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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

After a four-week trial a unanimous jury decided that the plaintiff's case was both proven and compelling. Plaintiff-Below/Appellee Paula Knecht, individually, and as Independent Executrix of the Estate of Larry W. Knecht, hereby answers Appellant Ford Motor Company's ("Ford") attempt to avoid the jury's verdict. The jury of twelve unanimously found Ford both liable for the death of Mr. Knecht from the asbestos-caused disease of mesothelioma after a career of exposure to Ford's products, and punitive in that conduct.

Ford first argues that New Mexico applies an asbestos causation standard unparalleled in any other jurisdiction. That standard – strict "but for" – would literally be impossible for any asbestos plaintiff to satisfy. The Superior Court considered this issue – only raised by Ford on the eve of trial – conducted voir dire of Plaintiff's causation expert, and repeatedly denied Ford's motions.

Ford next argues that the jury reached an inconsistent verdict. But here Ford cannot meet its heavy burden to disregard the findings of a clearly engaged and conscientious group of jurors. All that is required to uphold the verdict is *any possible explanation* for the jury's findings, while the record provides multiple probable explanations. In the alternative, Ford waived the right to complain about allegedly inconsistent verdicts, given that Ford itself drafted the verdict form that

expressly allowed for differing conclusions as to causation. Ford now contends those questions *must* be answered the same way.

Finally, Ford argues that the verdict is just too much. But the Superior Court addressed this issue at length, and nothing in its decision constitutes abuse of discretion.

The verdict in this case was a consequence of decades of inaction by Ford with respect to the dangers of asbestos. Likewise, Ford bears responsibility for litigation decisions it made in this case, particularly at trial. Denying the dangers of asbestos, while at the same time blaming the plaintiff for not doing more to protect himself from the asbestos-containing products that Ford sold, has consequences.

SUMMARY OF ARGUMENT

1) Denied. There is no indication the State of New Mexico adopted an outlier standard for asbestos causation. The Superior Court heavily weighed precedent from New Mexico and elsewhere, along with the language of New Mexico's jury instruction on causation (and commentary), concluding repeatedly that Plaintiff satisfied the applicable standard. The jury was entitled to reach the same conclusion.

2) Denied. As the Superior Court explained, the jury's verdicts can be reconciled. Among several possibilities, in the Superior Court's view, the jury found that "Mr. Knecht could have avoided the risk posed by Ford's defective product had there been an adequate warning, but actually would not have done so." A logical explanation is all that is necessary to uphold an allegedly inconsistent jury verdict, and that standard has been met here. In the alternative, Ford should not be permitted to benefit from alleged confusion of its own creation, including use notes and instructions which specifically allowed the jury to reach differing conclusions to the contested interrogatories.

3) Denied. Nothing about the jury's actions or its verdict is at all reflective of passion, prejudice, or any other indicator requiring remittitur. The jury took its time reaching its conclusion, and awarded a specific amount of compensatory damages that could only have been the result of reasoned calculations. The jury

logically assigned fault between Ford and similarly-situated non-party auto manufacturers, and assigned the greatest share of liability to Mr. Knecht himself. Finally, jury verdicts are entitled to enormous deference, as is the Superior Court's refusal to grant remittitur. Ford cannot meet its heavy burden here on appeal.

STATEMENT OF FACTS

Although the underlying facts are largely irrelevant to the legal issues posed by this appeal, certain of Ford's representations cannot stand unrefuted.

Ford begins by repeating one of its most unsuccessful arguments – that Mr. Knecht was exposed to asbestos "in different forms" during his lifetime, including from performing construction work as a teenager.[1] While Mr. Knecht did perform limited construction work in his life, literally no evidence was adduced at trial that he was exposed to asbestos during that time. The *only* sign to the contrary was that Plaintiff submitted a claim which was paid by Johns-Manville asbestos trust. The jury, attentively, credited Ford for this alternate exposure, assigning 10% of the comparative liability to Johns Manville. Nevertheless, consistent with the jury's findings, any asbestos exposure Mr. Knecht experienced in construction was dwarfed by his decades-long career as a mechanic, during which Ford was at all times a giant in the industry.

At trial, Ford insisted that the chrysotile asbestos in its brakes could not cause mesothelioma.[2] Ford therefore harped on the possibility that Mr. Knecht was exposed to asbestos outside of his automotive career; otherwise there was simply no explanation other than Ford's misconduct for the fact that Mr. Knecht was killed by

[1] Appellant's Opening Brief ("OB"), at 5.

[2] *See, e.g.,* B262-67, at 43:5-63:5 (Ford's Opening Statement)).

asbestos-caused mesothelioma. The jury disbelieved Ford's arguments in this regard, and Ford's continued attempts to point to significant non-automotive exposure at this late stage do it no credit.

Ford next repeats its argument that Mr. Knecht did "very little" work with Ford products.[3] To the contrary, Mr. Knecht testified that he performed warranty work on Ford vehicles "many times, hundreds of times."[4] The Superior Court specifically chided Ford for its semantic attacks on this testimony.[5]

As to product identification, Ford also reiterates its meritless argument that Mr. Knecht did not know what company's products he was using,[6] although such products came in Ford boxes, and were billed to him by Ford dealerships.[7] In a stipulation in lieu of a motion for summary judgment, Ford agreed that it is responsible for products that it "manufactured, sold, or otherwise placed into the stream of commerce."[8] It was well-established that third-party companies

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[3] OB at 5.

[4] B326, at 76:6-10.

[5] A728, at 81:17-23 (in response to Ford's argument that "hundreds" of jobs over twenty-seven (27) years may be as little as four jobs per year, "Don't play the math game here. … hundreds includes … up to a thousand. So, we're not just to divide a hundred by 27.").

[6] OB at 5-6.

[7] *See e.g.*, B327, at 77:12-78:1; B335, at 111:8-112:9 ("there was no question it was a Ford part").

[8] A875.

manufactured parts incorporated in Ford's cars, as well as parts that Ford sold in its own boxes under its own name. Ford is equally responsible for those other manufacturers' products. That Mr. Knecht "could not identify the manufacturer of any brakes, clutches, or gaskets"[9] is a purposeful misdirection on Ford's part, and an argument without any import here.

Plaintiff wishes only to add one detail to the record regarding the underlying facts; whether Mr. Knecht would have acted to protect against asbestos, were he aware of the risk. Mr. Knecht did testify that he never saw a warning on a brake box (a fact which Ford extrapolates into a general lack of attention to warnings). But there is substantial evidence to the contrary. Mr. Knecht's only son, Donnie, began accompanying his father to work at around twelve years of age, in approximately 1974.[10] Donnie learned the automotive trade from his father over the following years, eventually buying and continuing the business.[11]

The evidence at trial showed that Mr. Knecht took steps to avoid danger. Testimony established that Mr. Knecht avoided known hazards – for instance, by quitting smoking immediately and permanently, following a cancer scare at the

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[9] OB at 5.

[10] B315, at 29:11-30:19; B347, at 22:8-16 ("[H]e wanted him to be involved and to learn the business, but at the same time he wanted to make sure that his child was safe and not on the streets.").

[11] B348, at 26:1-27:9.

family dentist.[12] Significant evidence was introduced that showed how protective Mr. Knecht was of his son. As the Trial Court concluded, "I doubt if [Mr. Knecht] wanted his son to be engaged in a hazardous activity, given everything we've heard about him."[13] This is the evidence that the jury relied upon in finding that Mr. Knecht was unaware of the hazards of asbestos, and had he been aware, he would not have exposed himself, and certainly not his son, to such danger.

A. PROCEDURAL HISTORY

This litigation was commenced by Plaintiff's Complaint, filed on August 20, 2014.[14] Plaintiff produced the causation report of her expert, Dr. Mark E. Ginsburg, M.D., on March 15, 2016.[15] On August 26, 2016, Ford filed for summary judgment.[16] Yet on February 7, 2018, Ford withdrew that motion, instead entering into the aforementioned stipulation of partial dismissal with Plaintiff.[17]

[12] B362, at 83:13-84:11 ("The man had more willpower than I've ever seen."). Mr. Knecht smoked until his early/mid-twenties, and quit for the remaining forty-five (45) years of his life. *See* B318, at 44:18-44:23.

[13] A1294-95, at 74:13-75:7.

[14] A1-80.

[15] D.I. 135; *see also* A365-368.

[16] D.I. 188.

[17] D.I. 249; *see also* A875.

Dr. Ginsburg was deposed on April 25, 2018.[18] Although Ford had been in possession of Dr. Ginsburg's report since March 15, 2016, and although New Mexico law had been ordered as controlling on August 15, 2016,[19] Ford failed to ask Dr. Ginsburg a single question related to "but for" causation – the standard Ford now argues requires the reversal of this trial.

Ford's Motion to Preclude Dr. Ginsburg's Testimony

Ford's first bite at the apple as regards Dr. Ginsburg came in the form of a motion *in limine*. There, Ford argued that Dr. Ginsburg's testimony failed to meet the *Daubert* criteria for admissibility.[20] Ford advanced these arguments notwithstanding significant Delaware case law regarding Dr. Ginsburg's theories, all finding that Dr. Ginsburg's testimony passes muster.[21]

Next, Ford argued – premised on the false equivalency that Dr. Ginsburg's opinion was founded on the "each and every" exposure theory – that Plaintiff had failed to satisfy causation. For this argument, Ford stated specifically that "the term 'substantial factor' is 'essentially, the *but for* test of causation.'"[22] Of course, Ford now argues the opposite on appeal.

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[18] A390-434.

[19] D.I. 176.

[20] A260-263.

[21] *See* A376-383 (Plaintiff's Opposition to Ford's Motion *in Limine*).

[22] A264, n.16 (citing Utah Model Jury Instruction Committee Advisory Notes).

Indeed, on May 7, 2018, Ford filed an unapproved "Supplement" to its motion *in limine* based on the premise that "New Mexico does not follow 'substantial factor' causation, but rather 'but for' or 'significant link' causation."[23]

On May 10, 2018, the Superior Court heard oral arguments on Ford's motion *in limine*. The Superior Court did not take kindly to either the timing or content of Ford's "supplement," noting that it was unauthorized and arrived too close to the hearing for the Court to properly parse the issues.[24] Ultimately, the Court denied Ford's motion *in limine* as regards *Daubert*, finding Dr. Ginsburg to be "qualified as an expert," his opinion "relevant and reliable," and "based on information relied on by experts in the particular field."[25] Ford does not challenge this aspect of the Superior Court's ruling.

The Superior Court, however, reserved ruling on the argument from Ford's supplemental briefing. The Superior Court determined to hold voir dire in order to better determine how Dr. Ginsburg's "substantial factor" language "fits in with the New Mexico jury instruction …."[26]

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[23] A610.

[24] A675-676, at 28:10-29:19.

[25] A748-751.

[26] A752 at 105:2-17.

Voir Dire of Dr. Ginsburg and Denial of Ford's Motion in Limine

On May 25, 2018, the Superior Court posed its own questions to Dr. Ginsburg.[27] There, Dr. Ginsburg explained repeatedly that given the outcome – Mr. Knecht developing mesothelioma – it was impossible to identify which of his repeated exposures to asbestos was the specific cause. To the contrary, it was Mr. Knecht's cumulative dose of asbestos – a dose contributed to by multiple sources, including in significant part Ford – that caused Mr. Knecht's mesothelioma. Nonetheless, Ford was a "significant link" in the causation of Mr. Knecht's disease.[28] Moreover, "just [Mr. Knecht's] exposure to the Ford products … would probably have caused his mesothelioma" and "[t]his isn't a close call."[29]

Before delivering its decision, the Superior Court asked counsel to review and opine on the import of two cases out of the Tenth Circuit – *Wilcox v. Homestead Mining Company*,[30] and *June v. Union Carbide Corp*.[31] Those cases, which Ford was directed to by the Superior Court, now form a core piece of Ford's argument on appeal.[32] They are discussed in further detail, *infra*.

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[27] B368-414.

[28] *E.g.*, B374, at 131:16-22.

[29] B380, at 153:13-21.

[30] B382, at 162:21-163:11; *Wilcox*, 619 F.3d 1165 (10th Cir. 2010) (applying New Mexico law).

[31] 577 F.3d 1234 (10th Cir. 2009) (applying Colorado law).

[32] *E.g.*, OB at 19.

Ultimately, the Superior Court denied the remainder of Ford's motion *in limine*, and admitted the testimony of Dr. Ginsburg.[33] While noting that it is "always uncomfortable in trying to apply foreign jurisdiction standards," the Superior Court noted that the commentary to New Mexico's causation jury instruction explicitly made the "but for" language optional.[34] The instruction also contemplated situations, as here, where the exposure "may be a cause of an indivisible injury which is the cumulative effect of all of the exposures."[35] Given that the instruction "leaves certain issues to the determination of the Court," and the Superior Court's concern that "the straw that broke the camel's back" could never be definitively determined, the Superior Court held that "Dr. Ginsburg has satisfied the standard here."[36] The Superior Court reached this conclusion notwithstanding the language in *Wilcox*, which the Superior Court itself identified and brought to the attention of counsel, and which Ford now contends mandates reversal here.

Ford's Motion for Judgment as a Matter of Law

At the close of Plaintiff's case in chief, on May 25, 2018, Ford filed its Motion for Judgment as a Matter of Law.[37] Ford set forth six (6) wide-ranging arguments,

[33] B389-390, at 192:12-194:11.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] A838-873.

the majority of which reappear in the instant appeal. The Superior Court heard arguments the same day, denying all aspects except for an uncontested dismissal of Plaintiff's design defect claim.[38]

In delivering its decision, the Court opined again on Ford's "but for" causation argument.[39] The Superior Court rejected Ford's contention that Dr. Ginsburg need identify the "but for" cause of Mr. Knecht's mesothelioma, in the traditional sense:

> He got [mesothelioma] as a result of working in the automotive repair business, and he got it from exposures to products which contained asbestos that were made by Ford, GM, Chrysler … whomever. So, [strict but for causation] would be a defense for everybody, that you could never say that that particular product was a but-for cause of Mr. Knecht's mesothelioma.[40]

For that reason, "New Mexico allows for some exceptions in their jury instruction," including "where you have multiple acts, each of which may cause an indivisible injury regardless of the others." The Superior Court thought "this is the type of situation where that analysis is appropriate," and therefore denied Ford's motion.[41]

Jury Instructions, Deliberations, Verdict, and Ford's Post-trial Motions

The Jury received its instructions on June 6, 2018. Importantly, the final instructions, including "use instructions" for navigating the verdict form, were

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[38] A1287-93.

[39] A1291-93.

[40] A1292-93, at 72:16-73:1.

[41] *Id.*

derived mainly from Ford's proposals. Ford proposed three separate instructions on causation, including one titled "Causation for Product Defect," which, consistent with Ford's proposals, contained no language relating to the heeding of warnings.[42] The "use instructions" explicitly told the jury that it could find in Plaintiff's favor on "either of Questions 3 or 5."[43] Ford crafted this instruction, which led to the outcome that Ford now says is inherently contradictory.

For a detailed history on the proposal, argument, and rulings on the Jury Instructions, Plaintiff refers the Court to her papers below.[44]

The Jury deliberated for three days. Within hours, the Jury delivered the first of three notes. The first Jury Note asked "Please provide us with the definition of the word 'sufficient' as it is used under 'Causation' as it related to Question Number Five. Please see Page 27, 'Causation,' in the jury instructions."[45] Ford argued that the Court's answer should contain "but for" language, but did not raise the possibility of an inconsistent verdict on the basis that the Jury submitted the Note with respect

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[42] A1376 ("Causation for Product Defect" as appears in the Final Jury Instructions); *see also* A1367 (Causation); A1377 (Causation related to Warnings); B37 (Ford's Proposed Jury Instructions); B102 (Ford's Amended Proposed Jury Instructions); B167 (Ford's Second-Amended Proposed Jury Instructions).

[43] The Parties' proposed verdict sheets are attached collectively hereto as **Exhibit 1**. *See id.* at 1-3, 1-11, 1-21.

[44] A1995-2111 (Plaintiff's Brief in Opposition to Ford's Motion for a New Trial or, in the Alternative, Remittitur).

[45] B596-97, at 48:13-52:3.

to Question No. 5 (causation for strict liability), and not Question No. 3 (causation for negligence), to which the word "sufficient" applies equally.

On June 8, 2018, the Jury delivered its verdict, finding Ford liable for Mr. Knecht's mesothelioma.[46] On June 22, 2018, Ford filed two extensive post-trial motions, presenting a total of eight (8) arguments.[47]

The Superior Court Denies Ford's Post-Trial Motions

In a lengthy and well-reasoned opinion, the Superior Court denied Ford's post-trial motions in full.[48] As to Ford's Renewed Motion for Judgment as a Matter of Law (relating to Dr. Ginsburg and causation), the Court found those motions equivalent to Ford's previous motions.[49] "After careful consideration, the Court has twice rejected them. The Court adheres to those decisions for the same reasons it articulated previously."

As to the allegedly inconsistent verdict, the Superior Court found a discrepancy between the interrogatories themselves which allowed for the jury to reach disparate answers. "[I]f the questions do not ask the same thing, there is not

[46] Ex. C (Exhibits A-D, some of which are cited herein, are exhibits to Ford's Opening Brief. Numbered Exhibits are newly attached by Plaintiff to this Answering Brief.); A1331-36.

[47] A1390-1777 (Ford's Renewed Motion for Judgment as a Matter of Law); A1778-1938 (Ford's Motion for a New Trial, or in the Alternative, Remittitur)

[48] Ex. A.

[49] *Id*. at 11.

necessarily an inconsistency, and the jury's verdict may be upheld."[50] Indeed, the Superior Court correctly determined that "the phrasing and call of each question is different."

Specifically, the Superior Court noted that Question 3 asked whether Mr. Knecht "**would have**" noticed and acted upon an adequate warning, to which the jury answered "no." Question 4 asked whether Ford's products were defective because they "lacked warning of a risk which **could have** been avoided …." Thus, "[i]n essence, it appears that the jury determined that Mr. Knecht could have avoided the risk posed by Ford's defective product had there been an adequate warning, but actually would not have done so."[51]

The Superior Court also denied Ford's motion for new trial and/or remittitur. In so doing, the Superior Court rejected assertions of objectionable comments in Plaintiff's closing:

> Apart from the Court's own observation that the jury did not show any visible signs of being aroused by passion, the nuanced answers to the Verdict Sheet belie any such notion. The Court believes that an impassioned, biased, prejudiced jury would have been moved to find against Ford across the board, including finding that Ford's negligent failure to warn Mr. Knecht was the cause of his mesothelioma. This jury did not do that.[52]

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[50] Ex. A, at 16.

[51] *Id*. at 20.

[52] Ex. A, at 20.

Specifically, comments by Plaintiff's counsel cured any offense to the "golden rule," an approach which "appeared to satisfy Ford's counsel."[53] Ford itself insisted on a unified trial for both compensatory and punitive damages, rendering arguments geared towards Ford's knowing disregard of the risk appropriate. Ford repeats these arguments here, albeit without separate point headings.[54] They remain meritless.

As to remittitur, the Superior Court "consider[ed] the actual amount for which Ford was determined to be responsible in assessing whether remittitur is appropriate."[55] The Superior Court noted that other cases are "imperfect proxies," and "comparisons [are] difficult." Ultimately, and relying on this Court's guidance that a verdict should be interfered with "only with great reluctance," the Superior Court denied Ford's motion.[56] "It is difficult to believe that a jury consumed by passion, prejudice, partiality, or corruption, or one which manifestly disregarded the evidence or law could find Mr. Knecht more culpable than Ford."[57]

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[53] *Id*. at 23.

[54] OB at 40-41.

[55] Ex. A, at 30.

[56] *Id*. at 31 (quoting *Dana Companies, LLC v. Crawford*, 35 A.3d 1110, 1113 (Del. 2011)).

[57] *Id.* at 32.

ARGUMENT

I. UNDER ANY INTERPRETATION, THE EVIDENCE SATISFIED SPECIFIC CAUSATION UNDER NEW MEXICO LAW

A. Question Presented

1) What standard would the Supreme Court of New Mexico adopt for asbestos causation, and whatever the answer, did Plaintiff adduce evidence sufficient to satisfy that standard?

B. Scope of Review

This Court reviews *de novo* a trial court's denial of a motion for judgment as a matter of law.[58] The Court does not weigh the evidence, but rather seeks to determine whether the evidence and all reasonable inferences that can be drawn therefrom could justify a verdict in favor of the nonmoving party.[59] The evidence must be viewed in the light most favorable to the nonmoving party.[60] In order to find for the moving party, the Court must find that there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-movant.[61]

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[58] *CitiSteel USA v. Connell Ltd. Partnership*, 758 A.2d 928, 930 (Del. 2000).

[59] *Mumford v. Paris,* 2003 WL 231611, *2 (Del. Super. Jan 31, 2003).

[60] *Id. See also, e.g., Trievel v. Sabo*, 714 A.2d 742, 744 (Del. 1998).

[61] *Id.*

C. Merits of Argument

a. "Substantial Factor" or "Significant Link," Causation is Satisfied

Ford advances numerous arguments aimed at the same issue – whether Dr. Ginsburg's testimony satisfies New Mexico's causation standard. The Superior Court ruled on the issue clearly and decisively – three separate times. After dedicated oral arguments, and the voir dire of Dr. Ginsburg, the Superior Court held that although "the jury instruction … does [in]clude what may well be inconsistent language internally … I'm troubled by the notion that … [we would need to determine that] an individual contributor to an indivisible injury … was [] the straw that broke the camel's back," in that without that individual contribution "that the injury would not have occurred."[62] Admitting that terminology is difficult, the Court ruled that "Dr. Ginsburg has satisfied the standard here."[63]

Ford offers no reason for this Court to diverge with the Trial Court. Indeed, regardless of the terminology used to describe New Mexico's causation standard, Plaintiff has met her burden. It is the substance of the instruction that controls, not the label. And whether one wishes to categorize the New Mexico instruction as but for or substantial factor, Plaintiff has satisfied the standard. The jury was instructed:

> An act of 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

[62] B389-390, at 192:18-194:11.

[63] *Id.*

> 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.[64]

Dr. Ginsburg testified during voir dire that if you were to take away all of his other asbestos exposures, other than Ford, Ford would be the sole and actual cause of his mesothelioma.[65] He then backed this same testimony up in front of the jury:

> Q: I'd like you to assume for the purpose the next hypothetical that Mr. Knecht developed mesothelioma when he did, was properly diagnosed, and there was sufficient latency. I'd like you to assume that he didn't wear respiratory protection, a mask, a respirator any time in his career. I would like you to assume that the only exposures that he had in his career were Ford exposures, as articulated in the prior hypothetical and as articulated throughout the videotaped deposition and oral deposition that you reviewed in this case. If you assume those facts, what would the sole cause of Mr. Knecht's – what would the sole cause of Mr. Knecht's mesothelioma be, in your opinion?
>
> A: It would be the exposure to Ford brakes, clutches, and gaskets.[66]

If something is the sole and actual cause, surely the *harm would not have occurred without it*, satisfying the 'but for' component of the instruction. Further, Dr. Ginsburg testified again on cross examination:

> Q. Just to make sure the jury understands your answer. You have not concluded that Ford products alone caused Mr. Knecht's mesothelioma?

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[64] A1367 (Final Jury Instructions); *see also* New Mexico Uniform Jury Instruction § 13-305.

[65] B373, at 128:1-23.

[66] B451, at 147:10-22; 148:2-3.

> A. Well, my statement – let's be precise – is that the exposures to Ford products alone are adequate to attribute the development of his mesothelioma.[67]

Then, when questioned by the Court, Dr. Ginsburg again testified:

> THE COURT: So let me ask you this: We're trying to flesh out what the New Mexico standard for admissibility and of causation is. … [D]o you have an opinion about his – just his exposure to the Ford products that you talked about, whether that probably would have caused his mesothelioma?
>
> …
>
> THE WITNESS: That it would. This isn't a close call.[68]

Quite simply, this alone satisfies the New Mexico causation standard, no matter the categorization. Dr. Ginsburg also testified that the Ford exposures are a substantial contributing factor to his development of mesothelioma.[69]

Finally, the commentary to New Mexico's instruction provides compelling support to the conclusion that Dr. Ginsburg's testimony created a jury question regarding causation:

> The committee feels that the but-for clause may be unnecessary or inappropriate in particular cases, such as … when multiple acts each may be a cause of indivisible injury regardless of the other(s). … [T]he trial court might determine that the "cause-in-fact" element of causation is more adequately expressed through use of the terms "contributes to

[67] B496, at 103:6-12.

[68] B380, at 153:10-21.

[69] B447-48, at 131:1-133:3.

> bringing about" …. The present instruction leaves these issues for determination by the trial court ….[70]

Thus, the drafters of New Mexico's jury instruction not only foresaw the exact circumstance presented here, but explicitly placed discretion in the trial court to determine the proper course of action. The Superior Court's decision to send the issue of causation to the jury was well within the discretion contemplated by the New Mexico drafting committee.

With the standard of review being whether any rational juror could find that plaintiff met its burden on causation, this Court should deny Ford's appeal on this point.

b. New Mexico Would Likely Adopt Substantial Factor Causation

Regardless, were New Mexico to consider the issue, it would most likely join the vast majority of jurisdictions in adopting substantial factor causation in asbestos lawsuits. Ford admits that eleven states apply the so-called *Lohrmann* test of asbestos causation.[71] Ford does not mention the significant group of states that apply substantial factor, without having specifically adopted *Lohrmann*.[72] Ford also

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[70] New Mexico Uniform Jury Instruction § 13-305, Committee Commentary.

[71] OB at 16. *See also Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir. 1986).

[72] Purely by way of example, *see, e.g., Manske v. Workforce Safety & Ins.*, 748 N.W.2d 394, 397 (N.D. 2008) (in workers compensation hearing, "the analysis should focus on whether his asbestos exposure is a substantial contributing factor" in plaintiff's lung cancer).

declines to mention that *Lohrmann* itself imposes relatively stringent requirements as compared to some jurisdictions' interpretation of "substantial factor."[73] Finally, still other states apply "substantial factor" generally, without having explicitly adopted the standard in the context of asbestos.[74]

Those states applying substantial factor causation to asbestos litigation include each of New Mexico's neighboring jurisdictions.[75]

In contrast to this clear majority, Ford asserts that "several states" have adopted different standards, meaning, apparently, Virginia and Texas. Those states apply widely disparate standards; which would New Mexico supposedly select? Why should this Court presume that New Mexico would join one of these outlier jurisdictions?

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[73] *See, e.g., Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1219 (Cal. 1997), *as modified on denial of reh'g* (Oct. 22, 1997); *Allen v. Asbestos Corp.*, 157 P.3d 406, 410 (Wash. Ct. App. 2007).

[74] *See, e.g., Sampson v. Laskin*, 224 N.W.2d 594, 597–98 (Wis. 1975) ("[t]he cause of an accident is not determined by its most immediate factor;" rather, "there may be several substantial factors contributing to the same result.").

[75] *See, e.g., Riggs v. Asbestos Corp.*, 304 P.3d 61, 72 (Utah Ct. App. 2013); *Evans v. CBS Corp.*, 230 F. Supp. 3d 397, 403 (D. Del. 2017) (applying Colorado law) (citing *Rupert v. Clayton Brokerage Co.*, 737 P.2d 1106 (Colo. 1987)); *Hyde v. Owens-Corning Fiberglass Corp.*, 751 F. Supp. 832 (D. Ariz. 1990).

Ford focuses heavily on Virginia, and its "independent sufficiency" standard.[76] Plaintiff is not sure why, since Dr. Ginsburg very clearly stated, to the jury, that Mr. Knecht's "exposures to Ford products alone are adequate to attribute the development of his mesothelioma."[77] Even if Virginia law applied, Ford's appeal on causation would be meritless.

Texas imposes "the most stringent [causation] test of any state" on asbestos plaintiffs.[78] The law of Texas is unlike any other jurisdiction in that it imposes specific *prima facie* requirements that asbestos plaintiffs must satisfy through expert reports. Texas is the only jurisdiction that requires a dosage report through an industrial hygienist as well as a causation report incorporating that dosage report. There is no reason to think New Mexico would join Texas in this standard.

Finally, Delaware itself is the only state, to Plaintiff's knowledge, to actively apply a "but for" standard to asbestos litigation.[79] But Plaintiff contends that the Delaware standard, if it did control, would be satisfied. This Court has spoken on

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[76] *See, e.g.*, OB at 18. *See also Ford Motor Co. v. Boomer*, 736 S.E.2d 724 (Va. 2013).

[77] B496, at 103:6-12.

[78] *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1049 (Pa. 2016). *See also Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332 (Tex. 2014).

[79] *Money v. Manville Corp. Asbestos Disease Comp. Tr. Fund*, 596 A.2d 1372, 1377 (Del. 1991).

the issue. In *Shapira v. Christiana Care Health Services,* the trial court instructed the jury that:

> Proximate cause is a cause that directly produces the harm, and but for which the harm would not have occurred. A proximate cause brings about, *or helps to bring about,* the plaintiff's injuries, and it must have been necessary to the result. There may be more than one proximate cause of an injury.[80]

Shapira argued that the italicized phrase above rendered the instruction legally incorrect because it is inconsistent with the 'but for' causation standard. This Court found that the Superior Court "properly instructed the jury on the standard for proximate cause":

> Under settled law, this argument fails. This Court repeatedly has found that the phrase "helps to bring about" can be part of an accurate statement of the "but for" causation standard.[81]

Further supporting this interpretation of Delaware's "but for" standard, Delaware jurors are instructed on concurrent causes that:

> There may be more than one cause of an [accident/injury]. The conduct of two or more [persons, corporations, etc.] may operate at the same time, either independently or together, to cause [injury/damage]. Each cause may be a proximate cause. A negligent party can't avoid responsibility by claiming that somebody else – not a party in this

[80] *Shapira v. Christiana Care Health Servs., Inc.,* 99 A.3d 217, 224-25 (Del. 2014) (emphasis in original).

[81] *Id.* at 225 (citing *Ireland v. Gemcraft Homes, Inc*., 29 A.3d 246, 2011 WL 4553166, at *3 (Del. Oct. 3, 2011)).

> lawsuit – was also negligent and proximately caused the [accident/injury].[82]

Indeed, as applied to asbestos, the "but for" standard in Delaware presents a relatively low bar. An expert need only state that the plaintiff *may* not have developed the same disease in the same time and manner "but for" the disputed exposure.[83] It is illogical to imagine that the evidence here – Mr. Knecht's heavy exposure to Ford products over the course of decades – would be deemed insufficient to create a jury question under Delaware law.

i. Ford places too much reliance on *Wilcox*.

The Tenth Circuit's decision in *Wilcox* is not determinative.[84] Again, the Superior Court itself identified *Wilcox*, asked for counsel to discuss the opinion, and proceeded to determine that Dr. Ginsburg's testimony satisfied New Mexico causation regardless. Indeed, the court in *Wilcox* concluded in part that "as we interpret New Mexico law, a toxic tort plaintiff must demonstrate only to a reasonable degree of medical probability … 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**

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[82] *See* Delaware Pattern Jury Instruction on Concurrent Causes, 21.2; *see also Laws v. Webb*, 658 A.2d 1000, 1007-08 (Del. 1995).

[83] *See, e.g.*, *In re Asbestos Litig. (Walls)*, 2016 WL 10703199, *3-4 (Del. Super. June 8, 2016).

[84] *Wilcox v. Homestake Mining Co.*, 619 F.3d 1165 (10th Cir. 2010) (applying New Mexico law).

another sufficient cause."[85] This question is precisely what Dr. Ginsburg stated "isn't a close call" here.

Regardless, as the Superior Court also understood, *Wilcox* is distinguishable because it is not an asbestos case. In *Wilcox*, plaintiffs attributed a variety of cancers to radiation exposure, although those cancers could have been caused by any number of factors. In contrast, there is no question that Larry Knecht's mesothelioma was caused by asbestos exposure, albeit from numerous sources.[86] Requiring Appellee to show that without Ford, Mr. Knecht would not have contracted mesothelioma runs counter to any state's law of causation and ignores the language of New Mexico's jury instruction. The Superior Court said it perfectly itself – "That would be a defense for everybody, that you could never say that that particular product was a but-for cause of Mr. Knecht's mesothelioma."[87] Unlike in *Wilcox*, where it was unclear *what* caused plaintiffs' disease, in this case it is only a matter of *who*. Because it is unfair to absolve each of a group of culpatory entities, the *Wilcox* framework simply does not fit here.

The Court in *Wilcox* specifically noted this distinction, stating that the "multiple sufficient cause" exception to but for causation cannot apply "simply on

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[85] *Id*. at 1169 (emphasis added).

[86] *E.g.*, B372, at 122:4-6.

[87] A1292-93, at 72:16-73:1.

the basis that [a] product *could* have potentially caused or contributed to" the resultant disease.[88] Rather, as set forth in the Restatement(s), the exception only applies only where "***a substance*** that would have actually (that is, probably) caused the cancer can be a factual cause without being a but for cause."[89] Asbestos, of course, falls precisely within this distinction.

As such, this Court should deny the portion of Ford's appeal relating to New Mexico's causation standard, as interpreted by the Superior Court and jury.

[88] 619 F.3d at 1168 (emphasis added).

[89] *Id*. (emphasis added). The court's concern is what "substance" caused the injury in the first instance, and not distinguishing between multiple sources of the same substance.

II. MULTIPLE EXPLANATIONS POTENTIALLY HARMONIZE THE JURY'S VERDICT, WHICH IS CONSISTENT

A. Question Presented

1) Can any reasonable explanation harmonize the jury's answers to the special interrogatories?

B. Scope of Review

Ford's inconsistent verdict argument was contained in its motion for new trial, denials of which are reviewed under a "stringent" abuse of discretion standard.[90] Yet there is some precedent – in the criminal context only, to Plaintiff's knowledge – evaluating allegedly inconsistent verdicts *de novo*.[91] Regardless, "[t]his Court must try to reconcile any apparent inconsistencies in a jury's verdict. The jury's verdict will stand as long as the Court finds one possible method of construing the jury's answers as consistent with one another and with the general verdict."[92]

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[90] *See, e.g.*, *Strauss v. Biggs*, 525 A.2d 992, 997 (Del. 1987) (citing, as to motions for new trial, *Eustice v. Rupert*, 460 A.2d 507, 510-511 (1983)).

[91] *See* OB at 30 (citing *Van Vliet v. State*, 148 A.3d 257 (table), 2016 WL 4978436, at *3 (Del. 2016)).

[92] *Citisteel USA, Inc. v. Connell Ltd. P'ship*, 712 A.2d 475 (Del. 1998) (quoting *Grand Ventures, Inc. v. Whaley*, 622 A.2d 655, 664 (Del. Super. 1992), *aff'd*, 632 A.2d 63, 72 (Del. 1993)).

To the extent Ford argues that the jury was improperly instructed a plain error standard applies.[93] "[W]here a party has requested or accepted a particular jury instruction at trial, we review only for plain error."[94]

C. Merits of Argument

a. The Superior Court Provided a Reasonable Explanation for the Jury's Findings

The Superior Court got it right – the "phrasing and call" of questions 2, 3, 4 and 5 are different, allowing the jury to consistently reach different answers as to causation. Question 4 asks whether the product is defective "because it lacked a warning of a risk which **could have** been avoided by the giving of an adequate warning?" Substituting that definition into question 5, therefore, results in:

- Do you find … that [the lack of a warning of a risk which **could have** been avoided] caused Mr. Knecht's mesothelioma?

Question 3, in contrast, asks:

- Do you find … that Ford'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?

Questions 3 and 5 *are* different, and the jury was entitled to reach different answers to the two Questions.

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[93] *See, e.g., Volkswagen of Am., Inc. v. Costello*, 880 A.2d 230, 234-235 (Del. 2005).

[94] *Harris v. Cochran Oil Co.*, 70 A.3d 205 (table), 2011 WL 3074419, *3 (Del. July 26, 2011).

Ford may say that if Mr. Knecht would not have heeded a warning, there can be no causation. But that is not the question here. Rather, we are simply inquiring whether there is an irreconcilable inconsistency in the jury's answers to Questions 3 and 5. Because the questions are not equivalent, there is no inconsistency.

Regardless, the jury heard an instruction on "Causation for Product Defect," which stated:

> 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 of 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.[95]

This language is sufficiently broad to allow the jury to find causation on Plaintiff's product defect claim. As the Superior Court found, "[b]ecause Ford's products were defective in [in that they failed to warn of a risk which could have been avoided], and because Mr. Knecht was exposed to Ford's products, Ford's defective products caused Mr. Knecht's mesothelioma."[96]

b. Multiple Additional Explanations are Available

Because any reasonable explanation is sufficient to uphold a verdict, Appellee suggests the following alternate explanations:

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[95] A1376.

[96] Ex. A at 18.

- The compound nature of Question 3 means that the jury's answer of "no" could apply to any subpart.
- The passage of time is a confounding factor. The jury may have found that Mr. Knecht would have acted differently had an adequate warning been present at the beginning of his career, but not at the end. Likewise, the jury might have found that the concept of an "adequate" warning changed over the course of the decades.
- Certain of the instructions speak to adequate directions in addition to warnings. The jury could have read one or more of the questions to involve directions, and treated that issue differently than warnings.

The most rational explanation may be simply be that Question 3 explicitly incorporated "heeding" language, while Question 5 did not. The jury was given two instructions back to back: "Causation Relating to Warnings," which referenced heeding, and "Causation for Product Defect," which did not.[97] The jury likely did not apply "Causation Relating to Warnings" to Questions 4 and 5. Why would they, when provided with an apparently superseding instruction, directly on point to plaintiff's product defect cause of action?

[97] A1376, 1377.

While Ford now says that "Causation Relating to Warnings" should have applied to both Questions 3 and 5, its best support for that contention is in the commentary to the Instruction; material which did not reach the jury (and that was not included in any of Ford's jury instruction proposals). Even if Ford is right that causation is identical for the two causes of action (a point Plaintiff does *not* concede), Ford lost the right to complain about the jury's reasonable actions considering Ford itself is responsible for the relevant instructions.

c. Ford Waived the Right to Complain About Confusion of Its Own Creation

Indeed, setting aside the fact that the verdict *is* consistent, the initial problem here is that the Verdict Form allegedly allowed for inconsistent verdicts in the first instance. Ford drafted Questions 2, 3, 4 and 5 and the use notes relevant to those questions. During the prayer conference, Ford argued that its verdict form should be used. The trial court agreed to use Ford's Questions 2-5 without [significant] alteration.[98] In fact, even the instructions on what the jury was to do after answering "yes" or "no" came from Ford. The options Ford provided allowed the jury to reach the answers they reached.

[98] B547-551, at 8:19-22:3; *see also* Ex. 1.

The inconsistency of which Ford now complains was no typographical error or some sloppy drafting error. It consistently appeared in every draft submitted.[99] Ford's consistent position was that the jury could base damages and should move on to consider damages if it found liability based on Questions 3 or 5.[100] Also, the relevant causation instructions (Causation; Causation for Product Defect; Causation Related to Warning) appeared in the final instructions identically as in each of Ford's drafts.[101] Ford should not be permitted to advocate for instructions and a verdict form that allows for what they now deem "inconsistent" responses, and then benefit from the confusion it sowed.

This has happened to Ford before. In *Jarvis v. Ford Motor Company*, a Ford vehicle caused injury when it malfunctioned by "accelerating suddenly."[102] The plaintiff pursued theories of negligence and strict liability. As here, the jury was instructed that it could find in plaintiff's favor under *either* of the two theories. The jury found that the cruise control system was not defectively designed, but that Ford was nevertheless negligent in the design of the cruise control system. Ford objected

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[99] *See* Ex. 1.

[100] B550-551, at 20:4-21:7

[101] *Compare* B25, B37, B38; *with* B93, B102, B103; *with* B158, B167, B168.

[102] 283 F.3d 33 (2002).

on the basis of allegedly inconsistent verdicts.[103] The trial court granted Ford's motion for a new trial.

Then-Circuit Judge Sotomayor reversed and reinstated the jury verdict. She found that Ford's complaints "related to the jury instructions and verdict sheet, and not to the jury's general verdicts …." The charge made it "abundantly clear that the jury was instructed that it could find Ford liable under theories of *either* negligence *or* strict liability or both."[104] Under the only Rule the Court saw as applicable – Federal Rule of Civil Procedure 51 (equivalent to Superior Court Civil Rule 51) – Ford was required to "object before the jury retires to deliberate":

> We have previously emphasized that failure to object to a jury instruction or the form of an interrogatory prior to the jury retiring results in a waiver of that objection. Surely litigants do not get another opportunity to assign as error an allegedly incorrect charge simply because the jury's verdict comports with the trial court's instructions.[105]

Although Ford *did* argue during trial that the jury should not be charged with both theories, it did not "state distinctly the matter objected to and the grounds of the objection."[106]

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[103] *Id*. at 55. Note that in *Jarvis*, Ford objected before the jury was dismissed.

[104] *Id*. (emphasis in original).

[105] *Id*. at 56-7 (quoting *Lavoie v. Pac. Press & Shear Co.*, 975 F.2d 48, 55 (2d Cir. 1992)).

[106] *Id*. at 57 (quoting FRCP 51).

In conclusion, the court held that Ford must abide by the jury charge as delivered, noting that the "issue of the jury charge was litigated extensively":

> Ford asked for this jury charge, presumably for strategic reasons, and was well apprised of the law of waiver. To excuse Ford from the well-established rules of waiver would permit precisely the sort of "sandbagging" that the rules are designed to prevent, while undermining the ideal of judicial economy that the rules are meant to serve.[107]

Finally, and "[a]lthough Ford [did] not request[] that we do so," the Court noted the doctrine allowing it to "review jury instructions and verdict sheets for 'fundamental' error even when a litigant has not complied with the Fed.R.Civ.P. 51 objection requirements."[108] Nonetheless, the court did not find "fundamental" error, because "the degree of overlap between negligence and strict liability for design defects is unsettled under New York law." The court so found notwithstanding comments by New York's highest court that the two claims were "functionally synonymous."[109] Likewise, here, Plaintiff is aware of no authority finding a 100% "degree of overlap" between Plaintiff's claims for product defect and negligent failure to warn.[110]

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[107] *Id*. at 62.

[108] *Id*. (stating that relief has been found warranted "when the jury charge deprived the jury of adequate legal guidance to reach a rational decision").

[109] *Id*. at 63 (quoting *Denny v. Ford Motor Co.*, 662, N.E.2d 730, 735 (N.Y. Ct. App. 2995)).

[110] *Jarvis* was subsequently adopted by the Third Circuit in the case of *Frank C. Pollara Group v. Ocean View Investment, LLC*, 784 F.3d 177, 191 (3d Cir. 2015)

Courts in Delaware have reached similar conclusions. In *Beebe Medical Center v. Bailey*, for example, the court analyzed allegedly faulty jury instructions under the "plain error standard of review."[111] "The doctrine of plain error is limited to material defects which are apparent on the face of the record, which are basic, serious, and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly shows manifest injustice."[112] In *Beebe*, the record showed that the Court delivered instructions negotiated between the Parties, along with curative and cautionary instructions suggested by the party moving for relief post-trial. The court emphasized that "[a]lthough the trial judge has the responsibility to instruct the jury; it is the parties' responsibility to bring to the trial judge's attention the instructions they consider appropriate and the reasons why."[113]

Likewise, in *Broughton v. Wong*, the defendant moved for a new trial following a jury verdict, in part on the basis that the jury heard inappropriate expert testimony.[114] This Court denied the motion because the defendant failed to object at

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("Appellants failed to object either to the wording on the verdict form—indeed, they joined in proposing it—or to the responses provided by the jury before the jury was discharged.").

[111] 913 A.2d 543, 556 (Del. 2006), *as amended* (Nov. 15, 2006). The "plain error" standard appears to be the Delaware's equivalent to the "fundamental error" standard applied by then-Circuit Judge Sotomayor in *Jarvis*.

[112] *Id*. (quoting *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

[113] *Id*.

[114] 2018 WL 1867185 (Del. Super. Feb. 15, 2018).

trial. Noting the "perverse incentives" implicated by defendant's motion, this Court explained:

> Despite their failure to object at trial, the party now comes before the Court urging that a legal error occurred. Were the Court to grant this Motion, the practical effect of the party's conduct is that the party could make a strategic decision not to object at trial with the hope of receiving a favorable verdict, but if the party received an unfavorable jury verdict, they would be assured of a new trial before a new jury with the possibility of a different outcome. The Court will not retroactively cure any perceived mistake created by created by trial counsel's failure to object at trial. Defendants made a strategic decision and the Court is reluctant to provide a retroactive cure that could encourage gamesmanship.[115]

These cases stand for the proposition that a party may not "have it both ways" – litigants must abide by the results of their actions. Litigation decisions have consequences and Ford's now seeks to run from decisions it made in this trial. Ford's proposed verdict sheet and instructions were largely adopted by the Superior Court and delivered to the Jury. To the extent the instructions and verdict, read together, could be read to indicate that "heeding" of a warning is of lessened importance in a claim for strict liability, such is a circumstance created by Ford itself. If, as Ford now says, the Jury could not under any circumstances reach different causation findings as to Plaintiff's two claims, then Ford should not have drafted

[115] *Id*. at *8 (internal cites and quotes omitted). *See also, e.g., Shapira v. Christiana Care Health Servs., Inc.*, 99 A.3d 217, 224 (Del. 2014) (enforcing results of jury verdict where litigant did not object to instructions or jury sheet at trial).

forms explicitly allowing such findings. Ford should not be permitted to benefit from alleged confusion resulting from its own actions.

III. NEITHER REMITTITUR NOR A NEW TRIAL ON DAMAGES IS APPROPRIATE

A. Question Presented

1) Whether the Superior Court abused its discretion in denying Ford's Motion for Remittitur?

B. Scope of Review

"Appeals from a trial court's denial of a motion for new trial or for a remittitur are governed by a stringent 'abuse of discretion' standard of review."[116] Even beyond the Superior Court's decision, "enormous deference" is owed to the underlying jury verdict, which "should not be disturbed unless the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result."[117] "In assessing remittitur, tribute is still paid to the very jury whose verdict is being set aside. Under the Delaware policy to highlight the role of the jury, our practice should be in remittitur to grant the plaintiff every reasonable factual inference from the record and determine what the record justifies as an absolute maximum."[118] "A verdict will not be disturbed as excessive unless it

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[116] *Strauss v. Biggs*, 525 A.2d 992, 997 (Del. 1987) (citing, as to remittitur, *Yankanwich v. Wharton*, 460 A.2d 1326, 1332 (Del. 1983)).

[117] *Shapira*, 99 A.3d at 224 (internal quotes omitted).

[118] *Barba v. Boston Sci. Corp.*, 2015 WL 6336151, at *14 (Del. Super. Ct. Oct. 9, 2015) (internal quotes and cites omitted).

is so clearly so as to indicate that it was the result of passion, prejudice, partiality, or corruption; or that it was manifestly the result of disregard of the evidence or applicable rules of law."[119] "Absent the aforementioned infirmities, it is the jury which is in the best position to determine the value of consequential damages."[120]

C. Merits of Argument

a. The Superior Court did not Abuse its Discretion in Denying Ford's Motion for Remittitur.

To reverse on damages, this Court must determine that the Superior Court abused its discretion in determining whether its own conscience was shocked by the size of the verdict.[121] Especially in light of the Superior Court's well-reasoned and comprehensive written denial of Ford's Motion, there is no cause for this Court to change the outcome.

i. The Verdict and the Jury's Deliberations Indicate Thoughtful Rationality

As the Superior Court determined, multiple considerations suggest that the jury made a measured, rational decision – the opposite of Ford's argument "that the

[119] *Riegel v. Aastad*, 272 A.2d 715, 717-18 (Del. 1970).

[120] *Patterson v. Mayer*, 1997 WL 1048178, at *2 (Del. Super. July 24, 1997) (citing *Dolinger v. Scott & Fetzer Co.*, 405 A.2d 690, 692 (1979)).

[121] *See, e.g., Estate of Rae v. Murphy*, 956 A.2d 1266, 1272 (Del. 2006).

verdict was the result of bias, passion, or prejudice."[122] Deliberations lasted for over three full days.[123] During that time, the jury asked three distinct, nuanced questions. Ultimately, the jury awarded compensatory damages in the amount of $40,625,000 – an uneven amount that could only be the result of calculation and principled consideration. And of course, Ford is responsible for only 20% of the compensatory award – $8,125,000. Ford can point to no authority that the Superior Court erred in evaluating Ford's actual liability as distinct from the verdict as a whole.

There is no indication that the compensatory damages award here was meant to punish Ford. To the contrary, the argument is belied by the jury's separate award of $1 million in punitive damages. The jury clearly understood the different components of damages available, calculated an appropriate compensatory sum, and nonetheless felt that Ford should be further punished for its malfeasance.

In short, the only way the verdict can be reduced is if it "shocks the conscience" of the Court. If there exists a fair basis for the jury's decision – as exists here – the Court should not substitute a different judgment except under the most

[122] OB at 4.

[123] *Compare with, e.g., Chilson v. Allstate Ins. Co.*, 2007 WL 4576006, at *5 (Del. Super. Dec. 7, 2007) (considering "the short length of time the jury took in its deliberations" as relevant "to the Court's concerns about the carefulness of the jury's consideration ….").

extreme of circumstances. Even then, the Court should have a rational basis for alternate calculations before it disregards the findings of a Jury of Twelve.

ii. The Jury was empowered and specifically instructed to use its discretion in fixing damages.

The jurors were instructed here that "you … are the sole judges of the facts …." "No fixed standard exists for determining fair and just damages. You must use your judgment to decide a reasonable amount." Even more importantly, the jury was instructed that in quantifying compensatory damages, it must consider "[t]he mitigating or aggravating circumstances attending the wrongful act, neglect, or default."[124]

Any effort at remittitur here is complicated considerably by the fact that the jury was instructed to award a single lump sum as compensatory damages – no breakdown of the components of the award is available. Ford itself created this circumstance – Plaintiff's proposed verdict sheet included separate line entries for each component of compensatory damages.[125] Ford objected to this "breakdown" of compensatory damages award, and its version of the verdict sheet (in this regard) is what the jury completed.[126]

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[124] Final Jury Instructions, at 40. *See also* New Mexico Uniform Jury Instruction § 13-1830.

[125] Ex. 1, at 1-19.

[126] B551, at 21:10-21.

Accordingly, we cannot know what amount the jury awarded for each aspect of compensatory damages. Neither Ford nor the Court, therefore, can determine whether the jury overvalued Mr. Knecht's pain and suffering, Mrs. Knecht's loss of consortium, or any other aspect of its award. The only possibility is for the Court to determine the absolute maximum that could have been awarded for each component. These maximum figures must then be adjusted to account for "[t]he mitigating or aggravating circumstances attending the wrongful act." The sum of each of those absolute maximums, as adjusted for aggravating circumstances, is the *lowest and only* figure that can be appropriately used as a starting point in considering remittitur. On what basis the Court would determine those maximum figures, however, remains entirely uncertain.

iii. Direct Comparison to Other Verdicts is Difficult and Potentially Misleading

"This Court has previously noted that 'it is difficult, if not dangerous, to refer to other cases to argue that a particular verdict is too high or too low.' It is inevitable that there will be dissimilar results in personal injury suits because no two juries will judge the effect of a plaintiff's injuries identically."[127] Ford's citations to other verdicts therefore provide little guidance.

[127] *Novkovic v. Paxon*, 2009 WL 659075, at *2 (Del. Super. Ct. Mar. 16, 2009) (quoting *Chilson v. Allstate Ins. Co.*, 2007 WL 4576006, at *5 (Del. Super. Dec. 7, 2007)).

Each of the Delaware asbestos cases cited by Ford suffer from the same defect: in none of those cases was a verdict reduced on remittitur. The decisions, therefore, provide no guidance as to the upper boundaries of acceptable awards.[128]

As a counter example, Plaintiff can point to an order for additur by Judge Taylor delivered in 1990.[129] There, the court notes "awards in previous trials for asbestos-related pleural disease have been in the range of $150,000 - $4,000,000 and awards for asbestosis have been in the range of $100,000 - $4,750,000."[130] Compared to awards in the $4 million range, for *non-malignant disease*, delivered approximately thirty years ago, the award here is well within the bounds of reason.

Notwithstanding the inherent difficulties, courts do on occasion seek guidance from other cases when considering a motion for remittitur.[131] To that end, equivalent damages awards (and significantly larger awards) have been upheld by courts around the country. Solely by way of example:

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[128] OB at 39. *See also General Motors Corp. v. Grenier*, 981 A.2d 524 (Del. 2009) (no challenge to amount of jury award); *Dana Companies, LLC v. Crawford*, 35 A.3d 1110 (Del. 2011) (remittitur denied; additur denied due to unresolved issues of underlying law); *R.T. Vanderbilt Co. Inc. v. Galliher*, 98 A.3d 122 (Del. 2014) (no challenge to amount of jury award).

[129] *Bradley v. A. C. & S., Co., Inc.*, No. 84C-MY-145 (Del. Super. Mar. 8, 1990), Order (attached hereto as **Exhibit 2**).

[130] *Id*. at 4.

[131] *See e.g., Barba*, 2015 WL 6336151, at *14 (examining jury verdicts in "similar pelvic mesh cases" from other jurisdictions).

- Jury award of $81.5 million upheld in Washington State[132]

    - Notwithstanding the plaintiffs' request for $30 million in compensatory damages, the jury awarded $81.5 million, including $30 million *each* to the decedent and his wife of four years. Note that punitive damages are not available under Washington law.

    - The trial court upheld the verdict despite defendant's argument that the asbestos verdicts in Washington state averaged "$1 million to $5 million."

- New Jersey Appellate Division upholds $30.3 million asbestos verdict[133]

    - "The jury awarded plaintiff $8,000,000 for pain and suffering, $2,000,000 for loss of consortium, $9,281,660 for loss of earnings, $2,030,544 for loss of services, and $3,000,000 for each of their three daughters for loss of parental care and guidance."[134]

    - "The jury's award of $11,030,544 for loss of services and loss of parental care and guidance was substantially more than plaintiff's expert's calculation. However, the jury was entitled on this record to find the expert was conservative …. In deferring to the judge's feel of the case, we have been presented with no persuasive reason to intervene."[135]

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[132] *Coogan v. Borg-Warner Morse Tec, Inc.*, 2017 WL 9473495 (Wash. Super. Dec. 1, 2017) (order) (attached hereto as **Exhibit 3**); *see also* http://asbestoscasetracker.com/seattle-jury-renders-enormous-verdict-against-napa/ (last visited May 27, 2019); *see also* Defendant GPC and Napa's Motion for a New Trial and in the Alternative for Remittitur, Oct. 16, 2017 (brief attached hereto as **Exhibit 4**).

[133] *Buttitta v. Allied Signal*, 2010 WL 1427273 (N.J. Super. Ct. App. Div. Apr. 5, 2010).

[134] *Id*. at *1.

[135] *Id*. at *19 (internal quotes and cites omitted)

Those courts that *do* reduce damage awards consider issues not present here. Again, by way of example, courts in New York have reduced jury verdicts with some frequency.[136] In the case of *Gondar v. A.O. Smith Water Products*, the jury awarded $22 million in a living mesothelioma case. Unlike here, the award was delineated between $12 million in past pain and suffering, and $10 million for future pain and suffering. Also unlike here, the court considered settled New York precedent establishing values for each month of pain and suffering. As such, after the jury delivered its verdict awarding $10 million for future pain and suffering, it was sent back to answer how many months of future pain and suffering the award was meant to cover.[137] Based on the jury's answer of "a month," the future award was reduced to $2 million.

The transcript in *Gondar* illustrates the evidence *missing* here. For the reasons stated, the jury's verdict should be upheld as delivered.

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[136] *See, e.g., Gondar v. A.O. Smith Water Products*, 2017 WL 658033 (N.Y. Sup. Feb. 14, 2017); *see id.* at 26:4-10 ("… I have to address the remittitur sum [as] rooted in appellate case law.") (order and transcript attached hereto as **Exhibit 5**).

[137] *Id.* at 24-25.

CONCLUSION

For the reasons set forth herein, Ford's appeal should be denied in full.

Respectfully submitted,

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