THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2022-0001574

Steven R. Edwards, Individually and as Personal Representative of the Estate of Steven Redfearn Steward, .. Respondent,

v.

Scapa Waycross, Inc., ... Petitioner

BRIEF OF *AMICUS CURIAE*
AMERICAN TORT REFORM ASSOCIATION
IN SUPPORT OF PETITIONER

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I. Whether the Court of Appeals erred in affirming the trial court's ruling denying Petitioner's motion for judgment n.o.v. because Respondent did not introduce any legally sufficient evidence of causation.

II. Whether the Court of Appeals erred in affirming the trial court's order granting additur because the jury's damage awards were not actuated by passion, caprice, or prejudice, and the trial court failed to pay substantial deference to the jury's awards.

III. Whether the Court of Appeals erred in affirming the trial court's abuse of discretion in accepting Respondent's allocation of settlement proceeds.

INTEREST OF *AMICUS CURIAE*

Founded in 1986, the American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over three decades, ATRA has filed *amicus curiae* briefs in cases that address important liability issues. ATRA members include defendants in South Carolina asbestos cases.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents an opportunity for the Court to provide urgently needed guidance on a key issue the Court passed on in *Jolly v. General Elec. Co.*, 435 S.C. 607, 869 S.E.2d 819 (2021), *rev. granted,* Appellate Case No. 2022-000272: *i.e*., the proper analysis to establish specific causation in asbestos cases. In *Jolly* and here, the Court of Appeals primarily relied on a controversial 4-2 Pennsylvania opinion (*Rost v. Ford Motor Co*., 151 A.3d 1032 (Pa. 2016)) that is at odds with this Court's test in *Henderson v. Allied Signal, Inc*., 373 S.C. 179, 664 S.E.2d 724

(2017), and the majority of courts nationwide. We suggest the Court grant the Petition and ensure that South Carolina courts apply sound science and basic fairness in asbestos cases.

An additional reason to grant the Petition is that the Court of Appeals erred in affirming the trial court's additur and setoff rulings. As we explain, the trial court's additur ruling conflicts with this Court's precedents and reflects an outlier approach. Further, the trial court's decision to permit setoffs of settlement proceeds based on Plaintiff's "internal" allocation creates a significant potential for gamesmanship and abuse.

The rulings in this case favor asbestos plaintiffs. Plaintiffs' lawyers (often from out-of-state) have been filing more asbestos cases in South Carolina, even as such litigation declines nationwide. Hence, ATRA files this brief.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS APPLIED A CAUSATION STANDARD THAT IS INCONSISTENT WITH SOUTH CAROLINA LAW AND THE MAJORITY RULE NATIONWIDE

The Court should grant the Petition because the Court of Appeals primarily relied on the Pennsylvania Supreme Court's opinion in *Rost v. Ford Motor Co*., 151 A.3d 1032 (Pa. 2016), to find that Plaintiff established specific causation. The *Rost* standard conflicts with *Henderson v. Allied Signal, Inc*., 373 S.C. 179, 664 S.E.2d 724 (2017), and the majority of courts nationwide.

In *Henderson*, a mesothelioma case, this Court adopted the "frequency, regularity, proximity" test for substantial factor causation set forth in *Lohrmann v. Pittsburgh Corning Corp.,* 782 F.2d 1156, 1162 (4th Cir.1986): "To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked." In *Lohrmann*, an asbestosis case, the Court held that plaintiff's exposure to asbestos-

containing pipe covering "on ten to fifteen occasions of between one and eight hours duration . . . was not sufficient to raise a permissible inference that such exposure was a substantial factor in the development of his asbestosis." 782 F.2d at 1163.

The *Henderson*/*Lohrmann* "frequency-regularity-proximity test" is the "most frequently used test for causation in asbestos cases." *Slaughter v. S. Talc Co*., 949 F.2d 167, 171 (5th Cir. 1991). The test "attempts to reduce the evidentiary burden on plaintiffs while still absolving defendants who were not responsible for plaintiffs' injuries." David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 Brook L. Rev. 51, 56 (2008).

Some courts have ignored the *Lohrmann* case's specific holding and the teachings of the Restatement (Second) of Torts § 431 (1965)[1] regarding substantial factor causation. These courts hold that "any exposure" to asbestos or "each and every exposure" to asbestos above background is sufficient to make the exposure a "substantial factor" in disease causation, "even when the plaintiff was exposed to much more asbestos from other sources." Bernstein, 74 Brook L. Rev. at 55; *see also* Mark Behrens & William L. Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 Sw. U. L. Rev. 479, 480 (2008) ("One of the most substantial departures from black letter tort law is the *any exposure* theory of causation . . . . In a nutshell, the *any exposure* theory contends that because asbestos disease is a cumulative, dose-response disease, each and every exposure to asbestos during a person's lifetime, no matter how small or trivial, substantially contributes to the ultimate disease . . . .").

[1] The word 'substantial' is used in Section 431 "to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause . . . ." *Id*. at § 431 cmt. *a*.

"A significant number of jurisdictions have found the 'each and every exposure' theory to be unreliable." *Jolly*, 435 S.C. at 634, 869 S.E.2d at 833; William Anderson & Kieran Tuckley, *How Much Is Enough? A Judicial Roadmap to Low Dose Causation Testimony in Asbestos and Tort Litigation,* 41 Am. J. Trial Advoc. 39, 64 (2018) (the "vast majority" of courts that have addressed the every exposure theory or similar forms of testimony that eschew any dose estimate "hold such testimony to be insufficient scientifically and as evidence."); *Moeller v. Garlock Sealing Technologies, Inc.*, 660 F.3d 950, 955 (6th Cir. 2011) (stating that finding every exposure to asbestos to be "substantial" in causing mesothelioma is "akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume.").

The "cumulative exposure" theory accepted by the Court of Appeals reflects an attempt by plaintiffs' experts to evade courts' widespread rejection of the "each and every exposure" theory. "Most courts reviewing these meaningless changes have agreed that the variations all represent the same dose-ignoring approach and are inadmissible*." Krik v. Exxon Mobil Corp*., 870 F.3d 669, 672 (7th Cir. 2017); *Haskins v. 3M Co.,* 2017 WL 3118017, at *6 (D.S.C. July 21, 2017) (rejecting plaintiff expert's view that "whenever the total cumulative dose results in mesothelioma, every 'occupational' exposure should be considered causative, no matter how small.").[2]

[2] *See also Carpenter v 3M Co.,* 2022 WL 17885688, at *12 (N.D. Cal. Dec. 13, 2022) (noting courts' rejection of "each and every exposure" theory and stating "[c]ourts have also rejected for the same reason the so-called 'cumulative exposure' theory . . . .") (quoting *Clarke v. Air & Liquid Sys. Corp.*, 2021 WL 1534975, at *5 n.3. (C.D. Cal. Mar. 18, 2021)); *Doolin v. Ford Motor Co.*, 2018 WL 4599712, at *12 (M.D. Fla. Sept. 25, 2018) ("[T]he 'each and every' or 'any' exposure theory, and in recent variations the 'cumulative' exposure theory . . . has been extensively discussed and criticized as scientifically unsound by state and federal courts throughout the country."); *Schwartz v. Honeywell Int'l, Inc.*, 102 N.E.3d 477, 480 (Ohio 2018) ("[A] theory of causation based only on cumulative exposure to various asbestos-containing
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The opinion by the Court of Appeals and the Pennsylvania *Rost* case on which it primarily relies reflect a discredited, minority approach. The "*Rost* justices held that experts can testify that each exposure is a legal cause of the plaintiff's disease as long as they phrase it differently: 'It is the cumulative exposures [all of them] of this plaintiff' that caused the disease.'" William L. Anderson, *Pennsylvania Splits With Majority in Allowing "Cumulative Exposures" Asbestos-Liability Theory*, 26:7 Legal Backgrounder (Wash. Legal Found. Mar. 24, 2017).

But, as shown, there is "no meaningful difference between this formulation and the *any exposure* theory." *Id*. A commentator recently explained,

> The *Jolly* court succumbed to the siren song that *cumulative exposure* testimony is not the same as *every exposure* testimony and thus can support litigation despite the widespread rejection of *every exposure* testimony. It is surprising that a major appellate court would accept the mere change in terminology, not accompanied by any actual change in the approach to causation that excludes consideration of dose. As many courts have held, there is no meaningful difference between "each and every exposure above background is a significant contributing factor," and "every cumulative exposure to asbestos above background is a significant factor."

Bryce Friedman, *New York Contributes to the Demise of Every Exposure Testimony in Asbestos and Talc Litigation*, 38 Mealey's Litig. Rep.: Asbestos (Feb. 7, 2023).

The Court of Appeals opinion may be argued to allow an asbestos plaintiff to establish causation simply by showing that exposure to a defendant's asbestos product was "above background," regardless of other exposures. This would nullify the need for a plaintiff to

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products is insufficient to demonstrate that exposure to asbestos from a particular defendant's product was a "substantial factor . . . ."); *Smith v. Ford Motor Co.*, 2013 WL 214378 (D. Utah Jan. 18, 2013) (expert's opinion that plaintiff's mesothelioma "was caused by his total and cumulative exposure to asbestos, *with all* exposures and all products playing a contributing role' . . .asks too much from too little evidence as far as the law is concerned.").

establish *substantial* factor causation because *any* exposures that add to the plaintiff's total cumulative exposure to asbestos would suffice. The result would effectively remove a plaintiff's burden to show that exposure to a particular defendant's product was a *probable* cause of the harm, rather than a *possible* cause. *See* Anderson & Tuckley, 41 Am. J. Trial Advoc. at 42 ("The *every exposure* theory, and its close cousin the *cumulative exposure* theory, both effectively eliminate the 'substantial' part of a substantial factor causation requirement and shift the burden of proof to defendants for any identifiable workplace or home exposure.").

This Court should grant the Petition and specifically reject the Pennsylvania *Rost* case. As explained, South Carolina's *Henderson* "frequency-regularity-proximity test" for substantial factor causation has its origins in *Lohrmann,* an opinion from the United States Court of Appeals for the *Fourth* Circuit. In contrast, Pennsylvania's alternative version of the test has its origins in the United States Court of Appeals for the *Seventh* Circuit's opinion in *Tragarz v. Keene Corp*., 980 F.2d 411, 420 (7th Cir. 1992), applying Illinois law. *Tragarz* allows for a "less rigid" test in mesothelioma cases, 980 F.2d at 421, and rejects any notion that plaintiff experts must do a comparative analysis of different exposures to asbestos.

The Court should reaffirm that the *Henderson*/*Lohrmann* test applies in all asbestos cases, including mesothelioma cases. *Henderson* itself was a mesothelioma case, but the Court of Appeals in *Jolly* muddied the law and it should be clarified. *See Jolly*, 435 S.C. at 628 n.11, 869 S.E. 2d at 830 n.11.

Further, the Court should clarify that, as in all other toxic tort cases, a plaintiff must establish a causative dose of exposure to the defendant's product. *See, e.g*., *Nemeth v. Brenntag N. Am.,* 38 N.Y.3d 336, 343 (N.Y. 2022) ("precise quantification of exposure to a toxin is not always required," but plaintiffs "must . . . still establish sufficient exposure to the toxin even

though 'it is sometimes difficult, if not impossible,' to do so.") (citations omitted). Dose refers to the overall amount of exposure contributed by a particular source and depends on the intensity, frequency, and duration of the exposures. "Dose is the single most important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect." David L. Eaton, *Scientific Judgment and Toxic Torts—A Primer in Toxicology for Judges and Lawyers,* 12 J.L. & Pol'y 5 (2003). Simply put, "the dose makes the poison."[3]

Finally, the Court should clarify that a comparative analysis is required and not "indulge in a fiction that each and every exposure to asbestos, no manner how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation . . . ." *Gregg v. V-J Auto Parts Co.,* 943 A.2d 216, 226-27 (Pa. 2007); *McIndoe v. Huntington Ingalls Inc.,* 817 F.3d 1170, 1177 (9th Cir. 2016) (finding all asbestos exposures to be as causative would result in "precisely the sort of unbounded liability the substantial factor test was developed to limit . . . and, in turn, significantly broaden asbestos liability based on fleeting or insignificant encounters with a defendant's product . . . ."); *Martin v. Cincinnati Gas & Elec. Co*., 561 F.3d 439, 443 (6th Cir. 2009) (defendant's liability must be evaluated in the context of other exposures).[4]

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[3] *See, e.g., Bartel v. John Crane, Inc*., 316 F. Supp. 2d 603, 605 (N.D. Ohio 2004) ("While there is debate in the medical community over whether chrysotile asbestos is carcinogenic, it is generally accepted that it takes a far greater exposure to chrysotile fibers than to amphibole fibers to cause mesothelioma."), *aff'd sub nom. Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005).

[4] *See also Betz v. Pneumo Abex, LLC,* 44 A.3d 27, 58 (Pa. 2012) ("a comparative assessment of impact among differing exposures . . . is required for causal attribution as a matter of science . . . ."); *Rost*, 151 A.3d at 1061 (Saylor, C.J., dissenting) ("I fail to appreciate how the substantiality of relatively low-dose exposures can be fairly demonstrated in the absence of some sort of reasonably-developed comparative risk assessment accounting for higher-dose industrial exposures."); *Rost*, 151 A.3d at 1067 (Baer, J., dissenting) ("Once an exposure to asbestos fibers is determined to be sufficiently frequent, regular, and proximate, a fact-finder should consider factors such as the potency, concentration, and duration of the exposure in light of the plaintiff's

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II. THE PETITION ALSO SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S ADDITUR AND SETOFF RULINGS

This Court has consistently found that a "jury's determination of damages . . . is entitled to substantial deference." *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003). "A reviewing court will not interfere with the amount of a verdict unless the verdict is . . . so grossly . . . inadequate that it must be deemed the result of the jury's disregard of the facts and the court's instructions." *Craven v. Cunningham*, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987). "Compelling reasons . . . must be given to justify invading the jury's province in this manner." *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 692 (1995) (citing *Pelican Bldg. Ctrs. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993)). A trial court's "mere disagreement" with the amount of a verdict is not a compelling reason to grant additur. *Riley v. Ford Motor Co.*, 414 S.C. 185, 190, 777 S.E.2d 824, 827 (2015).

The trial court did not apply these clear constraints on the use of additur. There is no evidence the jury disregarded its role. To the contrary, the jury's $600,000 survival award covered plaintiff's medical expenses of $241,000 and included a higher award of $359,000 for noneconomic loss. The jury may have taken into account plaintiff's numerous comorbidities—diabetes, a prior heart attack, skin cancer, bladder cancer, prostate cancer, hypertension, and chronic obstructive pulmonary disease. In addition, the jury awarded $100,000 for the wrongful death claim.

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other asbestos exposures to determine if it is reasonable to deem the defendant's product legally responsible as a substantial causal factor in the development of the disease, in contrast to merely being a cause-in-fact.").

This Court should grant the Petition to make clear that additur is an extraordinary tool that judges may employ only in rare circumstances that do not exist here. The highly subjective nature of noneconomic damages, the extreme variability of such awards in mesothelioma cases,[5] and level of "pain and suffering" that is often associated with this always-fatal disease could conceivably be used by a trial court to grant additur in any mesothelioma case that falls short of a large verdict.

Without clear boundaries, South Carolina risks becoming an outlier jurisdiction in its use of additur in asbestos cases. Additur is virtually nonexistent in asbestos cases outside of South Carolina. For instance, a Lexis+ search of the term "additur" in the Mealey's Asbestos Litigation Reporter database—which reports regularly on rulings in asbestos cases nationwide—returns only two examples of a court outside of South Carolina awarding additur in an asbestos case in over thirty years.[6] South Carolina, however, has had two recent examples: *Jolly* and this case.

Further, additur is rare in non-asbestos cases in South Carolina and nationally. Additur has been declared unconstitutional in the federal courts, *see Dimick v. Schiedt*, 293 U.S. 474 (1935), and is prohibited in some states.[7] In states allowing the practice, empirical evidence suggests "almost no use of additur." Byron G. Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 Temp. L. Rev. 1013, 1027 (2007).

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[5] According to the Court of Appeals, awards of noneconomic damage in comparable mesothelioma cases range from $1.5 million to more than $20 million.

[6] *See 4 Verdicts Against Norfolk Southern Remain Standing*, 18 Mealey's Litig. Rep. Asb. 4 (2003) (reporting on Ohio asbestos case in which trial court granted motion for additur for one of four plaintiffs); *$50,000-plus Verdict Against Manville Fund, Porter Hayden*, 5 Mealey's Litig. Rep. Asb. 20 (1990) (reporting on New Jersey case in which trial court granted additur to increase $50,000 verdict to $95,000).

[7] *See, e.g., Routh Wrecker Serv., Inc. v. Washington*, 980 S.W.2d 240, 243 (Ark. 1998); *Dixon v. Prothro*, 840 P.2d 491, 496 (Kan. 1992); *Bohrer v. Clark*, 590 P.2d 117, 121 (Mont. 1978).

The trial court compounded the effect of improper additur by denying a complete setoff of the increased verdict against the amount Plaintiff received in settlements from other defendants. This is yet another reason for the Court to grant the Petition.

The trial court's approach to setoff contravenes the basic objective of South Carolina's setoff statute, which makes clear that settlements reduce the award against judgment defendants "to the extent of any amount stipulated by the release or the covenant, or in the amount of consideration paid for it, whichever is greater." S.C. Code Ann. § 15-38-50. Allowing the greatest possible setoff "prevents an injured person from obtaining a double recovery for the damage he sustained . . . ." *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012).

Further, the lower courts' acceptance of Plaintiff's "internal" apportionment of settlement proceeds has obvious potential for gamesmanship and abuse. Future plaintiffs will undoubtedly test the setoff rules to prevent defendants from obtaining a fair setoff of any settlement proceeds, leading to artificially inflated awards and double recoveries. At some point, the Court may have to decide whether such tactics are permissible and when the line is crossed. A straightforward application of S.C. Code Ann. § 15-38-50, allowing a complete setoff for any settlement proceeds, would avoid this morass.

Finally, allowing Plaintiffs to manipulate South Carolina's setoff statute to deny defendants a complete setoff for settlement proceeds is inconsistent with how other jurisdictions with similar statutes address setoffs. *See Dionese v. City of W. Palm Beach*, 500 So. 2d 1347, 1349 (Fla. 1987) (apply Fla. Stat. Ann. § 768.31(5)); *Knox v. Los Angeles Cty*., 167 Cal. Rptr. 463, 469 (Cal Ct. App. 1980) (applying Cal. Civ. P. Code § 877); *Hogan v. Armstrong World Indus.*, 840 S.W.2d 230, 238 (Mo. Ct. App. 1992).

III. THE ERRORS IN THIS CASE IMPACT SOUTH CAROLINA'S ASBESTOS LITIGATION ENVIRONMENT

Attorneys (often from out-of-state) are increasingly filing asbestos complaints in South Carolina—a trend that stands in sharp contrast to the decline in filings nationally.[8] On a percentage basis, the increase in South Carolina asbestos filings from 2018-2022 is among the largest in the country. Civil justice groups have taken note of these developments with concern.[9]

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

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[8] *See* Megan Shockley, *Asbestos Filings in 2020: A Tale of Two Jurisdictions*, KCIC, Nov. 30, 2020; KCIC, *Asbestos Litigation: 2022 Year in Review* 3 (2023) (compared to 2018, filings nationally have decreased 14%.).

[9] *See* American Tort Reform Foundation, *Judicial Hellholes 2022-23*, at 45-48 (2023) (including South Carolina's asbestos docket among the top areas across the United States in which courts systematically apply laws and procedures in an unfair and unbalanced manner); Otis Rawl, *Why is South Carolina a 'Hotspot' for Asbestos Lawsuits?*, Legal Newsline, June 10, 2021.