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Case Number 98,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: ASBESTOS LITIGATION	)	
	)	
FORD MOTOR COMPANY Defendant Below, Appellant	)	
	)	No. 98, 2019
	)	
v.	)	Court Below: The Superior Court of The State of Delaware C.A. No. N14C-08-164 (ASB)
	)	
PAULA KNECHT, Individually, and as Independent Executrix of the estate of LARRY W. KNECHT, deceased	)	
	)	
Plaintiff Below, Appellee.	)	

APPELLANT FORD MOTOR COMPANY'S AMENDED OPENING BRIEF

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Dated: April 30, 2019

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

EXHIBITS

TABLE OF CITATIONS

Page(s)

CASES:

TABLE OF CITATIONS—Continued

Page(s)

TABLE OF CITATIONS—Continued

Page(s)

TABLE OF CITATIONS—Continued

Page(s)

TABLE OF CITATIONS—Continued

Page(s)

TABLE OF CITATIONS—Continued

Page(s)

RULES:

OTHER AUTHORITIES:

TABLE OF CITATIONS—Continued

Page(s)

NATURE OF PROCEEDINGS

After Plaintiff-Appellee Paula Knecht's late husband Larry Knecht developed mesothelioma, the couple sued 18 different entities, including Ford, alleging that he had not been warned about asbestos in those entities' products. Plaintiff brought two separate failure-to-warn claims under New Mexico law: negligence and strict product liability. Ford was the sole remaining defendant at trial.

New Mexico's causation standard required Plaintiff to show that Knecht would not have developed mesothelioma without exposure to asbestos through Ford's products. Alternatively, if there were multiple sufficient causes, New Mexico law required Plaintiff to show that Knecht's exposure to asbestos through Ford's products was alone sufficient to cause his disease. Plaintiff's causation evidence—Dr. Mark Ginsburg's testimony—did not satisfy these requirements.

The jury nonetheless returned a verdict in favor of Plaintiff. For the strict-liability claim, it found that Ford's inadequate warnings rendered their products defective and that the products caused Knecht's disease. But in answering the negligent failure-to-warn claim, the jury found that the failure to warn was *not* the cause of Knecht's mesothelioma. The jury awarded compensatory damages of $40,625,000. It apportioned 20% of the fault to Ford, making it liable for just over

$8 million. The jury also awarded punitive damages of $1 million against Ford, bringing Ford's total liability to $9,125,000.

Ford argued that it was entitled to judgment as a matter of law because Plaintiff had not presented sufficient evidence to prove causation, that it was entitled to a new trial because the jury's verdict was inconsistent as to whether Ford's failure to warn caused Knecht's disease; and that it was entitled to a new trial limited to damages or remittitur given the jury's unprecedented award of over $40 million in compensatory damages. The Superior Court denied Ford's motions.

SUMMARY OF ARGUMENT

I. Ford is entitled to judgment as a matter of law because Plaintiff did not prove causation. A toxic tort plaintiff bringing a claim under New Mexico law must show that his harm would not have occurred without exposure to the defendant's product. A limited exception exists if a plaintiff's harm has multiple sufficient causes, such that exposure to the defendant's product alone was sufficient to cause the plaintiff's injury. Plaintiff's only causation evidence came in through Dr. Ginsburg, who failed to offer sufficient testimony to show causation under New Mexico law. His testimony addressed a relaxed, asbestos-specific causation standard that all relevant legal authority shows New Mexico rejects.

II. Alternatively, Ford is entitled to a new trial because the jury rendered an irreconcilably inconsistent verdict. The jury found that for purposes of strict liability, Ford's failure to warn caused Knecht's disease. But for negligence, the jury found that Ford's failure to warn did *not* cause his disease. Because the same causation standard applies to both the strict liability and negligence failure-to-warn claims, the verdict is irreconcilably inconsistent and re-trial is warranted.

III. Lastly, the jury's compensatory damages calculation was sufficiently excessive to shock the conscience. The $40-plus million in compensatory damages that the jury awarded here is larger—by a magnitude of 14-times—than the next highest calculation of compensatory damages for an asbestos plaintiff in Superior

Court since 2005. (That is as far back as undersigned counsel has verified verdict information). The amount is large enough to indicate it was based on bias, passion, or prejudice—not a measured consideration of the evidence. The compensatory award should be set aside, and a new trial on damages should be ordered or the amount should be remitted.

STATEMENT OF FACTS

A. Knecht's Asbestos Exposures and Lawsuit.

Knecht was exposed to asbestos dust, in different forms, through construction work and his years working in, owning and operating a large automotive repair shop in Los Alamos, New Mexico. *See* A00755-59, A00814, (discussing construction-related asbestos exposure). His automotive-related asbestos exposure came from years of working with brakes, gaskets, and clutches manufactured by many companies. *See* A00816-17; *see also* A00760-62, A00765-74, A00778, A00781-83.

From 1971 to 1998, Knecht operated his own auto repair shop. A00775. Although he personally repaired and replaced brakes, gaskets, and clutches there, he could not identify with certainty the manufacturer of any auto parts that he worked on during that time. A00774-75, A00787-89.[1] At his repair shop, Knecht did some, but "very little," warranty work for Ford, replacing "brakes, clutches, and gaskets" on Ford vehicles. A00794-96. Knecht could not identify the manufacturer of any brakes, clutches, or gaskets that he removed or installed on

[1] He could identify makes and models of cars he worked on, but did not know whether any part was an original part or had previously been replaced. A00777, A00782. Although he purchased the replacement parts from dealerships, dealerships also carried aftermarket parts, which the parties stipulated Ford has no liability for, so there is no evidence that the parts Mr. Knecht received from the dealerships were genuine, original Ford parts. A00848-50.

Ford vehicles, including his warranty work for Ford. A00777-80, A00782, A00785-93, A00795-801.

Knecht did not follow Ford's or other manufacturers' warnings to wear a mask when performing automotive work even after companies started putting asbestos warnings in manuals, technical service bulletins, and/or on the boxes of its automotive parts beginning in 1973. A01301-04, A00829-30. Nor did he ever comply with OSHA's 1972 requirements to monitor the amount of asbestos exposure he and his employees sustained. A00827-30.

In May 2014, Knecht was diagnosed with mesothelioma at age 71. A00098, A00103. He and his wife sued Ford and 17 other companies alleging that asbestos exposures from his automotive work caused his mesothelioma. A00081-86. Knecht's estate also filed a claim with the Manville Trust, *see* A00114-36, seeking compensation for the asbestos exposures he sustained using that company's construction products, *see* A0814. The trust paid the amount requested. A00120.

Plaintiff asserted four claims under New Mexico law: (i) negligence, for Ford's alleged failure to provide an "adequate warning" of the dangers of inhaling asbestos; (ii) willful and wanton conduct; (iii) strict product liability, for the allegedly unreasonable lack of "adequate warning" on Ford's products; and (iv) loss of consortium. A00088-94. As the case progressed, Plaintiff focused

exclusively on the allegation that inadequate warnings on Ford's products caused Knecht's disease. *See* A01288-89.

The case was tried to a jury for 16 days in May and June 2018.

B. Plaintiff's Causation Expert Offered Only A "Substantial Factor" and "Cumulative Exposure" Theory of Causation.

Plaintiff attempted to show that Ford's inadequate warnings caused Knecht's mesothelioma through testimony from Dr. Ginsburg. A01317. In Dr. Ginsburg's opinion, Knecht was exposed to asbestos-containing products from *twelve* different automotive parts manufacturers, and each company was a "substantial contributing cause" of Knecht's disease. A01309-13, A00826, A00836-37.

Specifically, Dr. Ginsburg stated exposures from Bendix brakes, Borg-Warner brakes and clutches, Victor gaskets, GM brakes and clutches, Chrysler brakes and clutches, Fel-Pro gaskets, Spicer clutches, Lewis clutches, Goodyear gaskets, and McCord gaskets—as well as the joint compound relating to Knecht's Manville trust claim—all rose to the level of "substantial contributing" factor. *Id.*; *see also* A00823-26. To determine what exposures were "substantial," Dr. Ginsburg considered "intensity, the frequency, the duration, and how close people were to the exposures." A00815; *see also* A00818. Those exposures "add[ed] up to reach" Knecht's "cumulative exposure." A00961. That "cumulative" exposure—and "all" of the exposures it comprises—were "attributable" to Knecht "getting mesothelioma." A00812.

In testifying on causation, Dr. Ginsburg expressly admitted that he could not offer but-for causation testimony. When asked directly whether Knecht would have developed mesothelioma *without* the exposure to Ford's products, Dr. Ginsburg responded: "[Y]ou can't work in those terms." A00832-34. He explained, "all [of Knecht's] exposures" contributed to his cumulative exposure and agreed that "you can't say that Ford's exposure was . . . the but-for cause of [Knecht's] mesothelioma." A00835. He stated, instead, that "the question is attribution. The question is if you get mesothelioma, what's an adequate exposure? All right, what's a substantial exposure?" A00832.

Dr. Ginsburg also admitted that exposure through Ford's products—or the individual products of any other defendant—was not alone sufficient to have caused his disease. He stated, "[y]ou can't say that if somebody is exposed to Chrysler brakes they're going to get mesothelioma. You can only go retrospectively in terms of attribution." A00834. According to Dr. Ginsburg, Knecht had "a number of exposures," and "all those exposures contributed to his development of mesothelioma." A00835. Plaintiff did not offer any other evidence that Ford's products caused Knecht's mesothelioma. *See* A01317.

C. <u>The Jury Instructions.</u>

The court's instructions to the jury on "causation" and "causation for product defect" differed only in the underlined opening clause, as shown below:

> Causation:
>
> An act or omission is a "cause" of harm if it contributes to bringing about the harm, and if harm would not have occurred without it. It need not be the only explanation for the harm, nor the reason that is nearest in time or place. It is sufficient if it occurs in combination with some other cause to produce the result. To be a "cause," the act or omission, nonetheless, must be reasonably connected as a significant link to the harm. A01367; *see* A01325.
>
> Causation For Product Defect:
>
> A product that is defective because it lacks an adequate warning is a "cause" of harm if it contributes to bringing about the harm, and if the harm would not have occurred without it. It need not be the only explanation for the harm, nor the reason that is nearest in time or place. It is sufficient if it occurs in combination with some other cause to produce the result. To be a "cause," the defective product must be reasonably connected as a significant link to the harm. A01376; *see* A01326.

These instructions were taken directly from New Mexico's model jury instruction and included the "but-for" clause. *See* UJI 13-305 NMRA, Committee commentary.

> The court also instructed the jury on "causation related to warnings":
>
> If, in light of all the circumstances of this case, an adequate warning or adequate directions for use would have been noticed and acted upon to guard against the danger, a failure to give an adequate warning or adequate directions for use is a cause of injury." A01377; *see* A01327.

This, too, was taken directly from New Mexico's model jury instructions. UJI 13-1425 NMRA.

Lastly, the Superior Court instructed the jury that for damages, it must "fix the amount of money which you deem fair and just for the life of Larry Knecht." A01380-81, A01328. That amount was limited to Knecht's pain and suffering, mitigating or aggravating circumstances, the value of his life apart from his earning capacity, emotional distress, and the non-pecuniary loss to the Knecht family. A01328-29, A01380-81. It could not include medical expenses, lost earnings, or punitive damages. *See id.*

D. <u>The Jury's Verdict.</u>

The jury answered a series of questions on the verdict form and returned a verdict in Plaintiff's favor. Questions 2 and 3 related to Plaintiff's negligence claim, asking: "Do you find by a preponderance of the evidence that Ford Motor Company negligently failed to warn Mr. Knecht of risks inherent in the use of its products?" and "Do you find by a preponderance of the evidence that Ford Motor Company's negligent failure to warn was a cause of Mr. Knecht's development of mesothelioma, in that Mr. Knecht would have noticed and acted upon an adequate warning had it been present?" A02533-34, A01333.

Questions 4 and 5, meanwhile, concerned the strict liability claim. They asked: "Do you find by a preponderance of the evidence that a friction product manufactured, sold, or otherwise placed into the stream of commerce by Ford Motor Company was defective because it lacked a warning of a risk which could

be avoided by the giving of an adequate warning?" and "Do you find by a preponderance of the evidence that the defect in a friction product manufactured sold, or otherwise placed in the stream of commerce by Ford Motor Company caused Mr. Knecht's mesothelioma?" A02534, A01333-34.

The jury answered "yes" to Questions 2, 4, and 5, but answered "no" to Question 3. A02533-34, A01333-34. As a result, Ford was found liable under Plaintiff's strict-liability claim and not liable under Plaintiff's negligence claim.

The jury calculated Knecht's compensatory damages as $40,625,000. A02535, A01334. It apportioned fault among Chrysler, Ford, and General Motors (20% each), Johns Manville (10%), and Mr. Knecht (30%), *see* A02535-36. The jury also awarded Plaintiff $1,000,000 in punitive damages from Ford. *See* A02536, A01335-36. Ford's total liability thus amounted to $9,125,000.[2]

E. <u>Ford's Motions for Post-Trial Relief.</u>

Ford sought judgment as a matter of law based on Plaintiff's lack of sufficient causation evidence, a new trial based on the inconsistency in the verdict, and a new trial or remittitur based on the excessive compensatory-damages award.

Ford's renewed motion for judgment as a matter of law argued that Plaintiff presented insufficient causation evidence. *See* A01402-11; *see also* A02498-99. The Superior Court recognized that under New Mexico's traditional causation

[2] No document designated a "Judgment" was ever entered against Ford by the Superior Court. *See* A02484.

standard, Plaintiff would have to "eliminate[] all the other potential causes" and determine whether Ford's products specifically caused Knecht's disease. A01292. The court decided not to enforce that standard because Dr. Ginsburg had "explained [Mr. Knecht's] disease, it doesn't work that way." *Id.*; *see also* A02498-99. In the court's view, it would allow "everybody" to escape liability if a plaintiff had to satisfy New Mexico's ordinarily applicable causation standard in an asbestos case. A01292-93; *see also* A02498-500 (incorporating this decision). The Superior Court denied Ford's motion based on its view that New Mexico law did not require proof that Ford's products in particular caused Knecht's disease. *See* A02498-500.[3]

Ford's motion for a new trial or in the alternative, remittitur, argued that the jury's verdict was irreconcilably inconsistent and that the jury's compensatory damages calculation was excessive. *See* A01778-812. As to the inconsistency, Ford pointed out that the jury found that Ford's failure to warn for the purposes of negligence *did not* cause Knecht's disease, but its failure to warn for the purposes of strict liability *did*—even though the same causation standard applied to both claims. *See* A01792-97. The Superior Court denied Ford's motion on the basis

[3] Ford challenged the admissibility and sufficiency of Dr. Ginsburg's opinions to meet New Mexico's causation standard prior to and throughout trial. Ford timely filed and argued a Motion *in Limine* and two directed verdicts related to these issues prior to the verdict. A00260-65, A00609-14, A00851-58, A00676-752, A01256-98, A01316.

that Question 3 asked whether Ford's failure to warn caused Knecht's injury because he "would have noticed a warning and would have acted upon that warning," while Question 5, read in light of Question 4, asked whether Ford's failure to warn caused Knecht's injury because "some person, not necessarily Mr. Knecht, could have avoided a risk had there been an adequate warning." A02504. Even Plaintiff had not argued that the inconsistency could be avoided by injecting a hypothetical person into the causation analysis for Knecht's injury.

As to the excessive compensatory damages, the Superior Court declined to assess the reasonableness of the jury's $40,625,000 damages award. Instead, it looked to only the $8.125 million that Ford was required to pay after accounting for apportioned fault. A02516. And it stated that this amount was not a result of prejudice since the jury had assigned Chrysler, Ford, and General Motors each 20% of the responsibility and 30% of the responsibility to Mr. Knecht himself. A02517.

Ford appealed within 30 days of the Superior Court's order denying Ford's post-trial motions for judgment as a matter of law, a new trial, and remittitur. *See* A2481-85.

ARGUMENT

I. FORD IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE PLAINTIFF FAILED TO PROVE CAUSATION UNDER NEW MEXICO LAW.

A. Question Presented.

Whether Plaintiff's failure to offer sufficient evidence to prove causation under New Mexico law entitles Ford to judgment as a matter of law. A01402-10, A01948-57, A02277-82, A00851-58.

B. Scope of Review.

This Court reviews de novo the Superior Court's decision to grant or deny judgment as a matter of law. *Mammarella v. Evantash*, 93 A.3d 629, 635 (Del. 2014).

C. Merits of Argument.

Because Plaintiff failed to offer any evidence to satisfy New Mexico's causation standard, Ford is entitled to judgment as a matter of law under Superior Court Rule 50. If "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on [an] issue, the [Superior] Court may determine the issue against the party." Del. Super. Ct. R. 50(a)(1); *see also* Del. Super. Ct. R. 50(b) (Renewal of motion for judgment after trial).

That standard is satisfied here. Several States have expressly declined to adopt the asbestos-specific "frequency, regularity and proximity" causation test. And all relevant legal authority indicates that New Mexico law takes the same

approach. Despite instructing the jury on this standard, the Superior Court then allowed the jury verdict to stand by finding that a relaxed asbestos-specific causation test governed. That was an error. None of Plaintiff's causation evidence was relevant to New Mexico's causation standard. Plaintiff's evidence of causation was therefore insufficient, and Ford is entitled to judgment as a matter of law.

1. Several States Reject The Asbestos-Specific "Frequency, Regularity And Proximity" Test And Instead Apply The Traditional Causation Standard in Asbestos Cases.

In New Mexico and elsewhere, there are two traditional causation standards in tort suits. *See Wilcox v. Homestake Mining Co.*, 619 F.3d 1165, 1170 (10th Cir. 2010); *Ford Motor Co. v. Boomer*, 736 S.E.2d 724, 730-32 (Va. 2013) (citing Restatement (Third) of Torts: Liability for Physical & Emotional Harm §§ 26, 27 (2010)). Generally, a plaintiff must show the defendant's actions "produced the result complained of, and *without which that result would not have occurred*." *Wilcox*, 619 F.3d at 1167 (internal quotation marks omitted) (describing "but-for" cause). As an "exception," a plaintiff may demonstrate causation where "multiple sufficient causes result in an indivisible injury—for instance, when two independently-set forest fires converge to burn a building, where either fire alone would have caused the same harm." *Id.* at 1168; *see also id.* at 1170 (describing

these as the *only* two ways in which a tort plaintiff can make a prima facie showing of causation under New Mexico law).

Some States have crafted a separate causation test unique to asbestos cases. In *Lohrmann v. Pittsburgh Corning Corp*., the Fourth Circuit held that in asbestos cases there could be a "reasonable inference of substantial causation," so long as there is "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." 782 F.2d 1156, 1162-63 (4th Cir. 1986). This asbestos-specific "frequency, regularity and proximity test," *id.* at 1163, has been adopted by a number of States both through the courts and legislature. State courts in Illinois, Maryland, Massachusetts, Michigan, New Jersey, Nebraska, Nevada, Oklahoma, and Pennsylvania have adopted it. *See Holcomb v. Georgia Pacific, LLC*, 289 P.3d 188, 195 (Nev. 2012). And it was later "adopted by statute in Florida, Georgia, and Ohio." *Id.*

This test "attempt[s] to reduce the evidentiary burden on plaintiffs." *Id.* at 195 (internal quotation marks omitted); *see also Steele v. Aramark Corp.*, 535 F. App'x 137, 141 (3d Cir. 2013) (the substantial factor test is an "alternative" "intended to lighten [the] burden" on asbestos plaintiffs). It is not "functional[ly] equivalent" to but-for causation or the multiple-sufficient-causes test. *Wilcox*, 619 F.3d at 1173 (Lucero, J., concurring in part); *see also Culver v. Bennett*, 588 A.2d

1094, 1097 (Del. 1991) ("The 'but for' test and the 'substantial factor' test are two different rules."); *Huber v. Armstrong World Indus., Inc.*, 930 F. Supp. 1463, 1465 (D.N.M. 1996) (describing the "substantial factor" test as "more liberal").

Specifically, finding causation for any "substantial contributing factor" "could be construed to mean any cause that is more than a merely *de minimus* factor." *Boomer*, 736 S.E.2d at 730; *see also In re Asbestos Litig. 112010JR Trial Grp.*, 2011 WL 684164, at *5 (Del. Super. Ct. Feb. 2, 2011) (courts "must apply the concepts of frequency and regularity to determine *as a matter of [Louisiana] law* whether a plaintiff has offered evidence of non-trivial exposures sufficient to meet a *de minimis* threshold and raise a triable issue as to causation"). Indeed, *Lohrmann* itself stated it was crafting "a *de minimis* rule" where a plaintiff must prove only "more than a casual or minimum contact with the product." *Lohrmann*, 782 F.2d at 1162; *see also Holcomb*, 289 P.3d at 195. The two traditional causation standards require more. *See Wilcox*, 619 F.3d at 1167-70; *Boomer*, 736 S.E.2d at 729-32; *cf. Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 772 (Tex. 2007) (refusing to adopt "the *de minimis* standard *Lohrmann* purported to establish").

Several States have expressly declined to adopt the asbestos-specific causation test coined by the *Lohrmann* court. Delaware, for starters, applies "but-for" causation in asbestos cases. *Money v. Manville Corp. Asbestos Disease*

Comp. Tr. Fund, 596 A.2d 1372, 1377 (Del. 1991). A Delaware plaintiff must show that "but for the plaintiff's exposure to the defendant's asbestos product, the plaintiff's injury would not have occurred." *Id.*; *see also Culver*, 588 A.2d at 1097 (rejecting the "substantial factor" test).

Virginia, meanwhile, applies the traditional "multiple sufficient causes" test in asbestos cases. *See Boomer*, 736 S.E.2d at 732. In *Boomer*, the question before the Virginia Supreme Court was whether that State's traditional causation standards "should be modified" in "multiple exposure mesothelioma cases." *Id.* at 729. The court said no. It held that "multiple-exposure mesothelioma cases fit quite squarely with our line of concurring cause cases, 'where two causes concur to bring about an event and either alone *would have been sufficient* to bring about an identical result."' *Id.* at 731 (citation omitted). If multiple exposures are *independently* sufficient to cause the disease, Virginia's test considers each to be the actual cause, even though strict "but-for causation is not present." Am. L. Prod. Liab. 3d § 4:30 (Feb. 2019 update); *Boomer*, 736 S.E.2d at 730 (quoting Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 27 cmt. c)).

Texas, as well, has expressly refused requests to "adopt[] the *Lohrmann* test." *Flores*, 232 S.W.3d at 770. In Texas, an asbestos plaintiff must additionally show that defendant's product "at least . . . doubled [their] risk" of developing their

asbestos-related disease. *Id*. at 772; *see also Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 339 (Tex. 2014) (mesothelioma "does not merit a different [causation] analysis" from other toxic torts suits).

2. New Mexico Also Applies The Traditional Causation Standard In Asbestos Cases.

All relevant legal authority indicates New Mexico, too, has declined to adopt the *Lohrmann* test. *First*, no New Mexico case has ever modified the State's causation standards to accommodate asbestos plaintiffs or plaintiffs in any other toxic tort case. In *Wilcox*, the Tenth Circuit had to determine what causation standard New Mexico applies "in a toxic torts case." 619 F.3d at 1166. The Court noted that "[s]ince 1892, New Mexico has generally required the plaintiff" to prove but-for causation, *id.*, and has recognized an "exception" where there are "multiple sufficient causes." *Id.* at 1167-68.[4] The plaintiff in *Wilcox* argued that "this general rule is not applicable" in toxic tort cases, in part because, if rigidly applied, it would "cut off virtually all relief for toxic tort plaintiffs." *Id.* at 1167, 1169.

The Tenth Circuit rejected that reading of New Mexico law. As in all tort cases, plaintiffs have the burden to prove a defendant was either (1) "a but-for cause of their cancer, either alone or as a necessary part of a combination of

[4] New Mexico recognizes a second exception to but-for causation, applying to "the unusual circumstances" where "two or more defendants engage in simultaneous or nearly identical negligent acts but only one of these acts causes the injury complained of." *Wilcox*, 619 F.3d at 1167 (internal quotation marks omitted). There is no dispute that this exception is inapplicable here.

different factors, or (2) would have been such a but-for cause were it not for another sufficient coincident cause." *Id.* at 1170. The court saw "no basis in New Mexico law for creating an exception to but-for causation simply because a case involves toxic torts." *Id.* at 1169. In its view, New Mexico's causation standard was balanced and manageable: "[A] toxic tort plaintiff must demonstrate only to a reasonable degree of medical probability—not as a certainty—that exposure to a substance was a but-for cause of the injury or would have been a but-for cause in the absence of another sufficient cause." *Id.*

Second, New Mexico relies on the Restatement (Third) of Torts, which expressly rejects a "substantial factor" causation test. In *Acosta v. Shell Western Exploration & Production, Inc.*, the New Mexico Supreme Court relied on the Restatement (Third) of Torts when analyzing "[p]roof of [c]ausation in [t]oxic [t]ort [l]itigation." 370 P.3d 761, 767 (2006). And Restatement (Third) of Torts: Liability for Physical & Emotional Harm permits *only* the two traditional tests for causation. First, Section 26 cmt. c allows for "factual cause" when "the harm would not have occurred absent [defendant's] conduct." Second, Section 27, entitled "Multiple Sufficient Causes," states that "[i]f multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each is regarded as a factual cause

of the harm." *See also Wilcox*, 619 F.3d at 1170 (limiting causation to these two tests).

Section 432(2) of the of Torts had previously articulated a "substantial factor" test. But the Third Restatement specifically "abandoned" it "because of the misunderstanding that it had engendered." *June v. Union Carbide Corp.*, 577 F.3d 1234, 1239 (10th Cir. 2009); *see* Restatement (Third) Torts: Liability for Physical & Emotional Harm § 27 cmt. b. In that same comment, the Restatement clarified that a defendant is a "factual cause of the harm" only if its actions were "sufficient to cause the harm." *Id.* The Virginia Supreme Court "agree[d] with the explicit rejection of substantial contributing factor language," *Boomer*, 736 S.E.2d at 730, and relied heavily on the Third Restatement when declining to adopt a modified causation test unique to asbestos cases, *see id.* at 730-32.

Third, the text and structure of New Mexico's model causation instruction—read in this case—clearly limit it to traditional causation tests. *See* A01325-26, A01367, A01376. The uniform instructions adopted by the New Mexico Supreme Court, located in the court rules, and specifically given—and agreed to by Plaintiff—in this case are presumptively correct. *See State v. Wilson*, 867 P.2d 1175, 1177-78 (N.M. 1994); *see also Chairez v. James Hamilton Constr. Co.*, 215 P.3d 732, 743 & n.1 (N.M. Ct. App. 2009) (applying that presumption to product liability cases). And here, New Mexico's model causation instructions leave no

question that the traditional causation tests—and only those tests—apply. The model instruction's first sentence states that the harm "would not have occurred without" the defendant's conduct. A01367, A01376. This squarely invokes traditional causation requirements. As a New Mexico federal district court has explained, that language is "the traditional but-for causation instruction." *Peshlakai v. Ruiz*, 2014 WL 4106879, at *1 (D.N.M. Aug. 8, 2014). And the relevant committee commentary for New Mexico's model jury instructions expressly labeled this language "the but-for clause." UJI 13-305 NMRA, Committee commentary; *see also Ruiz*, 2014 WL 4106879, at *1.

Nothing in the remainder of the instruction diminishes or qualifies the instruction's up-front statement that traditional causation is required. The instruction's second sentence reads: "It need not be the only explanation for the harm, nor the reason that is nearest in time or place." A01367, A01376. That simply recognizes that there can be "multiple but-for causes of a single loss." *See* 65 C.J.S. *Negligence* § 220 (Mar. 2019 update). As the Third Restatement states, "Recognition of multiple causes does not require modifying or abandoning the but-for standard . . . ." Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 26 cmt. c; *see also Menne v. Celotex Corp.*, 861 F.2d 1453, 1460 (10th Cir. 1988) ("In other words, *each* of the negligent actors was a but-for cause; all were needed to produce the injury.").

The sentence after that says that "[i]t is sufficient if it occurs in combination with some other cause to produce the result." A01367, A01376. That too is consistent with both the but-for and multiple-sufficient-causes tests. As the California Supreme Court has explained, when "forces operate[] in combination, with none being sufficient in the absence of the others to bring about the harm," the "case is governed by the [traditional] 'but for' test." *Viner v. Sweet*, 70 P.3d 1046, 1051 (Cal. 2003); *see also Harvey v. Washington*, 95 S.W.3d 93, 96 (Mo. 2003) ("'Two causes that combine' can constitute 'but for causation.'" (citation omitted)). And as the Tenth Circuit noted in *Wilcox*, the "multiple sufficient causes" framework is appropriate where a defendant "would, either alone or as a necessary part of a combination of other factors, have caused the harm in the absence of the coincident act." 619 F.3d at 1168. Finally, the instruction's last sentence, that the "cause" "must be reasonably connected as a significant link to the harm," A01367, A01376, simply ensures that a defendant is the proximate, in addition to factual, cause of plaintiff's injury. *See Romero v. United States*, 159 F. Supp. 3d 1275, 1281 (D.N.M. 2015).

Nowhere does the instruction allude to, much less invoke, the less rigorous "substantial factor" test. That is telling: when a causation instruction is meant to encompass asbestos's "substantial factor" standard, it will say so. "In the last several decades, with the rise of asbestos-based lawsuits, the 'substantial

contributing factor' instruction has become prominent . . . ." *Boomer*, 736 S.E.2d at 729. Usually, this instruction expressly states that causation is satisfied if the plaintiff "was exposed to [the] defendant's product and that such exposure was a substantial factor in bringing about his injuries." *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 361 (3d Cir. 1999); *see also, e.g., Jack v. Borg-Warner Morse Tec, LLC*, 2018 WL 4409800, at *12 (W.D. Wash. Sept. 17, 2018) (listing examples). And sometimes the instruction even expressly incorporates *Lohrmann*'s terminology of frequency, regularity, and proximity. *See, e.g., Georgia-Pacific Corp. v. Pranksy*, 800 A.2d 722, 725 (Md. 2002); *Coffman v. Keene Corp.*, 608 A.2d 416, 423-24 (N.J. Super. Ct. App. Div. 1992).

These types of "substantial factor" causation instructions are given in Delaware Superior Court, if the applicable substantive state law calls for them. For example, in instructing a jury under Louisiana law, the Superior Court explained that "in an asbestos case, an exposure is a 'substantial contributing factor' in causing an asbestos-related injury when the injury would not have occurred without it *or* if the exposure played an important role in producing the injury." *In re Asbestos Litig. 112010JR Trial Grp.*, 2011 WL 684164, at *5 (internal quotation marks omitted).

The Superior Court erred in ignoring this authority and ruling that New Mexico law applies the *Lohrmann* "substantial factor" test. The court's reasoning

was that the traditional causation standard is simply too high, in its view; the court thought that standard might allow "everybody" to escape liability. A01291-92. But that is precisely the argument that the Tenth Circuit rejected in *Wilcox*. Showing that an "exposure to a substance" was likely "a but-for cause of the injury or would have been a but-for cause in the absence of another sufficient cause" is not an "insurmountable" burden. *Wilcox*, 619 F.3d at 1169. Indeed, Virginia and Delaware require just that in asbestos cases. *See Boomer*, 736 S.E.2d at 728 (maintaining multiple-*sufficient*-cause requirement notwithstanding unique burdens on asbestos plaintiffs); *Money*, 596 A.2d at 1375 (applying the universal causation standard in asbestos cases).

Moreover, the court ruled the *Lohrmann* standard applied in New Mexico because it viewed it as "difficult[]" for Plaintiff to "segregate out" the various exposures Mr. Knecht had experienced over time. A01291-92. But, again, that is exactly what Delaware, Virginia, and Texas law require asbestos plaintiffs to do. *See Boomer*, 736 S.E.2d at 731-32; *Bostic*, 439 S.W.3d at 372 ("The Court now holds that in multiple-exposure cases a plaintiff must isolate his exposure to each defendant's product and show that exposure to that particular defendant's product, alone, more than doubled his risk."); *Money*, 596 A.2d at 1375 (agreeing that "each defendant's asbestos product [must be] a proximate cause of each plaintiff's asbestos-related disease").

New Mexico's courts have never applied an asbestos or toxic torts exception to its causation standard. A01290. And unlike Georgia, Florida, and Ohio, its legislature has not created one. It was therefore not "appropriate" for the Superior Court "to read such an exception into New Mexico law." *Wilcox*, 619 F.3d at 1169; *see also Malone v. Air & Liquid Sys. Corp.*, 2016 WL 4522164, at *7 (D. Del. Aug. 29, 2016) (applying the "frequency, regularity, and proximity standard to this mesothelioma action" because Mississippi case law specifically requires it), *report and recommendation adopted*, 2016 WL 5339665 (D. Del. Sept. 22, 2016). New Mexico's traditional causation requirements must govern.

3. Plaintiff Failed To Satisfy The Traditional Causation Tests Applicable in New Mexico.

As just explained, New Mexico's causation standard required Plaintiff to offer evidence at trial that Knecht's mesothelioma would not have occurred without exposure to Ford's products, or that the exception for multiple sufficient causes applied. *See Wilcox*, 619 F.3d at 1169; *Boomer*, 736 S.E.2d at 729-31 (citing Restatement (Third) of Torts: Liability for Physical & Emotional Harm §§ 26, 27). Plaintiff's only causation expert, Dr. Ginsburg, did neither. Ford is therefore entitled to judgment as a matter of law.

First, Dr. Ginsburg's testimony forecloses a finding that Plaintiff's injury would not have occurred without Ford's conduct. When asked directly, Dr. Ginsburg admitted he could not say that "but for Mr. Knecht's exposures to Ford

products" Mr. Knecht would not have developed mesothelioma. A00834-35. He then stated that if Mr. Knecht "didn't have the Ford exposure, if he had the exposure to General Motors brakes, McCord gaskets, all the other exposures that we talked about, you could attribute his mesothelioma to those exposures if he didn't have the Ford." A00833; *see also* A00832.

Second, Dr. Ginsburg's testimony also rejected the multi-sufficient-cause framework. He stated that you "can't say that if somebody is exposed" to a certain amount of asbestos exposure from Ford, or any other individual defendant, "they're going to get mesothelioma." A00834. Instead, he testified repeatedly that Ford's products, along with those of "at least 11 other companies," were a "substantial contributing cause to Mr. Knecht's mesothelioma." A00826. To determine what exposures were "substantial," Dr. Ginsburg considered "intensity, the frequency, the duration, and how close people were to the exposures." A00815; *see also* A00818 ("I base the issue of defining substantial on intensity, frequency, duration, and proximity."); A00835. But as stated, *Lohrmann*'s frequency, regularity, and proximity test ensures only that exposure passes a *de minimis* threshold. *See supra* pp. 16-17. Because New Mexico's traditional causation tests require more, *see id.*, Dr. Ginsburg's causation testimony is insufficient as a matter of law.

Similarly, Dr. Ginsburg testified that Mr. Knecht's mesothelioma could be "attributed" to Ford and the other auto parts manufacturers. He stated that "*if* [Knecht's] only exposure was to Ford products and he developed mesothelioma, you could attribute that mesothelioma to that exposure." A00831 (emphasis added); *see also* A00833-34. Such a counterfactual scenario has it backwards. The question is whether Knecht's actual exposures to Ford's products alone was sufficient to cause Knecht's mesothelioma—not whether an imagined plaintiff who is exposed to asbestos solely through a single defendant's product developed mesothelioma through those exposures alone. Moreover, Dr. Ginsburg's own testimony reveals that the "attribution" terminology simply re-packages the "substantial factor" framework. *See* A00832 ("Once again, is—the question is attribution. The question is if you get mesothelioma, what's an adequate exposure? All right, what's a substantial exposure?"); A00832-33 (if exposure to a product was a "substantial contributing cause," "you can attribute his mesothelioma to that exposure."). This testimony is therefore also insufficient to show traditional causation.

Worse still, Dr. Ginsburg based his opinions in large part on the "cumulative exposure" theory, a method of causation that even courts applying the less rigorous "substantial factor" test have rejected. *See, e.g.*, *Comardelle v. Pa. Gen. Ins. Co.*, 76 F. Supp. 3d 628, 634 (E.D. La. 2015); *Schwartz v. Honeywell Int'l, Inc.*, 102

N.E.3d 477, 483 (Ohio 2018); *In re N.Y.C. Asbestos Litig. (Juni)*, 148 A.D.3d 233, 239 (N.Y. App. Div. 2017), *aff'd on alternate grounds*, 116 N.E.3d 75 (N.Y. 2018). The core conclusion of Dr. Ginsburg's expert opinion is that exposures from multiple products "contributed to a cumulative dose of asbestos for Mr. Knecht and therefore each such product was a substantial factor in contributing to Mr. Knecht's malignant mesothelioma and death." A00364. That conclusion was repeated throughout Dr. Ginsburg's testimony, *see* A00812-13, and it, too, is wholly insufficient to satisfy New Mexico's traditional causation standard.[5]

Because Plaintiff failed to offer any sufficient causation evidence to meet the governing standard in New Mexico law, Ford is entitled to judgment as a matter of law. *See Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 526 (Del. 1998) (reversing Superior Court's denial of judgment as a matter of law on a product liability claim because plaintiff failed to offer sufficient causation evidence).

[5] In the briefing below, Plaintiff rested their arguments on the notion that there was sufficient evidence to sustain the jury's verdict on Dr. Ginsburg's responses during voir dire. *See* A01950-51 (citing 5/16 Tr. 153:10-21). His voir-dire testimony was not presented to the jury and therefore cannot create a "legally sufficient evidentiary basis for a reasonable jury" to decide in favor of Plaintiff on causation. Del. Super. Ct. R. 50(a).

II. THE JURY'S INCONSISTENT VERDICT ENTITLES FORD TO A NEW TRIAL.

A. Question Presented.

Whether the jury's determination that Ford's failure to warn both *was* and *was not* a cause of Knecht's injury is an inconsistency that requires a new trial. A01788-97, A02015-18, A02116-28.

B. Scope of Review.

The Superior Court's ruling on an inconsistent verdict "presents a question of law subject to *de novo* review." *Van Vliet v. State*, 148 A.3d 257, 2016 WL 4978436, at *3 (Del. 2016) (Table).

C. Merits of Argument.

In the alternative, Ford is entitled to a new trial based on a fundamental inconsistency in the jury's verdict: Answering Question 3, the jury found that Ford's failure to warn did *not* cause Knecht's mesothelioma, and answering Question 5, the jury found that Ford's failure to warn *did* cause Knecht's mesothelioma. A02534. These findings are irreconcilable. The Superior Court attempted to harmonize them, but it could only do so by ignoring certain jury instructions and rationalizing that causation for Knecht's injury turned on a hypothetical person—not Knecht—for purposes of strict liability. This Court should reverse and remand for a new trial.

Where a jury verdict is inconsistent and lacks a rational explanation, it must be set aside and a new trial ordered. *Citisteel USA, Inc. v. Connell Ltd. P'ship*, 712 A.2d 475, 1998 WL 309801, at *4 (Del. 1998) (Table); Del. Super. Ct. R. 49(b). That is exactly what happened here. Questions 2 and 3 on the verdict form relate to Plaintiff's negligence claim, while Questions 4 and 5 bear on Plaintiff's strict-liability claim. These two "failure to warn" claims are nearly identical. Lawrence G. Cetrulo, 1 Toxic Torts Litigation Guide § 2:6 (Nov. 2018 update) ("The scope of the defendant's duty to warn, and the plaintiff's burden of proof as to the adequacy of a particular warning, are very similar regardless of whether the suit is grounded in negligence, [or] strict liability . . . ."). Under either theory, a plaintiff must prove: "(1) no warning was provided or the warning was inadequate; and (2) the inadequacy or absence of the warning caused the plaintiff's injury." *Silva v. Smithkline Beecham Corp.*, 2013 WL 4516160, at *3 (N.M. Ct. App. Feb. 7, 2013).

The primary, if only, distinction is that for negligence claims, the defendant's *conduct* in failing to provide an adequate warning must be unreasonable, *see* Toxic Torts Litigation Guide, *supra*, § 2:6, while for strict liability, the *product* itself must be unreasonably dangerous without an adequate warning, *see* Restatement (Third) of Torts: Product Liability § 2 (1998) (adopting "a reasonableness test for judging the adequacy of product instructions and warnings"); *see also* A00108 (claiming strict product liability because it was

"unreasonabl[e]" for Ford's products not to have a warning). But as numerous courts and treatises have acknowledged, that is a distinction without a difference.[6]

Nevertheless, because Plaintiff pressed the claims separately, *see* A00104-09, the verdict questions are phrased and structured accordingly. Question 2 focuses on the reasonableness of Ford's *conduct*: whether the company "negligently failed to warn Mr. Knecht." A02533. Question 4, meanwhile, focuses on the reasonableness of Ford's *products*: whether they "lacked a warning of a risk which could be avoided by the giving of an adequate warning." A02534. Questions 3 and 5 then ask, respectively, whether Ford's failure to warn caused Knecht's mesothelioma. *Id.*

The jury's response is inconsistent. It answered "yes" to both questions addressing whether there was in fact an unreasonable failure to warn—Questions 2 and 4—but then found that Ford's failure both was a cause *and* was not a cause of Knecht's mesothelioma. That cannot be. The failure to warn either did, or did not, cause Knecht's disease. The jury's verdict lacks "any rational basis." *Citisteel*,

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[6] *See, e.g., Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 742 (3d Cir. 1990) ("[A]lthough [strict liability for failure to warn] is sometimes referred to as strict liability, is really nothing more than a ground of negligence liability . . . ." (quoting W.L. Prosser & W.P. Keaton, Torts § 99 at 697 (5th ed. 1984))); *Wedgewood v. U.S. Filter/Whittier, Inc.*, 2011 WL 2150102, at *13 (Neb. Ct. App. 2011) (citing multiple authorities); *see also Argonaut Ins. Co. v. Samsung Heavy Indus. Co.*, 929 F. Supp. 2d 159, 177 (N.D.N.Y. 2013); *Gourdine v. Crews*, 955 A.2d 769, 782 (Md. 2008); *Cervelli v. Thompson/Center Arms*, 183 F. Supp. 2d 1032, 1040 (S.D. Ohio 2002).

712 A.2d 475, 1998 WL 309801, at *4; *see also Bradley v. Gen. Motors Corp.*, 116 F.3d 1489, 1997 WL 354721, at *4 (10th Cir. 1997) (Table) ("[I]f the plaintiffs had elected to proceed only on their theory of negligence, no inconsistency would exist . . . .").

The Superior Court could only conclude that the answers were consistent by engaging in reasoning that makes no sense. The Superior Court concluded that causation for purposes of Plaintiff's negligence claim means whether Knecht felt an effect, while causation for purposes of strict liability means whether a hypothetical person would feel an effect. A02504-05. Specifically, by looking at Questions 4 and 5 together, the Superior Court ruled it was rational for the jury to find that Ford was not liable to Plaintiffs because "Mr. Knecht would not have acted on an adequate warning," but that Ford was liable to Plaintiff because "some person, not necessarily Mr. Knecht, could have avoided a risk had there been an adequate warning." A02504. The Superior Court claimed that its interpretation was supported by the "jury's determination that Mr. Knecht himself was 30% responsible for his mesothelioma." *Id.*

That is wrong as a matter of law. For one thing, the causation elements for Plaintiff's two claims are the same. 65 C.J.S. *Negligence* § 250 (Mar. 2019 update) ("The ordinary rules of causation and defenses applicable to an action for negligence are equally applicable to an action grounded in strict liability . . . .").

The New Mexico Court of Appeals made that clear in *Silva*, referring to the "causation element" of an "inadequate warning" claim regardless of the underlying tort theory. 2013 WL 4516160, at *2-3. Indeed, the model New Mexico failure-to-warn causation jury instructions—which were read in this case—"must be given in all products liability cases, whether founded upon negligence or strict liability." UJI 13-1425 NMRA, Use Note; *see* A01367. Accordingly, the Superior Court gave the exact same instructions for causation under the negligence and strict liability claims. *See* A01367, A01376. And it gave a *single* instruction for "causation relating to warnings." A01377. The Superior Court therefore erred by interpreting the jury instructions—and the underlying substantive law—to impose different causation standards for Plaintiff's two failure-to-warn claims.

The second problem flows from the Superior Court's view that causation in a strict-liability failure-to-warn case just means that an adequate warning "could have" avoided injury for some person *other* than the plaintiff. If that were right, the causation element of a plaintiff's claim would not be a causation requirement at all: It would not require a causal link between the defendant's product and the plaintiff's injury. *See* A02503. That makes no sense. The *causation* element in strict product liability claims does not concern hypothetical persons that "could have" avoided injuries through a proper warning; it concerns an actual person, the Plaintiff. *Silva*, 2013 WL 4516160, at *2-3 (plaintiff must show "the inadequacy

or absence of the warning caused the *plaintiff's injury*" (emphasis added)); *see also Fabian v. E.W. Bliss Co.*, 582 F.2d 1257, 1260 (10th Cir. 1978) (plaintiff must prove "that a causal relationship existed between the injury suffered and the defective condition"). That is what the separate "inadequate" warning element does. *See id.* A product is "defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product *could have* been reduced or avoided by the provision of reasonable instructions or warnings." Am. L. Prod. Liab. 3d § 16:7 (Feb. 2019 update) (emphasis added). Question 4 encapsulates that element. *See* A02534 (asking whether Ford's products were "defective because [they] lacked a warning of a risk which *could be* avoided by the giving of an adequate warning" (emphasis added)).

Causation is a separate element that must be separately proven. *Oja v. Howmedica, Inc.*, 111 F.3d 782, 791 (10th Cir. 1997) ("[A]s with all tort claims, the plaintiff must prove the elements of causation and damages."); *see also Fabian*, 582 F.2d at 1261. Showing simply that the lack of warning "could have" avoided harm for other hypothetical plaintiffs eliminates strict liability's causation requirement altogether and is insufficient to create liability for Ford. *Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1018 (10th Cir. 2001) ("[A]ssuming that plaintiffs have established both duty and a failure to warn, plaintiffs must further establish proximate causation by showing that had defendant issued a proper warning . . . he

would have altered his behavior and the injury would have been avoided." (internal quotation marks omitted)) (applying Oklahoma law).

As a final indication that the Superior Court erred, apportioning 30% of the fault to Knecht does not reconcile the jury's inconsistent verdict. *See* A02504. The jury instructions make clear that "comparative negligence" governs Plaintiff's negligence claim. A01378. Therefore, if the jury believed that Knecht was 30% responsible for his injury, it was required to apportion 30% of the fault to each of Knecht's claims—not find that Ford's negligent failure to warn did not cause the injury but the product's lack of an adequate warning did cause the injury. *Id.*; *see also Marchese v. Warner Commc'ns, Inc.*, 670 P.2d 113, 116-17 (N.M. Ct. App. 1983) (creating a comparative fault regime for negligence claims).

Because there is no way to reconcile the jury's verdict, this Court should reverse and remand for a new trial.

III. THIS COURT SHOULD ORDER A NEW TRIAL LIMITED TO COMPENSATORY DAMAGES OR, ALTERNATIVELY, REMIT THE JURY'S EXCESSIVE COMPENSATORY DAMAGES AWARD.

A. Question Presented.

Whether the jury's compensatory damages calculation of over $40 million was clearly excessive and requires a new trial limited to damages, or alternatively remittitur. A01797-811, A02018-22, A02129-31.

B. Scope of Review.

This Court reviews the denial of motions for a new trial or remittitur for abuse of discretion. *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997).

C. Merits of Argument.

The Superior Court's denial of Ford's request for a new trial as to compensatory damages, or alternatively remittitur, is a third independent legal error. The jury awarded Plaintiff more than $40 million in compensatory damages. A02535; *see* A02516. That sum goes beyond "an objective consideration of the trial evidence," and was tainted by Plaintiff's counsel's prejudicial closing statements. *Young*, 702 A.2d at 1237. Because Ford does not challenge the jury's apportionment of fault, this Court should order a new trial solely on the issue of compensatory damages, or in the alternative, remittitur. Ford should then be held liable for 20% of that newly calculated sum.

The Superior Court must set aside a damages verdict that "is so grossly excessive as to shock the [c]ourt's conscience and sense of justice" and the

impropriety of allowing it to stand is manifest. *Storey v. Castner*, 314 A.2d 187, 193 (Del. 1973) (citations omitted). That standard is satisfied when a verdict is "based on passion, prejudice or misconduct rather than on an objective consideration of the trial evidence." *Young*, 702 A.2d at 1237. It is not uncommon for the Superior Court to misapply this standard. In *Hugg v. Torres*, for example, this Court reversed the Superior Court's denial of a motion for a new trial on damages, stating the damages award simply "b[ore] no relationship to the damages proved and therefore shock the Court's conscience and sense of justice." 637 A.2d 827, 1993 WL 557946, at *2 (Del. 1993) (Table). In this Court's view, it was plain that the Superior Court had abused its discretion; there was "no need" to even "discuss the [damages] evidence in detail." *Id.*; *see also Peterson v. William E. Street, Inc.*, 609 A.2d 669, 1992 WL 135142, at *4 (Del. 1992) (Table) (reversed and remanded for a trial on damages only); *Mills v. Telenczak*, 345 A.2d 424, 426 (Del. 1975) (same).

Knecht was diagnosed at age 71 with mesothelioma, and he passed away exactly seven months later. A00103. The jury was permitted to award Mrs. Knecht damages based on Mr. Knecht's pain and suffering, mitigating or aggravating circumstances, the value of his life apart from his earning capacity, emotional distress, and the non-pecuniary loss to Mrs. Knecht; it awarded $40,625,000. *See* A01328-29, A01380-81.

That is off the charts when compared to damages calculations in similar cases. While "each case is fact-specific and heavy reliance should not be placed on any particular award, . . . it [is] informative to examine other relevant verdicts." *Barba v. Boston Sci. Corp.*, 2015 WL 6336151, at *14 (Del. Super. Ct. Oct. 9, 2015). In the past 15 years, Superior Court juries have issued a handful of verdicts awarding compensatory damages in asbestos cases—all of which are at least *14 times smaller* than the award here. In *General Motors Corp. v. Grenier*, a 2007 jury awarded damages to a mesothelioma plaintiff of $2 million. 981 A.2d 524, 527 (Del. 2009). A 2010 jury in *Dana Companies, LLC v. Crawford* awarded $1.74 million in combined damages for a mother and son who died from mesothelioma at the ages of 74 and 55. 35 A.3d 1110, 1112 (Del. 2011); *see* A01801. Their pain and suffering damages were measured at $80,000 and $1.16 million, respectively. *Id.* And in *R.T. Vanderbilt Co. v. Galliher*, the jury calculated damages for a 62-year-old man who died from mesothelioma to be $2,864,583. 98 A.3d 122, 125 (Del. 2014); *see* A01801. Most recently, a jury awarded $650,000 to the family of a 68-year old deceased man who died from mesothelioma. *See* Special Verdict Form, *Stewart v. Union Carbide*, No. N16C-03-281 ASB (Del. Super. Ct. Dec. 6, 2018) (attached as Exhibit D).

The compensatory damages calculation here was "not based on . . . an objective consideration of the evidence." *Young*, 702 A.2d at 1237. Even Plaintiff

recognized that the jury's award, including its calculation of compensatory damages, was meant to "punish[] Ford and deter[] other corporations from knowingly using dangerous compounds in their products." A01976. Because juries may not use compensatory damages to "send a message" to a defendant, *McLeod v. Swier*, 2016 WL 355123, at *9 (Del. Super. Ct. Jan. 27, 2016), a new trial must be ordered or the award reduced accordingly.

Similarly, the sheer size of the damages calculation indicates the jury was improperly acting on "personal sympathies for [Plaintiff]" rather than the evidence before it. *Rodas v. Davis*, 2012 WL 1413582, at *2 (Del. Super. Ct. Jan. 31, 2012). That bias was due in large part to counsel's "studied purpose" to "prejudice the jury improperly." *Del. Elec. Coop., Inc. v. Duphily*, 703 A.2d 1202, 1209 (Del. 1997) (internal quotation marks omitted). In closing argument, Plaintiff's counsel repeatedly violated the "Golden Rule," prohibiting counsel from "ask[ing] the jury to place themselves in the shoes of a party to the suit in arriving at a verdict." *Del. Olds, Inc. v. Dixon*, 367 A.2d 178, 179 (Del. 1976) (internal quotation marks omitted). Plaintiff's counsel asked the jury to decide damages by imagining that "every time you go to bed at night you don't know if you're waking up. And you know every day that you live going forward is going to be a day in pain, short of breath, not being able to live the life you used to live." A01320.

Ford contemporaneously objected, *id.*, yet Plaintiff's counsel persisted, asking: "How much is your companion for 52 years worth? What dollar amount can you give for that?" A01322. It is no surprise, then, that "the jury's verdict demonstrates that they were overly sensitive to the Plaintiffs' plight." *Bloom v. Smales*, 2000 WL 973090, at *3 (Del. Super. Ct. May 4, 2000). A new trial on damages, or remittitur, is therefore warranted. *Id.*; *Rodas*, 2012 WL 1413582, at *2-4.

The Superior Court, however, denied Ford's motion for a new trial limited to damages, or alternatively remittitur. *See* A02516; A02518. In doing so, the court declined to even consider the jury's $40 million compensatory damages calculation. *Id.* It instead ruled that because "Ford is responsible for the considerably smaller amount of $8.125 million," that was the *only* figure relevant "in assessing whether [a new trial or] remittitur is appropriate." A02516. And it stated that amount was not the result of prejudice because the jury afforded equal blame to Chrysler and General Motors and determined that Knecht was even more at fault. A02517-18, A02535-36. The court went further, stating it was "not clear how the jury arrived at its calculations." A02516. According to the court, the jury could have started by "determining $8.125 million was the appropriate amount of damages Ford ought to pay," and then worked backwards to arrive at $40.625 million. *Id.*

This was legal error twice over, and this Court should reverse. *See Cox v. Hiner*, 630 A.2d 1102, 1993 WL 245326, at *2 (Del. 1993) (Table) (reversing Superior Court's new trial motion for "apply[ing] an erroneous legal standard" (quoting *Story v. Camper*, 401 A.2d 458, 466 (Del. 1979)). As an initial matter, the Superior Court erred by refusing to consider whether the jury's compensatory damages award as a whole was excessive. "[T]he standard applicable to a trial judge's determination of whether a new trial should be granted based upon an erroneous jury verdict of liability is different than that used for damage awards." *Cox*, 1993 WL 245326, at *2 (citing *Gannett Co. v. Re*, 496 A.2d 553, 558 (Del. 1985)). For "compensatory damages," courts must determine if the amount is "so grossly excessive as to shock the court's conscience." *Riegel v. Aastad*, 272 A.2d 715, 718 (Del. 1970). The "jury's apportionment of fault," on the other hand, is set aside if it goes "against the great weight of the evidence." *State Farm Mut. Auto. Ins. Co. v. Harris*, 744 A.2d 988, 1999 WL 1319341, at *1 (Del. 1999) (Table); *see also Gannett*, 496 A.2d at 558 (setting out the two distinct standards). Because these are different standards relating to different issues and concerning different facts, a court's ruling on post-trial motions must "sever[]" the "issue of liability" and the "issue of damages" wherever possible. *Chilson v. Allstate Ins. Co.*, 979

A.2d 1078, 1084 (Del. 2009); s*ee also Peterson*, 1992 WL 135142, at *3 (remanding for a new trial where "only damages should be retried").[7]

Ford challenged the jury's "compensatory damages" award of $40,625,000 as "objectively excessive." A01799-800. It did *not* challenge the jury's verdict apportioning 20% of the fault as "against the great weight of the evidence." *Gannett,* 496 A.2d at 558 (internal quotation marks omitted). As separate inquiries, the Superior Court did not have the authority to consider the *fault* the jury apportioned to Ford, to other automobile manufacturers, and to Knecht when determining the excessiveness of the compensatory *damages*. *Chilson*, 979 A.2d at 1084 (separating the two inquiries); *see also* 58 Am. Jur. 2d *New Trial* § 406 (Feb. 2019 update) ("A remittitur may not be used to condition a new trial order if a damage award is excessive only because it reflects an improper apportionment of liability."); 65A C.J.S. *Negligence* § 365 (Mar. 2019 update) (as a matter of law, a jury must "apportion fault among multiple defendants without reference to any effect the apportionment might have on the dollars ultimately received by plaintiffs as a result of the overall assessment of damages"). This Court should reverse that error and remand for a new trial to determine the extent of the Knechts' compensable injuries. *Cox*, 1993 WL 245326, at *1 (ordering retrial because the

[7] Other jurisdictions have taken this same approach. *See Schelbauer v. Butler Mfg. Co.*, 673 P.2d 743, 752-753 (Cal. 1984) (citing cases and treatises that require re-trial of damages and apportionment of fault to be separately treated).

compensatory damages calculation was "grossly out of proportion to the injuries sustained"); *Barba*, 2015 WL 6336151, at *9, *15 (agreeing "that the jury's award of $25 million in compensatory damages bears no reasonable relationship to Plaintiffs' economic and physical damages" and ordering remittitur).

The second error committed by the Superior Court was to speculate that the jury strayed from its instructions in determining compensatory damages. The jury was instructed to determine the amount of damages by "fix[ing] the amount of money which you deem fair and just for the life of Larry Knecht." A01380. If it found that number was greater than zero, it was instructed to then "[c]ompare the negligence" of Knecht and each of over a dozen manufacturers, including Ford. A02535-36. The jury is "presumed" to have followed those instructions. *Hamilton v. State*, 82 A.3d 723, 726 (Del. 2013) (internal quotation marks omitted); *see also Dana Cos.*, 35 A.3d at 113 ("It is error for a trial court to uphold a jury verdict that is contrary to the jury instructions."). It therefore makes no sense for the Superior Court to have sustained the excessive award on the basis that the jury might have proceeded to answer the questions by ignoring the directions on the verdict sheet. *See Cox*, 1993 WL 245326, at *2 (reversing Superior Court for applying an "erroneous legal standard" (internal quotation marks omitted)).

This Court should reverse and remand for a new trial on compensatory damages alone, or alternatively remittitur. Ford should then be held liable for 20%

of that sum—just as the first jury determined. If this Court decides not to order a new trial on damages, it may order the Superior Court to decide the remitted amount in the first instance. *See, e.g.*, *Glabman v. De La Cruz*, 954 So.2d 60, 63 (Fla. Dist. Ct. App. 2007) (per curiam).

CONCLUSION

For the foregoing reasons, this Court should hold that Ford was entitled to judgment as a matter of law, or alternatively, a new trial or remittitur.

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