that asbestos

fibers did not remain encapsulated during the ordinary wear and tear on the gaskets. (TT 7/26 at 109-10). There was also evidence that Fisher and Crosby did not measure the fiber release levels from the removal of asbestos gaskets and packing. (TT 7/27 at 146-47; TT 7/31 at 13, 33-34, 40-41, 90). In the absence of fiber release testing, the jury could have reasonably concluded that Defendants did not have a rational basis to say that their products did not release asbestos fibers. (TT 7/26 at 112).

There was evidence that replacement asbestos gaskets sold by Fisher and Crosby should have included an OSHA-approved asbestos warning label. (TT 7/26 at 189). In addition to a warning label, Fisher and Crosby could have provided material safety data sheets ("MSD sheet") with information about the product composition, hazards, and recommended precautions. (TT 7/26 at 188-89). Dr. Frank testified that this was not an OSHA requirement until 1986, but would have been a good prudent business practice. (TT 7/26 at 194). If Fisher and Crosby had provided MSD sheets to Duke, that would have corrected Duke's misconception, as stated in its asbestos policy, that gaskets do not release asbestos fibers. (TT 7/26 at 191-92).

Even though Fisher was supposed to behave with the knowledge of an expert, Fisher did not discontinue its sales of asbestos-containing gaskets and packing until its customers demanded it. (Pl.'s Ex. 1008.01).

Defendants also argue that Mr. Jolly's exposure to asbestos from their valves did not exceed OSHA permissible exposure limits (PEL). Plaintiffs' evidence contradicted this, as Dr. Frank testified that "if you see dust from an asbestos product you're dealing with levels that are generally quite high." (TT 7/26 at 113). He further testified that Mr. Jolly's exposures to asbestos from gaskets were many orders of magnitude above background levels. (TT 7/26 at 76-77).

Plaintiffs' evidence therefore establishes the standard of care, and it was reasonable for the jury to conclude that Fisher and Crosby failed to meet this standard. Even though they were charged with the knowledge of experts, and were supposed to keep up with scientific developments with regard to the products they were selling, there was evidence that they made no.effort to do so. Even though they were required under OSHA to determine whether their products released asbestos fibers, there was evidence that they made no effort to do so. Even though they were required by OSHA to include a warning label on their asbestos products, the evidence showed that they failed to do so. Plaintiffs presented evidence that if Fisher and Crosby had tested their products, they would have learned that the gaskets and packing they were selling were friable, released high levels of asbestos, and should have included a caution label. The evidence was thus sufficient for the jury to conclude that Fisher and Crosby violated the standard of care.

H. Bare Metal Defense

1. *Direct Sales to Duke*

Fisher and Crosby contend that they are entitled to summary judgment because they did not manufacture or provide the asbestos materials to which Mr. Jolly was exposed. This assertion is contradicted by the evidence that they were selling asbestos gaskets and packing to Duke with some of their valves, and that they also supplied replacement internal gaskets, flange gaskets, and packing. Under South Carolina law, "[a] manufacturer or assembler who incorporates a defective component part into its finished product and places the finished product into the stream of commerce is liable for injuries caused by a defect in the component part." *Baughman v. General Motors Corp.*, 780 F.2d 1131, 1132 (4th Cir. 1986). In fact, "[a] manufacturer who incorporates into his product a component made by another has a responsibility to test and inspect such component, and his negligent failure to properly perform such duty renders him liable for injuries proximately caused as a consequence." *Duncan*, 385 S.C. at 133, 682 S.E.2d at 884. "The fact that the manufacturer or assembler did not actually manufacture the component part is irrelevant, as it has a duty to test and inspect the component before incorporating it into its product." *Baughman*, 780 F.2d at 1132.

***12** There was evidence that Crosby valves have incorporated asbestos components since the 1930s. (TT 7/31 at 26). Internal asbestos gaskets were installed by Crosby at the factory. (TT 7/31 at 22). Some Crosby valves contained asbestos

components until 1991, but thereafter asbestos replacement parts may still have been available. (TT 7/31 at 39). Crosby provided asbestos replacement gaskets. (TT 7/31 at 41).

Plaintiff presented evidence that Crosby sold a lot of valves to the Duke plants where Jolly worked—66 to Oconee, 72 to McGuire, and 18 to Catawba. (TT 7/31 at 143-150; Pl's Ex. 6395). Some Crosby valves sold to Duke contained asbestos gaskets. (TT 7/31 at 157). Crosby sold asbestos-containing replacement gaskets and packing to Duke. (TT 7/31 at 151, 155; Pl's Ex. 6364.04). The material specification for the gasket part card relevant to Duke sales showed that an asbestos gasket made by Garlock was supplied by Crosby. (TT 7/31 at 74-77; Pl's Ex. 6395, p. 39). This asbestos gasket was used in valve number 67261 at Duke. (TT 7/31 at 78). This gasket specification was for an asbestos-containing gasket until 1989. (TT 7/31 at 79). Other records show that asbestos gaskets were specified by Crosby until 1989. (TT 7/31 at 167).

Depending on Fisher's design, its valves came with a number of internal gaskets, including bonnet gaskets, cage gaskets, and seat ring gaskets, as well as packing. (TT 7/27 189-91). The gasket and packing material was selected according to Fisher specifications and installed at its manufacturing facility in Iowa. (TT 7/27 at 190, 208). Fisher sold valves to Duke that contained asbestos gaskets and packing. (TT 7/27 at 158). Fisher material specification 17A2 was for asbestos gasket material composed of 80 to 85% asbestos fiber. (TT 7/27 at 166-67). Fisher used a material specification number for its asbestos gaskets so that its customers could order replacement gaskets that were the exact same asbestos gaskets that had been supplied with the valve. (TT 7/27 at 167, 169). Every time the 17A2 specification was used in invoices and purchase orders through 1988, the gaskets would have contained 85% asbestos. (IT 7/27 at 168). Fisher also had a specification number its customers could use to order asbestos packing from Fisher. (TT 7/27 at 177, 179, 192; Pl's Ex. 1008.1964; Pl's Ex. 948 at 27-28).

David Taylor testified that the replacement asbestos flange gaskets came from the valve manufacturers. (TT 7/26 at 214-15; TT 7/27 at 104-05). Purchase orders confirm the presence of Fisher valves at Duke and the sale of replacement asbestos gaskets, including asbestos flange gaskets, to Duke. (Pi's Ex. 1012; Pl's Ex. 1012.6; TT 7/26 at 215-16).). Duke purchase orders indicate that Fisher was selling replacement asbestos gaskets, specification 17A2, to Duke facilities. (TT 7/27 at 168-69; Pl's Ex. 1008.1964). In 1982, Fisher sold replacement asbestos gaskets, specification 17A2, to the Oconee nuclear station. (TT 7/27 at 169; Pl's Ex. 1012.5). In 1982, Fisher sold several different asbestos gaskets to Oconee, including bonnet gaskets, gage gaskets, adaptor gaskets, and seat ring gaskets for Fisher valves. (Pl's Ex. 1012.5). Fisher sold more asbestos gaskets to Oconee in 1985. (Pl's Ex. 1012.7).

Given the evidence of sales of asbestos gaskets and packing from both Crosby and Fisher to Duke, the jury could have reasonably inferred that Mr. Jolly was exposed to asbestos materials supplied directly by Defendants. The record supports the conclusion that Mr. Jolly was exposed to asbestos gaskets supplied by Fisher and Crosby with their valves and as replacement parts.

2. *Liability for Foreseeable Harm*

***13** Fisher and Crosby raise the so-called "bare metal" defense, contending that they do not bear liability for replacement asbestos gaskets and packing. The Court has already rejected this argument.

A manufacturer's duty to warn extends to foreseeable dangers resulting from the anticipated and intended use of its products. *See* Ralph King Anderson, Jr., South Carolina Requests to Charge - Civil § 3,2-27 (2d ed. 2009); *Spruitt v. Boyle-Midway, Inc.*, 308 F.2d 79, 84 (4th Cir. 1962); *Claytor v. General Motors Corp.*, 277 S.C. 259, 286 S.E.2d 129 (1982); *Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 259 S.C. 346, 359-60, 191 S.E.2d 774, 870 (S.C. 1972); *Mickle v. Blackmon*, 252 S.C. 202, 233, 166 S.E.2d 173, 187 (S.C. 1969). A manufacturer is "'expected to anticipate the environment which is normal for the use of his product and ... must anticipate the reasonably foreseeable risks of the use of his product in such environment.'" *Mickle*, 252 S.C. at 233 (quoting *Spruill*, 308 F.2d at 83-84). "Liability may be imposed on a manufacturer or seller notwithstanding subsequent alteration of the product when the alteration could have been anticipated by the manufacturer or seller." *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 466, 494 S.E.2d 835, 844 (Ct. App. 1997).

In *Garvin*, Judge D. Garrison Hill ruled that when a "manufacturer recommends specifies, or requires that asbestos gaskets and packing be replaced with like materials," liability may be imposed for replacement gaskets and packing because the product remains in essentially the same condition as when it was sold. *Garvin v. Agco Corp.*, No. 2012-CP-40-6675, at 18 (S.C. Ct. Comm. Pleas Nov. 14, 2014). Judge Hill reasoned that, "Crane's liability arises because its own valves caused injury as manufactured, supplied, and designed by Crane with asbestos gaskets and packing. When the asbestos gaskets and packing were replaced with the same materials that came with the valve, it was not a 'substantial change' in the condition of the product." *Id.* at 16-17.

The Court rejected the "bare metal defense" on the basis that Crane Co. valves were not sold as mere bare metal, but with asbestos materials that needed to be replaced. When asbestos replacement parts are recommended, specified, or required, the manufacturer cannot reasonably claim that its product somehow ceases to be harmful when such replacements are used. The Court reasoned that, "[t]o say Crane was no longer part of the 'chain of distribution' when the original gaskets and packing wore out on its still-functioning product would be artificial, if not silly." *Id.* at 13-14. The evidence showed that the asbestos gaskets and packing used as replacements were no different than that originally supplied by Crane Co., that Crane Co. knew those parts would have to be replaced, and knew that exposure to asbestos was hazardous. *Id.* at 13. The Court determined that Crane Co. "occupied the best position in the chain of distribution to warn consumers of those risks." *Id.* This conclusion is supported by the comments to the Restatement of Torts (Second) § 402A, incorporated by reference by S.C. Code Ann. § 15-73-30, which espouses the policy that "'the consumer of such products is entitled to the maximum of protection ... and the proper persons to afford it are those who market the products.'" *See id.* at 14 (quoting Comment c to the Restatement of Torts (Second) § 402A).

***14** Other courts have taken a similar approach and recognized an equipment manufacturer's liability when the manufacturer could foresee and anticipate that asbestos replacement parts would be used and could cause injury. *See, e.g., Osterhout v. Crane* Co., No. 514CV208MADDEP, 2016 WL 6310765, at *3 (N.D.N.Y. Oct. 27, 2016); *Stevens v. Foster Wheeler, LLC*, No. CV 14-157S, 2016 WL 8577465, at *3 (D.R.I. Oct. 14, 2016), *report and recommendation adopted sub nom. Stevens v. Air & Liquid Sys. Corp.*, No. CV 14-157 S, 2017 WL 1025797 (D.R.I. Mar. 16, 2017); *Spychalla v. Boeing Aero. Operations Inc.*, 2015 U.S. Dist. LEXIS 71682, at *8-11, 2015 WL 3504927 (E.D. Wis. June 3, 2015); *Quinn v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760, 762, 769-70 (N.D. 111. 2014); *Chicano v. Gen. Elec. Co.*, 03-5126, 2004 WL 2250990 at *6 (E.D. Pa. Oct. 5, 2004); *In re New York City Asbestos Litig. (Dummit and Suttner)*, 27 N.Y.3d 765, 794, 59 N.E.3d 458 (N.Y. App. 2016); *McKenzie v. A. W. Chesterson Co.*, 373 P.3d 150, 159-60 (Or. App. 2016); *May v. Air & Liquid Sys. Corp.*, 129 A.3d 984, 1000 (Md. 2015).

Most recently, the U.S. Third Circuit Court of Appeal reversed summary judgment for asbestos equipment manufacturers and held that under federal maritime law "a manufacturer of a bare-metal product may be held liable for a plaintiff's injuries suffered from later-added asbestos-containing materials if the facts show the plaintiff's injuries were a reasonably foreseeable result of the manufacturer's failure to provide a reasonable and adequate warning ...." *In re Asbestos Prods. Liab. Litig. (Devries)*, 2017 WL 4366866, at *6 (3d Cir. Oct. 3, 2017). Such foreseeability is shown with evidence that the manufacturer knew asbestos was hazardous and knew asbestos-containing parts would be used with its equipment because the product was originally equipped with asbestos-containing parts, the manufacturer specified asbestos-containing parts, or the product required asbestos-containing parts to function properly. *Id* at *6-7.

Here, Plaintiffs presented evidence that Fisher and Crosby sold their valves with asbestos components, knew that the gaskets and packing would have to be changed according to the valve design, and intended that asbestos replacements be used. There was evidence that Fisher engineers selected the components and built the valves for the particular application requested. (TT 7/27 at 197). Similarly, the internal components of Crosby valves were installed by Crosby pursuant to the valve design of Crosby engineers. (TT 7/31 at 22).

Both Fisher and Crosby had material specifications that called for asbestos gaskets and/or packing to be used. (TT 7/27 at 166-69; Pl's Ex. 1008.1964; TT 7/28 at 84-86; TT 7/31 at 74-79, 167; Pl's Ex. 6395, p. 39). Mr. Jolly recalled that the manuals for Fisher and Crosby valves specified the type of gaskets that must be used. (TT 7/25 at 78). Crosby, in fact, recommended that asbestos gaskets be used as replacement parts. (TT 7/31 at 30-31).

There was evidence that Fisher decided whether or not to utilize asbestos-containing materials for the parts it supplied with its valves and as replacement parts. (TT 7/27 at 225). In 1986, for example, it changed the material composition of its packing to substitute non-asbestos materials. (TT 7/27 at 226-27). After that substitution, Duke would order the same Fisher part number and receive a part with a different material. (TT 7/27 at 227-28).

***15** In addition to specifying asbestos gaskets, Plaintiffs' evidence showed that Fisher recommended that the gasket should be replaced whenever the valve was opened. (TT 7/28 at 38-39). Crosby was similarly aware that the internal gaskets in its valves would have to be removed and replaced during routine maintenance of its valves. (TT 7/31 at 41).

Defendants also designed their valves with flanged connections, as set forth above. (TT 7/27 at 187-89; 7/31 at 18, 122-23, 125). A lot of the valves Fisher and Crosby sold to Duke had flanged connections. (TT 7/31 at 164-65). Because of that design, flange gaskets had to be used to connect their flanged valves to the pipeline. (TT 7/27 at 187-89; *see also* TT 7/31 at 18-19, 123). Fisher and Crosby knew that asbestos flange gaskets would sometimes be used. (TT 7/31 at 122-23). The Fisher and Crosby valves at Duke did, in fact, require asbestos flange gaskets. (TT 7/26 at 210-13).

The evidence that Fisher and Crosby could anticipate that asbestos components would be used in their valves, and that asbestos flange gaskets would be used with their flanged valves, raised questions of fact for the jury regarding Defendants' breach of their duty to warn of the foreseeable dangers resulting from the design of Defendants' valves. When Mr. Jolly or his co-workers used replacement asbestos gaskets and packing in Fisher and Crosby valves, the valves remained unchanged from Defendants' original design. The evidence was therefore sufficient for the jury to conclude that Fisher and Crosby were negligent in failing to warn Mr. Jolly of the asbestos hazards associated with their valves.

I. Expert Causation Testimony

1. *Standard of Review.*

The admissibility of expert testimony is governed by South Carolina Rule of Evidence 702. That rule provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." S.C. R. Evid. 702.

Courts evaluating the admissibility of scientific, expert evidence "must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508 (S.C. 1999). The reliability of scientific evidence is evaluated based on several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684 (S.C. 2009) (citing *Council*, 335 S.C. at 19).

"[C]ross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the ordinary means to attack an opposing expert. *Daubert v. Merrett Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993). Courts should not exercise their gatekeeping responsibility by excluding expert testimony that falls within the range of matters on which reasonable experts can disagree. *See Milward v. Acuity Specialty Prods. Group, Inc.*, 639 F.3d 11, 22 (1st Cir. 2011). While the trial court may look at the reliability of the expert's methodology, it is for the jury to determine the soundness of the facts underlying the expert's opinion and the correctness of the expert's conclusions. *See id.* 22.

2. *Testimony of Dr. Frank and Dr. Maddox*

*16 Dr. Frank and Dr. Maddox testified that mesothelioma can be caused by brief or low level cumulative exposures. (TT 7/26 at 41-43, 52-53; TT 7/31 at 179-80, 184-85). These experts were entitled to rely on this basic medical fact in reaching their opinion in this case. That does not mean that they concluded that "each and every exposure" that Mr. Jolly had was a substantial factor in causing his disease. This distinction was recently explained by the Pennsylvania Supreme Court in an opinion upholding the admissibility of Dr. Frank's causation opinions. *See Rost v. Ford Motor Co.*, 151 A.3d 1032, 1045-46 (Pa. 2016). The court found his testimony to be entirely compatible with the substantial factor causation standard. *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1045-46 (Pa. 2016).

The Eleventh Circuit has recently held the same. In *Bobo v. Tennessee Valley Auth.*, 855 F.3d 1294 (11th Cir. Apr. 26, 2017), the court noted that expert testimony that "there is no evidence that there is a threshold level of exposure below which there is zero risk of mesothelioma," and that "all 'significant' exposures to asbestos 'contribute to cause mesothelioma,'" is not the same thing as saying that each and every exposure is causative. *Id.* The expert's causation opinion was admissible because it was based on the exposure facts in the case and was supported by scientific literature, including the Helsinki Criteria. *Id.*

Judge Robreno of the federal asbestos MDL has similarly found that a "cumulative exposure" opinion is not the same as the "each and every exposure" opinion. The court agreed with the plaintiff that the "cumulative exposure" opinion is different "in substance and by definition" from the "any exposure" opinion. *Mortimer v. A.O. Smith Corp.*, 2015 WL 12533103, at *8 (E.D. Pa. Oct. 23, 2015). The court therefore rejected the defendant's argument that the experts' opinions were inadmissible on grounds that they are the same as the "any exposure" opinion. *Id.*

As recognized by these other distinguished courts, which have all admitted the causation testimony of Dr. Frank and/or Dr. Maddox, it is not proper to evaluate the experts' medical opinions with reference to only one narrow part of the basis for the opinion. In reaching their opinions, Dr. Frank and Dr. Maddox both relied on their many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including epidemiology and other scientific literature, the dose-response relationship, the science regarding the low levels of exposure that can cause mesothelioma, the exposure levels documented from working with gaskets and packing in the manner described by Jolly and Taylor, and the facts surrounding Jolly's exposure to visible dust from Defendants' valves. (TT 7/26 at 19-95; 7/31 at 169-77, 179-80, 184-85).

The specific causation opinions of Drs. Frank and Maddox were firmly grounded in the exposure evidence presented at trial. Dr. Frank testified that he had reviewed Jolly's medical records, the deposition transcripts of Jolly and his co-workers and other case-specific materials. (TT 7/26 at 58-60). He also described that, based on Jolly's testimony, the exposures he had from working with Fisher and Crosby valves were quite high. (TT 7/26 at 51). Mr. Jolly's exposures were many orders of magnitude above background levels. (TT 7/26 at 76-77). In stating his causation opinion, Dr. Frank relied on a summary of the exposure facts proven to the jury. (TT 7/26 at 72-73).

Dr. Maddox similarly based his specific causation opinions on a summary of the exposure facts in this case. (TT 7/31 at 180-82). Dr. Maddox also addressed the issue of very low exposures and explained that low exposures carry only a low risk of disease. (TT 7/31 at 194-95).

*17 The trial testimony of Dr. Frank and Dr. Maddox demonstrates that their causation opinions are based on the record of Mr. Jolly's repeated exposures to asbestos from Fisher and Crosby valves during four years at Duke, as well as the scientific literature. The methodology and approach of Dr. Frank and Dr. Maddox is exactly the same as that approved by Judge Hill in *Garvin v. Agco Corp.*. There, Judge Hill rejected a challenge to the admissibility of Dr. Maddox's causation testimony, and found it reliable and helpful to the trier of fact. No. 2012-CP-40-6675 (S.C. Ct. Comm. Pleas Nov. 14, 2014).

The Court finds that the causation testimony of Dr. Frank and Dr. Maddox is admissible. It is supported by the scientific literature as well as the facts of this case, and was relevant and helpful to the jury.

J. *Henderson* Causation Standard

A plaintiff in an asbestos case may defeat summary judgment with evidence of "actionable exposure" to a defendant's

asbestos product. *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). To determine whether exposure is actionable, South Carolina courts apply the "frequency, regularity and proximity" factors set forth in *Lohrmann v. Pittsburgh Alorning Corp.*, 782 F.2d 1156 (4th Cir. 1986). *Id.* Therefore, "'[t]o 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.* (quoting *Lohrmann*, 782 F.2d at 1162).

The Court finds that the *Henderson* causation standard is satisfied by the evidence presented at trial. The evidence showed that when Mr. Jolly was a mechanical inspector at Duke from 1980 to 1984, he was repeatedly exposed to asbestos gaskets and packing from Fisher and Crosby valves. (TT 7/25 at 61-63, 72-76, 84-94). Asbestos gaskets and packing were removed in a manner that released dust, and Mr. Jolly was close enough to breathe that dust many times over the course of his time at Duke. (TT 7/25 at 198-201, 204-05, 220).

At trial, Crosby's corporate representative acknowledged that there is a health risk from the removal of asbestos gaskets and packing from its valves. (TT 7/31 at 65-66). Defendants' own expert, Dr. Crapo, testified that a "very low" level of exposure to crocidolite can cause mesothelioma. (TT 8/1 at 114).

The jury could thus have concluded not only that Mr. Jolly had frequent, regular, and proximate exposure to asbestos gaskets and packing from Fisher and Crosby valves, but that these exposures were to the most potent form of asbestos fiber. This evidence was sufficient to support the jury's determination that Mr. Jolly's mesothelioma was caused by his exposure to asbestos products sold by Defendants and for which they are responsible.

IV. Ruling on Defendants'Motion for Election of Remedies

Defendants argue that Plaintiffs should be required to "elect a remedy" between their negligence and breach of implied warranty claims. Defendants have confused election of remedies with election of causes of action. "Election of remedies involves a choice between different forms of redress afforded by law for the same injury or different forms of proceeding on the same cause of action." *Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 44-45 (1996). "[I]n cases where the complaint stated different causes of action, but only one recovery was sought, and the causes of action were so stated because of an uncertainty as to which the evidence might establish or on which it might appear that plaintiff was entitled to recover, no election was required." *Harper v. Ethridge*, 290 S.C. 112, 121, 348 S.E.2d 374, 379 (Ct. App. 1986).

***18** At trial, three causes of action were submitted to the jury. Each, however, was for recovery of a single injury. Plaintiffs, individually, were awarded a single recovery on their claims. "[W]hile the complaint stated ... different causes of action, only one recovery was sought and only one recovery was awarded." *Creach v. Sara Lee Corp.*, 331 S.C. 461, 464, 502 S.E.2d 923, 924 (Ct. App. 1998). Consequently, there are no inconsistent remedies for Plaintiffs to choose between, no danger of double recovery as the jury only made one award per plaintiff. Plaintiffs do not have to elect their remedies in this matter.

V. Ruling on Defendants' Motion for Production of Settlements

Defendants argue that they are entitled to disclosure of Plaintiffs' confidential settlement documents because they are "relevant" to set-off. The Court does not find a compelling reason to require disclosure of the confidential releases. The only matter of relevance is the amount of the settlements, and that information has been disclosed. The Court has reviewed the releases *in camera* and has verified that Plaintiffs' pre-trial settlements are in the amount of $2,270,000. Defendants' motion for production of settlement releases is denied.

VI. Ruling on Defendants' Motion for Setoff

Defendants are entitled to a set-off in the amount of Plaintiffs' settlements with other defendants in this case. S.C. Code Ann. § 15-38-50 provides that, "[w]hen a release ... 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 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.

Defendants correctly assert that Plaintiffs have received settlement money from other defendants in this case. The Court has verified that Plaintiffs have received $2,270,000 in pre-trial settlements. This is not the end of the matter, however. In determining set-off, the Court must take into account the allocation of these pre-trial settlements to the various claims that the Jollys have or may have had at the time the settlement releases were executed.

In *Ellis v. Oliver*, 335 S.C. 106, 112-13, 515 S.E.2d 268, 271-72 (Ct App. 1999), the Court of Appeals held that "when a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law." *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). However, when the settlement involves compensation for an injury different from the one tried to verdict, there is no setoff as a matter of law. *Hawkins v. Pathology' Assocs. of Greenville, P.A.*, 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct. App. 1998). When the settlement "is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between" the claims. *Smith*, 397 S.C. at 473, 724 S.E.2d at 191.

The claims tried to verdict in this matter were personal injury claims on Mr. Jolly's behalf and loss of consortium on Mrs. Jolly's behalf. The settlements received by Plaintiffs also include compensation for the release of the potential future wrongful death claim that the Jollys had at the time of their pre-trial settlements. As such, Defendants' entitlement to a setoff does not arise as a matter of law.

***19** Defendants are only entitled to "credit for the amount paid by another defendant who settles for the same cause of action." *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). Plaintiffs' personal injury and loss of consortium claims are separate and distinct from their potential wrongful death claim. Because the potential wrongful death claim is different, factually and legally, from the claims tried to verdict, the amount that Plaintiffs received as compensation for the release of future claims, such as wrongful death, should not be considered by this Court when determining the setoff amount. Instead, in accordance with *Rutland and Smith*, only the amounts received by Plaintiffs in settlement for the personal injury and loss of consortium claims should be considered when determining the setoff amount.

In determining the allocation of Plaintiffs' settlements, the Court accepts Plaintiffs' representation that at the time the settlements were received by Plaintiffs, they were internally allocated as one-third to Mr. Jolly's personal injury claims, one-third to Mrs. Jolly's loss of consortium claims, and one-third to the release of future wrongful death claims. Additionally, the Court reviewed the releases of the settling defendants and confirmed that all future claims related to Mr. Jolly's mesothelioma, including wrongful death, were released by the Plaintiffs. Because the total pre-trial settlements were in the amount of $2,270,000, one-third of the settlements is valued at $756,666.67.

The Court finds that the internal allocation of the settlement funds received by Plaintiffs is reasonable as required by South Carolina precedent. The Supreme Court has noted that "[s]ettling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify ... reapportionment for the sole purpose of benefitting [non-settling defendants]." *Riley v. Ford Motor Co.*, 414 S.C. 185, 196-97, 777 S.E.2d 824, 830-31 (2015).

As set forth above, the total amount of the addited verdict for Mr. Jolly's personal injury claims is $1,580,000. Defendants are entitled to a setoff in the amount of Plaintiffs' pre-trial settlements allocated to the personal injury claim, which is $756,666.67. Defendants owe the balance of $823,333.33 for Mr. Jolly's personal injury claim.

As set forth above, the total amount of the addited verdict for Mrs. Jolly's loss of consortium claim is $290,000. This does not exceed the $756,666.67 in settlement proceeds allocated to her loss of consortium claim.

VII. Conclusion

The Court GRANTS Plaintiffs' motion for new trial *nisi additur*, and raises the verdict to $1,580,00 for Mr. Jolly's personal injury damages and $290,000 for Mrs. Jolly's loss of consortium damages. The Court GRANTS in part Defendants' motion for set-off, and reduces Mr. Jolly's damages by one-third of Plaintiffs' pre-trial settlements, in the amount of $756,666.67. Mrs. Jolly's damages are likewise reduced in the amount of $756,666.67, which exceeds her addited damages award. Judgment will therefore be entered against Defendants in the amount of $823,333.33 Defendants may, of course, reject the additur, and a new trial will be scheduled. Defendants' remaining post-trial motions are DENIED.

IT IS SO ORDERED.

<<signature>>

Chief Justice Jean Toal (Ret.)

Supreme Court of South Carolina

December 15, 2017

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