THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Jean H. Toal, Acting Circuit Court Judge

Appellate Case No. 2022-000272

Beverly Dale Jolly and Brenda Rice Jolly, ... Respondents,

v.

General Electric Company, et al., ... Defendants,

Of whom Fisher Controls International LLC and
Crosby Valve, LLC are the ..... Petitioners.

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

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II. Whether the Court of Appeals erred in affirming the trial court's setoff calculation based on Plaintiffs' improper, unilateral allocation of settlement proceeds to avoid a complete setoff, including an allocation of settlement funds to a nonexistent claim.

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

Rulings by the trial court and Court of Appeals in this case exemplify mounting fairness issues with respect to South Carolina's asbestos litigation.

Here, a jury rejected Plaintiffs' strict liability claim against Petitioners Fisher Controls International, Inc. (Fisher) and Crosby Valve, LLC (Crosby) and further rejected Plaintiffs' claim for punitive damages. The jury found in favor of Plaintiffs on their negligence and breach of warranty claims, awarding $200,000 in damages to Mr. Jolly and $100,000 to Mrs. Jolly.

The trial court subsequently granted Plaintiffs' motion for a new trial *nisi additur*, increasing Mr. Jolly's award nearly eight-fold to $1,580,000 and nearly tripling Mrs. Jolly's award to $290,000.

The trial court and Court of Appeals rulings essentially give the trial court absolute discretion to replace a jury's determination of damages with the trial court's subjective view of what the jury should have awarded. We appreciate that the trial judge is a highly respected jurist with a long history of public service and dedication to the bar. Nevertheless, because the granting of additur intrudes on a defendant's constitutional right to trial by jury as to the amount of damages, the practice must be confined to compelling circumstances not present here.

Further, the trial court's approach conflicts with this Court's precedents requiring trial court judges to (1) provide "compelling reasons" to invade the province of the jury with respect to damages determinations and (2) support that decision with unassailable evidence that the jury disregarded the facts to reach a grossly inadequate award. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015). The trial court relied on a speculative assessment of how the jury determined different damage components in the absence of a special verdict form and substituted an inflated damages assessment based on general observations by one of Plaintiffs' experts. *See Jolly v. General Elec. Co.*, 435 S.C. 607, 657, 869 S.E.2d 819, 846 (Ct. App. 2021).

In actions that further boosted Plaintiffs' recovery, the trial court accepted Plaintiffs' unilateral allocation of $2.27 million in settlement proceeds, and refused to permit a setoff for the one-third portion of the settlements that Plaintiffs allocated for future wrongful death claims. This approach conflicts with the clear objective of South Carolina's setoff statute, which to allow for only one recovery and to authorize setoffs to the greatest "extent of any amount stipulated by the release." S.C. Code Ann. § 15-38-50. Allowing plaintiffs to allocate settlements based on internal allocation preferences that are not part of an agreement with settling defendants creates improper incentives for plaintiffs to pick recovery-optimizing allocations and allows for prohibited double recoveries.

The combined effect of the trial court's additur and setoff rulings is that, unless reversed, Plaintiffs will recover more than $3 million ($2.27 million in settlements and $823,333.33 from Fisher and Crosby after partial setoffs), plus interest significantly above the prime rate,[1] for claims the jury determined were worth only $300,000.

The additur and setoff rulings in this case favor asbestos plaintiffs. Out-of-state plaintiffs' lawyers have been filing more asbestos cases in South Carolina, even as such litigation declines nationwide. Hence, ATRA files this brief.

For these reasons, the Court should reverse the Court of Appeals' decision.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE TRIAL COURT'S GRANTING OF A NEW TRIAL *NISI ADDITUR* BECAUSE THE TRIAL COURT AND COURT OF APPEALS FAILED TO FOLLOW PRECEDENT, APPLYING AN OUTLIER APPROACH THAT ESSENTIALLY GAVE THE TRIAL COURT ABSOLUTE DISCRETION TO REPLACE THE JURY'S DETERMINATION OF DAMAGES

This Court has consistently found that a "jury's determination of damages . . . is entitled to substantial deference" and that additur is reserved for carefully circumscribed situations because it is an extraordinary incursion upon the jury's fact-finding role. *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003). Additur is only available "[w]hen the verdict indicates that the jury was *unduly* . . . conservative in its view of the damages." *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 531, 431 S.E.2d 557, 558 (1993) (emphasis added). "A reviewing court will not interfere with the amount of a verdict unless the verdict is . . . so grossly . . .

[1] Supreme Court of South Carolina, No. 2023-01-04-01, Re: Interest Rate on Money Decrees and Judgments (Jan. 4, 2023) (setting legal rate of interest on judgments from January 15, 2023, through January 14, 2024, at 11.50% compounded annually).

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).

If a jury's verdict is grossly inadequate, the reviewing court is required to explain the unique circumstances of the case, how the jury failed to properly consider the evidence, and why the judge's substituted damages award is appropriate. *See Riley*, 414 S.C. at 193-95, 777 S.E.2d at 829-30. "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 cannot serve as a compelling reason for granting additur. *Riley*, 414 S.C. at 190, 777 S.E.2d at 827.

Further, any increased damages award assessed by the trial judge must be firmly grounded in evidence presented to the jury. *See O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 557 (1993) (finding "$12,500 verdict is not grossly inadequate *considering the evidence before the jury*") (emphasis added); *Pelican Bldg. Ctrs.*, 311 S.C. at 61, 427 S.E.2d at 676 (additur must be "based on the evidence"). A corollary to this requirement is that a trial judge may not engage in speculation that could support either an increased or a reduced award.

The trial court did not apply these clear constraints on the use of additur. In particular, the trial court based the massive increase in Mr. Jolly's award—from $200,000 to $1.58 million—on speculation about how the jury assessed the noneconomic and medical expense components of the award. *See Jolly*, 435 S.C. at 656, 869 S.E.2d at 845. The trial court's increased award relied

not on any full, or reasonably certain accounting of the damages Mr. Jolly sustained,[2] but rather on guesswork and general observations by Plaintiffs' expert. *See id.* at 657, 869 S.E.2d at 846. That expert stated he had only "seen *some* of the medical bills" and that it was *possible* for medical costs in some mesothelioma cases to "go to a million dollars or more." *Id.* at 657, 661, 869 S.E.2d at 846, 848 (emphasis added). Even the expert did not consider those general statements to be reasonably certain damage valuations. *See* Pet. Br. at 20. Nevertheless, the trial court relied on them to infer the inadequacy of the jury's assessments of different types of damages embedded within the general verdict.[3]

The trial court's approach, which the Court of Appeals allowed, is pure speculation—"an assumption or guess based on small amount of data or none at all." Black's Law Online Dictionary (definition of speculate). If left uncorrected, the finding that pure guesswork by a trial court does not constitute an abuse of discretion will green light future additurs based on similarly speculative assessments. It will also muddy South Carolina law on this issue. *See, e.g., Jenkins v. Few*, 391 S.C. 209, 221, 705 S.E.2d 457, 463 (Ct. App. 2010) (stating that a court "will not speculate as to how the jury allocated damages" because "it is *impossible* to determine how the jury allocated damages" with a general verdict) (emphasis added). Jury determinations of awards deemed too low by the trial court may become mere "advisory opinions" to be cast aside whenever the trial court believes the jury did not award "enough."

This Court should make clear that additur is an extraordinary tool that judges may employ only in rare circumstances that do not exist here. There is no evidence that the jury

[2] Plaintiffs did not present any of Mr. Jolly's medical bills or medical records at trial or present testimony from doctors or family members about the amount of his medical expenses.

[3] The trial court also did not offer compelling reason for nearly tripling Mrs. Jolly's award.

disregarded its role. Rather, this case involves relatively weak evidence supporting liability and damages, suggesting the jury acted appropriately with the information it had. This Court should not permit trial courts to prop up weak evidentiary support and engage in speculative analyses to substantially increase a verdict simply because the trial judge disagrees with a jury's award.

Indeed, it is entirely possible that Plaintiffs did not present evidence of Mr. Jolly's medical bills because the amount appeared modest under the circumstances. Perhaps Plaintiffs did not want the jury to utilize that figure as an "anchor," hoping instead to produce a giant verdict largely comprised of noneconomic damages. It did not work this time. It is inappropriate for trial courts to use additur to correct for trial strategies that do not produce hoped-for results.

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.[4] South Carolina, in comparison, boasts two recent examples: the instant case and *Edwards v. Scapa Waycross Inc.*, 437 S.C. 396, 878 S.E.2d 696 (Ct. App. 2022), where the same trial court increased an asbestos plaintiff's survival damages from $600,000 to $1 million.

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

[4] *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).

(1935), and is prohibited in some states. *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). 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). There is consensus that "[s]ince additurs represent a judicial incursion into the traditional habitat of the jury, they should never be employed without great caution." John Bourdeau et al., *Additur or Increase of Amount of Verdict*, 58 Am. Jur. 2d New Trial § 409 (updated 2023).[5]

This Court should reaffirm the narrow circumstances in which a trial judge may grant additur and prevent the practice in South Carolina from moving far outside the legal mainstream.

II. THIS COURT SHOULD REVERSE THE TRIAL COURT'S SETOFF CALCULATION, WHICH UTILIZED PLAINTIFFS' UNILATERAL ALLOCATION OF SETTLEMENT PROCEEDS TO AVOID A COMPLETE SETOFF

The trial court compounded the effect of improper additur in this case by denying a complete setoff of the increased verdict against the $2.27 million Plaintiffs received in settlements from other defendants. The Court should find that the trial court erred in basing its setoff calculation on Plaintiffs' unsubstantiated "internal" allocation preference, which unilaterally allocated the settlement proceeds one-third each to Mr. Jolly's claim, Mrs. Jolly's claim, and a future wrongful death claim. *Jolly*, 435 S.C. at 664, 869 S.E.2d at 850. The trial court denied any setoff for the future wrongful death claim, resulting in a windfall to the Jollys

[5] Many jurisdictions contrast additur with remittitur, recognizing "there has been much more controversy" regarding courts' use of additur. James E. Rooks, Jr., *Remittitur and Additur, Recovery for Wrongful Death* § 17:12 (2022); *Dixon*, 840 P.2d at 496 ("An additur is totally different from a remittitur. Adding to a jury's verdict is adding something that the jury in no way, either explicitly or implicitly, passed upon.").

for that portion of the settlement proceeds. The Court should reject such a biased, self-dealing approach for determining allocation of settlement proceeds for setoff purposes.

First, the trial court's approach 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. As this Court has explained, the statute "represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" *Riley*, 414 S.C. at 196, 777 S.E.2d at 830 (citation omitted). Allowing the greatest possible setoff "prevents an injured person from obtaining a double recovery for the damage he sustained, for it is 'almost universally held that there can be only satisfaction for an injury or wrong.'" *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (citation omitted).

Second, the Court should reject the lower courts' acceptance of Plaintiffs' unsubstantiated "internal" allocation preferences because of the obvious potential for gamesmanship and abuse. Consider if Plaintiffs' had "internally" decided that allocation should be 10% to Mr. Jolly, 10% to Mrs. Jolly, and 80% to "future" claims. Fisher and Crosby would obtain a setoff on only a small portion of the settlement proceeds and pay an artificially inflated award as a result of Plaintiffs' boldness and imagination.

Plaintiffs in future cases will undoubtedly test the setoff rules in this manner. At some point, the Court may have to decide whether such tactics are permissible and when the line is crossed. ATRA suggests that a straightforward application of S.C. Code Ann. § 15-38-50, allowing a complete setoff for any settlement proceeds, would avoid this morass.

Third, allowing Plaintiffs to manipulate South Carolina's setoff statute to deny judgment defendants a complete setoff for settlement proceeds is inconsistent with how jurisdictions with similar statutes address setoffs. Fisher and Crosby cite examples from Florida and California. *See* Pet. Br. at 25. Additionally, a Missouri appellate court found the "absence of an allocation of the plaintiff's claims indicates the intention of treating them as indivisible," therefore, "subtraction of the entire settlement amount from the award of actual damages to [plaintiff]" was justified. *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

The additur and setoff issues raised in this appeal impact South Carolina's asbestos litigation environment.

Attorneys are increasingly filing asbestos complaints in South Carolina. Asbestos lawsuits have risen dramatically in Richland County in recent years, primarily due to the activity of out-of-state law firms. *See* Megan Shockley, *Asbestos Filings in 2020: A Tale of Two Jurisdictions*, KCIC, Nov. 30, 2020. This trend stands in sharp contrast to the downward national trend in asbestos case filings. *See* KCIC, *Asbestos Litigation: 2021 Year in Review* 3 (2022) (finding a 16% decrease in asbestos filings nationwide between 2017 and 2021). On a percentage basis, the increase in South Carolina asbestos filings from 2018 to 2022 appears among the largest in the country. Civil justice groups have taken note of these developments with concern.[6]

[6] *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.

CONCLUSION

For these reasons, the Court should reverse the Court of Appeals' decision.

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