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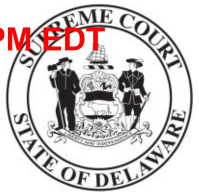

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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 REPLY BRIEF

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Dated: June 12, 2019

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SUMMARY OF ARGUMENT

Plaintiff's answering brief hardly even disputes Ford's arguments. As to causation, Plaintiff opts not to engage with Ford's ample legal authority showing that New Mexico does not apply the "substantial factor" causation test. And to show that New Mexico's causation standard has been satisfied, Plaintiff—without further explanation—relies on nearly the same excerpts of the trial transcript that Ford undercut in its opening brief.

Plaintiff's response to Ford's inconsistent verdict argument also rings hollow. Instead of defending the Superior Court's actual analysis, Plaintiff offers a handful of one-sentence alternate explanations without elaboration. Then, remarkably, Plaintiff argues Ford's inconsistent verdict argument is somehow waived, even though both parties fully briefed the exact issue below and the Superior Court issued a detailed opinion on it.

Finally, as to Ford's excessive damages arguments, Plaintiff altogether ignores Ford's authority showing that the Superior Court erred by combining liability and damages in its excessive verdict analysis. Plaintiff similarly ignores Ford's discussion of the "Golden Rule" argument that Plaintiff advanced, several times, during closing. This Court should hold that Ford was entitled to judgment as a matter of law, or alternatively, grant a new trial or remittitur.

ARGUMENT

I. PLAINTIFF FAILS TO IDENTIFY EVIDENCE THAT COULD SATISFY NEW MEXICO'S CAUSATION STANDARD.

Plaintiff's evidence does not show that Ford caused Mr. Knecht's mesothelioma as required under New Mexico law. Plaintiffs in New Mexico toxic tort cases must show that a defendant's products were either (1) "a but-for cause of their cancer, either alone or as a necessary part of a combination of different factors, or (2) would have been such a but-for cause were it not for another sufficient coincident cause." *Wilcox v. Homestake Mining Co.*, 619 F.3d 1165, 1170 (10th Cir. 2010); Opening Br. 19-26. The "frequency, regularity and proximity" "substantial factor" test is a different, more relaxed standard. Opening Br. 16-18. That standard imposes a "*de minimis* rule," where a plaintiff must prove only "more than a casual or minimum contact with the product." *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986). In thirty years, New Mexico has never adopted any version of the "substantial factor" test, and it is not "appropriate" for out-of-State courts to do so. *Wilcox*, 619 F.3d at 1168-69; Opening Br. 19-26.

Yet, inexplicably, all of Plaintiff's causation arguments are geared towards satisfying the less stringent, *Lohrmann* "substantial factor" test, which New Mexico has not adopted. Opening Br. 26-29. Because Plaintiff failed to offer any evidence under New Mexico's established causation standard showing that Ford

caused Mr. Knecht's mesothelioma, Ford is entitled to judgment as a matter of law. *See* Del. Super. Ct. R. 50.

A. Plaintiff Does Not Meaningfully Address Ford's Authority Showing New Mexico Has Not Adopted The "Substantial Factor" Causation Test.

The Superior Court erred in ruling that New Mexico applies the "substantial factor" test articulated in *Lohrmann*. *See* A01291-93; A02498-500. Applying *Lohrmann*, the Superior Court stated that "frequency, regularity, intensity, [and] proximity" were "relevant" to the "substantial factor" test, A01291-92, and concluded "this is the type of situation where that analysis is appropriate," A01293.

All available legal authority shows that was an error. Opening Br. 19-26 (relying on *Wilcox*; the Restatement (Third) of Torts; and New Mexico's model causation instruction). Plaintiff barely disputes this. Instead, Plaintiff primarily contends that because her causation evidence satisfies New Mexico's multiple-sufficient-cause test, the Superior Court's threshold error is irrelevant. Answering Br. 19 ("[R]egardless of the terminology used to describe New Mexico's causation standard, Plaintiff has met her burden.").

Plaintiff ignores two of Ford's three pillars of authority: The Restatement (Third) of Torts ("Restatement") and text of the New Mexico model jury instruction. The New Mexico Supreme Court considers the Restatement (Third) of

Torts an authoritative treatise. *See Acosta v. Shell W. Exploration & Prod. Inc.*, 370 P.3d 761, 767 (N.M. 2016). And that treatise has rejected "substantial factor" causation as unfairly amorphous. *See* Opening Br. 20-21.

Further, Plaintiff does not reference—at all—the text and structure of New Mexico's model causation jury instruction. Ford explained that New Mexico's model causation instruction reflects the State's substantive law and went through it line by line to show that the jury was required to find that Ford's products were either the but-for cause of Mr. Knecht's mesothelioma or one of multiple sufficient causes. Opening Br. 21-25.

Here, too, Plaintiff avoids the main issue and cites instead to committee commentary that permits New Mexico courts, under certain circumstances, to apply the multiple-sufficient-cause test instead of the strict but-for standard. Answering Br. 21-22 (quoting New Mexico Uniform Jury Instructions § 13-305, Committee Commentary) (but-for causation may not be appropriate when "multiple acts each may be a cause of indivisible injury regardless of the other(s)"). But that is Ford's point exactly. *See* Opening Br. 19-26 (explaining that the "multiple sufficient causes" framework is the only appropriate exception to but-for causation); *Wilcox* 619 F.3d at 1169-70. The commentary cited by Plaintiff allows the multiple-sufficient-cause test as an exception to "but-for" causation; it

does not show—in any way—that New Mexico embraces a lower "substantial factor" test.

Tellingly, Plaintiff also offered no legal authority of her own to rebut Ford's argument that "all relevant legal authority indicates that New Mexico law" rejects the "substantial factor" framework. Opening Br. 14-18. At times, the answering brief even acts as though Ford did *not* present the ample legal authority that it did. *See, e.g.*, Answering Br. 23 (asking why this Court should "presume" that New Mexico does not apply the "substantial factor" test). Ford, of course, is not requesting that this Court "presume" anything. It is requesting that the Court follow all available legal authority showing that New Mexico has not adopted the "substantial factor" test.

Plaintiff raises a handful of additional points. Mainly, Plaintiff argues that other States, including North Dakota and Arizona, also apply versions of the "substantial factor" test, *see id.* at 22-23, nn.72, 75; Texas imposes an unusually high causation standard, *id.* at 24; and in practice, Delaware courts do not impose a strict but-for standard in asbestos cases, *id.* at 24-26.

These arguments miss the point entirely. Ford cited out-of-State court decisions to show the Superior Court erred in ruling that the *Lohrmann* "substantial factor" test *must* apply because anything more demanding would be literally impossible for a Plaintiff to satisfy. *See* A01291-93; *see* Opening Br. 24-25.

Plaintiff's authority does not rebut that point. Nor does it rebut Ford's larger argument that *New Mexico* applies the traditional causation standards—not the "substantial factor" test. *See* Opening Br. 19-26.

Next, Plaintiff argues that *Wilcox* is inapplicable because the case (i) does not apply in the asbestos context; and (ii) allows for an exception to but-for causation. Answering Br. 26-28. Both arguments are unpersuasive. *First*, although *Wilcox* is not an asbestos case, it strongly suggests that New Mexico has not adopted an asbestos-specific lower causation standard. *See, e.g.*, 619 F.3d at 1167, 1169 (there is "no basis in New Mexico law for creating an exception" simply "because a case involves toxic torts"). Indeed, *Lohrmann* was decided 33 years ago, and neither the New Mexico courts nor legislature has adopted it. Given this silence, *see* A01290, it makes sense to look outside of the asbestos context for guidance. Plaintiff focuses only on the fact that *Wilcox* involved a different toxic substance, without addressing *Wilcox*'s reasoning or its holding, each of which indicates New Mexico rigidly applies its traditional causation tests. *See Wilcox*, 619 F.3d at 1167 (rejecting plaintiff's argument that New Mexico's "general" causation rule "is not applicable in cases such as toxic tort cases that involve multiple potential contributing causes").

Relatedly, Plaintiff asserts (at 27) that the "substantial factor" test should govern asbestos cases because with mesothelioma, there is no question "*what*

caused plaintiff['s] disease."[1] That, too, is irrelevant. The asbestos-specific "substantial factor" test exists because it can be difficult for plaintiffs who had *several sources* of asbestos exposure to show they were sufficiently exposed to a specific defendant's products. *See, e.g.*, *Sholtis v. Am. Cynamid. Co.*, 568 A.2d 1196, 1199 (N.J. Super. Ct. App. Div. 1989) (invoking the *Lohrmann* test because it can be "difficult" for asbestos plaintiffs to prove "exposure to a particular defendant's product"). Plaintiff fails to offer *any* authority showing that applicability of the "substantial factor" test turns on the type of asbestos-related disease involved. *Cf. Holcomb v. Georgia Pacific, LLC*, 289 P.3d 188, 195-196 (Nev. 2012) (citing sources to show that States do not treat "mesothelioma cases" any differently from other asbestos cases). In fact, several States have rejected that very argument. *See Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 338 (Tex. 2014) (mesothelioma cases do "not merit a different analysis."); *Ford Motor Co. v. Boomer*, 736 S.E.2d 724, 732 (Va. 2013) (rejecting the "substantial factor" test as "the causation standard appropriate for mesothelioma").

Second, Plaintiff's argument (at 27-28) that *Wilcox* recognizes the multiple-sufficient-cause test as an exception to but-for causation actually supports Ford's

[1] Plaintiff also argues (at 27) that the "substantial factor" test must apply here so that the responsible defendants cannot escape liability. Appellant offers no authority showing that, if applied in the asbestos context, *Wilcox*'s causation tests would somehow automatically release blameworthy defendants from liability. *See* Opening Br. 17-19.

position. As Plaintiff explains, *Wilcox* held that the only exception to the but-for causation standard occurs where "a substance that would have actually (that is, probably) caused the cancer" is not the but-for cause due to other independently sufficient exposures. Answering Br. 28 (emphasis omitted) (quoting *Wilcox*, 619 F.3d at 1168). That simply describes the multiple-sufficient-cause exception, and in no way suggests that New Mexico has adopted a lower asbestos-specific "substantial factor" test.

B. None Of The Evidence That Plaintiff Cites Satisfies New Mexico's Causation Standard.

As just described, New Mexico's two traditional causation tests are controlling. Yet Plaintiff's only causation evidence was Dr. Ginsburg's testimony, and that testimony exclusively related to the more relaxed, asbestos-specific "substantial factor" test. *See* Opening Br. 26-29.

On appeal, Plaintiff argues that three passages of Dr. Ginsburg's testimony *do* satisfy New Mexico's multiple-sufficient-cause test. Plaintiff is wrong. First, Plaintiff points to the following exchange:

> Q: I'd like you to *assume for the purpose of 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.

Answering Br. 20 (emphases added) (quoting B0451).

That testimony, however, fails to carry Plaintiff's causation burden because Dr. Ginsburg was instructed to "assume" for the purposes of this "hypothetical" the very question that he was required to opine on: Whether the *level* of asbestos that Mr. Knecht sustained from Ford's products was by itself sufficient to have caused his disease. *See, e.g.*, *Bagley v. Adel Wiggins Grp.*, 171 A.3d 432, 441 (Conn. 2017) ("[P]laintiff's case lacked essential expert testimony to prove" defendant released "respirable asbestos fibers in a quantity sufficient to cause mesothelioma"); *Romano v. Metro. Life Ins. Co.*, 221 So.3d 176, 182 (La. Ct. App. 2017) (expert sufficiently "testified that [plaintiff] was exposed" to asbestos "at a level ten times above the level necessary for the experts to opine that the exposure" satisfied Louisiana's causation standard). This testimony does not state, as required, that the actual level or amount of Mr. Knecht's exposure to Ford's products was sufficient by itself to cause his disease. *See Wilcox*, 619 F.3d at 1170. The excerpt *assumed* it.

Additionally, the excerpt does not relate to multiple-sufficient-cause standard at all. Dr. Ginsburg stated that *assuming* Mr. Knecht developed mesothelioma when he did *and* that he sustained no other exposures "in his career"

except from Ford products, then Ford would be the "sole cause" of his disease. B0451. That flows from Dr. Ginsburg's testimony that mesothelioma is unquestionably caused by asbestos exposure. B0418 ("[A]ll mesotheliomas are caused from exposure to asbestos"); *see also* A00945 (noting the ongoing academic debate over whether "chrysotile asbestos is as potent for causing mesothelioma as crocidolite and amosite" asbestos). So, in Dr. Ginsburg's view, assuming that a mesothelioma plaintiff's entire exposure history came from a single company also assumes that the company responsible for the exposure is the sole cause. It says nothing about causation specific to Mr. Knecht or under the multiple-sufficient-cause analysis where there were many potentially responsible companies.

Indeed, sole causation is analytically distinct concept from multiple-sufficient-causation. *Compare* Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 26 cmt. c (2010) (recognizing sole causation as a *subset* of but-for causation), *with id.* § 27 (2010) (multiple-sufficient-cause test is the single *exception* to the requirement for showing but-for causation).[2] New Mexico law makes clear that experts are not required to "opine that the defendants' actions

[2] Given Mr. Knecht's large amounts of exposure to other sources of asbestos, *see* Opening Br. 5-6, there has been no suggestion that Ford is the strict but-for cause of Mr. Knecht's disease. For Plaintiff to prevail on this appeal, she must show evidence that satisfies the multiple-sufficient-cause exception.

were the sole cause of the injury." *Wilcox*, 619 F.3d at 1173 (Lucero, J., concurring in part). Dr. Ginsburg's statement therefore serves little purpose.

This question is completely different from the one asked just minutes before it:

> Q: To a reasonable degree of medical certainty, assuming what I just asked you to assume, do you have an opinion whether that Ford work as described in the hypothetical was a cause, a substantial factor and significant link to the development of Mr. Knecht's malignant mesothelioma?
>
> A: I do.
>
> Q. What's your opinion?
>
> A. It was.

B0451.

In this exchange, Dr. Ginsburg actually does provide an opinion about whether Ford was a "substantial factor" in causing Mr. Knecht's disease. By contrast, in the exchange at issue, Dr. Ginsburg is instructed to *assume* that Ford's products were independently sufficient to cause Mr. Knecht's mesothelioma and opines that if that were true, Ford would be the "sole cause" of the disease. Dr. Ginsburg never testified that the amount of Mr. Knecht's asbestos exposure from Ford's products was sufficient to cause his mesothelioma. He assumed—without opining on—that dispositive question for the purposes of answering an elaborate, unrelated "hypothetical" about sole causation. B0451.

Plaintiff's second excerpt is equally unhelpful. Plaintiff (at 21) points to the Dr. Ginsburg's statement that "the exposures to Ford products alone are adequate *to attribute* the development of his mesothelioma." (emphasis added) (quoting B0496). But as Ford already explained, *see* Opening. Br. 28, "attribution" as Dr. Ginsburg uses it is just another word for "substantial factor." In full, Dr. Ginsburg opined:

> 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?
>
> And what I stated and I'll state it again so it's clear is that if his only exposure was the Ford products, his Ford product exposure is—was a substantial contributing cause, and you can attribute his mesothelioma to that exposure.

A00832-833.

In other words, Plaintiff's excerpt reiterates "the exposures to Ford products alone are adequate to [be a substantial factor in] the development of his mesothelioma," A00831, which is, as explained, insufficient to meet New Mexico's causation standards. Ford pointed this out in its opening brief, *see* Opening Br. 28 (citing A00831-34), and Plaintiff does not dispute that Dr. Ginsburg's "attribution" terminology is just another way of articulating his "substantial factor" opinion. Any contrary argument is now waived. *See Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1243 (Del. 2004) (party

"abandoned and waived that issue in his appeal to this Court by raising it for the first time at oral argument").

The third excerpt Plaintiff highlights (at 21) is Dr. Ginsburg's statement made during *voir dire* when the *jury was outside of the courtroom* that this case "isn't a close call." (quoting B380). But Ford already explained why *voir dire* evidence is irrelevant to the sufficiency of the evidence inquiry, *see* Opening Br. 29 n.5, and Plaintiff has no response. Without sufficient testimony on causation, Ford is entitled to judgment as a matter of law.

II. FORD IS ENTITLED TO A NEW TRIAL BECAUSE THE JURY'S INCONSISTENT VERDICT CANNOT BE RECONCILED.

A. Plaintiff's Proffered Explanations Fail To Reconcile The Jury's Verdict.

Plaintiff again leaves Ford's primary contention unrebutted. The jury's verdict must be set aside because it irreconcilably found that Ford's failure to warn both caused and did *not* cause Mr. Knecht's mesothelioma. Opening Br. 30-33. Plaintiff relies on the theory that the Superior Court applied in denying Ford's post-trial motion, arguing that the jury's divergent verdict could be consistent because Question 3 asks whether "Mr. Knecht would have noticed" an adequate warning, while Question 5, read in light of Question 4, asks whether the risk "could have been avoided" with an adequate warning. Answering Br. 30-31 ("Because the questions are not equivalent, there is no inconsistency."). Ford's opening brief explained in detail that this explanation incorrectly assumes that the strict liability and negligence claims had different causation standards and that strict liability's causation element is not tied to the actual plaintiff who brought suit. Opening Br. 33-36. Plaintiff is silent in response.

Instead, Plaintiff (at 31-33) offers a handful of supposed alternative explanations that the Superior Court did not reference. Like the Superior Court's proposed explanation, these alternative justifications make no sense. Plaintiff (at 32) argues that the "compound nature" of Question 3 could explain the verdict's

apparent inconsistencies. Presumably, Plaintiff is referring to Question 3's phrase that Mr. Knecht would have "noticed *and* acted upon" any warnings. A02534, A01333 (emphasis added). But even if Question 3 asked only whether Mr. Knecht would have "acted upon" any potential warnings, it would still make no sense for Ford to be both the cause and not the cause of Plaintiff's injury. Next, Plaintiff (at 32) refers to the "passage of time" as a potential explanation. But if the jury found—and it did not—that at some point in Mr. Knecht's career he would have followed at least a few of Ford's warnings, Questions 3 and 5 would still have to rise and fall together. Plaintiff (at 32) then argues the inconsistency can be explained by the difference between adequate "warnings" and adequate "directions." That is also wrong. Even if there is somehow a meaningful difference between "warnings" and "directions," (Ford is at a loss for what that might be), both Question 3 and Question 5, read in light of Question 4, ask about "adequate warnings," not "directions." A02534. The use of adequate "directions" elsewhere in the instructions does not explain the jury's inconsistent verdict.

Lastly, Plaintiff (at 32) states that the "most rational" explanation is that the jury did not apply the "causation relating to warnings" instruction to the strict liability claim. But the jury is "presumed" to have followed its instructions. *Hamilton v. State*, 82 A.3d 723, 726 (Del. 2013) (internal quotation marks omitted); Opening Br. 44. And here, the same "causation relating to warnings"

instruction was given for each of Plaintiff's two claims. *See* Opening Br. 34 (citing A01377). To the extent that Plaintiff argues that Plaintiff's strict liability claim does not have a causation element, that is clearly incorrect. Opening Br. 33-36 (collecting sources). There is simply no way to reconcile the jury's inconsistent verdict.

B. Plaintiff's "Waiver" Argument Is Baseless.

In a last-ditch effort, Plaintiff complains (at 34) that Ford may not advocate for the jury instructions and verdict form and then challenges its inconsistent verdict. According to Plaintiff, (1) because Ford drafted proposed jury instructions, it has "[w]aived" arguments about inconsistent verdicts, Answering Br. 33; and (2) case law relating to general verdicts on strict liability and negligence failure-to-warn claims effectively defeat Ford's argument, Answering Br. 34-37.

First, Plaintiff mischaracterizes Ford's argument. Plaintiff asserts that Ford argues the verdict is irreconcilably inconsistent simply because the jury reached opposite verdicts on Plaintiff's strict liability and negligence claims. That is incorrect. Ford specifically focuses on the jury's factual findings on causation, not just its general verdict. It was irreconcilably inconsistent for the jury to find, as a factual matter, that Ford both *did* cause and *did not* cause Mr. Knecht's disease.

See Del. Super. Ct. R. 49(b). Because the facts and the law as to causation were the same for both claims, the jury's inconsistent finding should be set aside. *Id.*

The crux of Plaintiff's argument (at 34-36) is that Ford may not now argue about the inconsistent jury *verdict* because it never objected to the *instructions* below. But the two issues are completely separate. Jury instructions are challenged on the basis they do not contain "accurate statement[s]" of substantive law. *Russell v. K-Mart Corp.*, 761 A.2d 1, 4-5 (Del. 2000) (citing *Culver v. Bennett*, 588 A.2d 1094, 1096 (Del. 1991)). The rule against inconsistent jury verdicts is a procedural mechanism found in Superior Court Rule 49(b) that has nothing to do with legal errors in the jury instructions. *See, e.g.*, *CitiSteel USA, Inc. v. Connell Ltd. P'ship*, 712 A.2d 475, 1998 WL 309801, at *4 (Del. 1998) (Table) (holding "[t]he jury's verdict that CitiSteel breached the oral agreement . . . is inconsistent with its verdict that CitiSteel did not breach the same oral contract" without ever mentioning the specific instructions); *see also Burlew v. Eaton Corp.*, 869 F.2d 1063, 1068 (7th Cir. 1989) (vacating an inconsistent jury verdict after noting that the appellant did "not challenge the instructions on appeal"); *Grand Ventures, Inc. v. Whaley*, 622 A.2d 655, 664 (Del. Super. Ct. 1992), *aff'd* 632 A.2d 63 (Del. 1993) ("[T]his Court need not consider the validity of the content of the special instructions themselves, but rather, must only try to reconcile the jury's [factual] findings . . . .").

For that reason, Plaintiff's argument (at 38) that Ford cannot "have it both ways" by drafting proposed jury instructions and then bringing a Rule 49(b) motion is wrong. As noted even in *Beebe Medical Center, Inc. v. Bailey*—Plaintiff's primary authority—"it is the parties' responsibility to bring to the trial judge's attention the instructions they consider appropriate and the reasons why." 913 A.2d 543, 556 (Del. 2006) (citing *Bullock v. State*, 775 A.2d 1043, 1047 (Del. 2001)). That a party fulfills its responsibility without challenging the *legal substance* of the instructions does not mean it has waived viable Rule 49(b) arguments that the jury's subsequent *factual findings* are inconsistent. Neither this Court, nor any court that Ford is aware of, requires a party to object to the legality of a jury instruction in order to challenge the verdict's factual consistency.

In no way has Ford "[w]aived" its inconsistent verdict argument. *See* Answering Br. 33. This Court considers an issue waived if it does not "come with a full record and input from learned trial judges" and the opposing party did not "have a fair chance to address" it at the trial court. *Shawe v. Elting*, 157 A.3d 152, 168-169 (Del. 2017) (citing Del. Sup. Ct. R. 8). That is not this case. As soon as the verdict was rendered, Ford filed a motion with the Superior Court arguing that the verdict should be set aside for its irreconcilable inconsistencies; Plaintiff then filed a detailed brief in opposition. A01788-97, A02015-17, A02116-28. The parties fully briefed the issue, and—with the benefit of a developed record—the

Superior Court rejected it with a detailed opinion. A02502-05. The issue is therefore not waived. *See Shawe*, 157 A.3d at 169.

Second, the case law that Plaintiff points to misses the mark entirely. In *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 37 (2d Cir. 2002) (cited at Answering Br. 34-36), the defendant argued that it was "inconsistent" for the jury to "return[] a verdict for [plaintiff] on her negligence claim but not on her strict products liability claim." *See also id.* at 60 ("The 'fundamental' nature of Ford's position [is] that the court should have charged negligence or strict liability but not both . . . ."). The Second Circuit ruled that Federal Rule of Civil Procedure 49(b) "is inapplicable here because the alleged inconsistency was not among responses to interrogatories regarding 'issues of fact,' but between two general verdicts based on different legal theories." *Jarvis*, 283 F.3d at 56. The court further ruled that the defendant's objection to the district court's "charg[ing] both theories" was waived because it was not raised before the instructions were sent to the jury. *Id.* at 60-62.

By contrast, this appeal does not center on a general verdict; rather, the parties jointly agreed on Special Interrogatories. Ford's argument is that the jury irreconcilably found, in response to Special Interrogatories and as a matter of fact, that Ford did and did not cause Mr. Knecht's disease. Superior Court Rule 49(b) is the proper mechanism to bring such a challenge. *See, e.g.*, *Grand Ventures*, 622 A.2d at 656-657, 664-665.

Plaintiff's other citations (at 37-38) are also off-point. In *Beebe Medical Center*, this Court held the appellant "waived any claim that the trial judge erred by not independently crafting and giving his own limiting instructions." 913 A.2d at 555. That argument was about the substance of the instructions, not, as here, inconsistencies between the jury's factual findings. Similarly, *Broughton v. Wong*, 2018 WL 1867185, at *8 (Del. Super. Ct. Feb. 15, 2018), stands only for the proposition that "[p]arties must make contemporaneous objections at trial." It has nothing to do with Rule 49(b) or the type of inconsistent jury verdict set aside in *CitiSteel*.

Finally, Plaintiff's accusation (at 34) that Ford broke out Questions 2, 3, 4 and 5 to "[sow] confusion" is baseless. Causation and fault are separate elements, which must be separately proven for each claim, *see* Opening Br. 34-36, so presenting distinct questions on causation and fault for each claim made sense. And it was *Plaintiff*, not Ford, who pressed two different theories of liability, necessitating Questions 4 and 5 in the first place. *See* A00088-94.

Plaintiff's conspiracy theory ignores the wide range of verdicts that would have made sense. The jury could have answered Questions 3 and 4 affirmatively, and Questions 2 and 3 negatively (or blank), finding fault under a strict liability theory but not a negligence theory. Or it could have answered Questions 2 and 4 affirmatively and Questions 3 and 5 negatively, finding that Ford was at fault but

that its failures did not *cause* Plaintiff's disease. And of course, it could have answered all four Questions affirmatively, or all four negatively (or blank). Ford had no expectation that the jury would render the irreconcilable verdict that it did. The jury's inconsistent verdict should be set aside.

III. THE JURY'S EXCESSIVE COMPENSATORY DAMAGES WARRANTS A NEW TRIAL LIMITED TO DAMAGES OR REMITTITUR.

A. Plaintiff Does Not Address Ford's Leading Argument.

The jury's $40 million plus compensatory damages for a 71-year-old retiree is excessive and should be set aside. *See* Opening Br. 37-45. The Superior Court 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. But as explained, fault and liability are separate inquiries that must be considered separately. Opening Br. 43. The Superior Court erred when it adopted a contrary analysis.

In response, Plaintiff states that "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." Answering Br. 42. That is demonstrably incorrect. Ford highlighted one Delaware Supreme Court case and two leading treatises, spelling out that apportionment and damages must be considered separately. *See* Opening Br. 43 (citing *Chilson v. Allstate Ins. Co.*, 979 A.2d 1078, 1084 (Del. 2009); 58 Am. Jur. 2d *New Trial* § 406 (Feb. 2019 update); 65A C.J.S. *Negligence* § 365 (Mar. 2019 update)). Presumably, Plaintiff does not address this authority, or Ford's larger argument, because there is no way to defend the Superior Court's error.

B. Plaintiff Also Ignores Ford's "Golden Rule" Argument.

Ford's Opening Brief specifically discussed Plaintiff's "Golden Rule" closing argument: "[E]very time you go to bed at night you don't know if you're waking up. . . . How much is your companion for 52 years worth? What dollar amount can you give for that?" Opening Br. 40-41 (quoting A01320-22). Citing settled law, Ford argued that it was entitled to a new trial based on Plaintiff's comments and Ford's contemporaneous objection. *Id.* Plaintiff makes no response and does not rebut Ford's argument in any way. Plaintiff therefore has conceded this issue on appeal. *Roca*, 842 A.2d at 1242 n.12. Ford respectfully requests that this Court grant a new trial because Plaintiff repeatedly violated the "Golden Rule" prohibition even after Ford's contemporaneous objection.

C. Plaintiff's Remaining Arguments On The Excessiveness Of Compensatory Damages Fail.

Plaintiff makes a series of flawed arguments in an effort to explain why the verdict was not grossly excessive. First, Plaintiff asserts (at 42) that because the jury awarded the "uneven amount" of $40,625,000, the award must be supported by the evidence. Several courts disagree. *See, e.g.*, *Tedder v. Am. Railcar Indus., Inc.*, 739 F.3d 1104, 1112 (8th Cir. 2014) (affirming remittitur of $737,500 for "pain, suffering, and mental anguish" because "the jury 'pulled it out of the air' "); *Cosby v. AutoZone, Inc.*, 445 F. App'x 914, 916-917 (9th Cir. 2011) (reversing district court's denial of remittitur and new trial on damages for award of

"$1,326,000 for past mental suffering"); *Fenner v. Dependable Trucking Co.*, 716 F.2d 598, 603 (9th Cir. 1983) (concerning a $400,270.54 jury verdict ruled to be excessive). Plaintiff offers no contrary authority, nor does she adequately explain why a figure large enough to "shock" the conscience must be round or even. *Storey v. Castner*, 314 A.2d 187, 193 (Del. 1973).

Next, Plaintiff argues (at 42) that the jury's imposition of punitive damages shows that the compensatory award is not excessive. But, here again, the weight of the authority goes against Plaintiff's argument. *See, e.g.*, *Spence v. Bd. of Educ. of Christina Sch. Dist.*, 806 F.2d 1198, 1199 (3d Cir. 1986) (affirming remittitur of compensatory damages on a $25,000 compensatory damages verdict, when $3,500 in punitive damages was also awarded); *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1471 (9th Cir. 1993) (concerning jury award of $2,887,000 in compensatory damages and $55,000 in punitive damages). And she provides no contrary authority for Ford to address.

Plaintiff then argues (at 43-44) that a new trial, or alternatively remittitur, is unwarranted because the verdict was rendered as a single lump-sum. But Rule 59's new trial standard is meant to be flexible and fact-specific: The trial court must "weigh the evidence" in that particular case "to decide if the verdict was one which might have been reached on reasonable grounds." *Rodas v. Davis*, 2012 WL 1413582, at *1 (Del. Super. Ct. Jan. 31, 2012). If the verdict is excessive, it

must be set aside, whether the components of compensatory damages are broken down or not. *See, e.g.*, *Farrens v. Meridian Oil, Inc.*, 852 F.2d 1289, *3-4 (9th Cir. 1988) (Table) (reversing and ordering a new trial or remittitur even though jury awarded a single lump sum for past and future earnings, "emotional distress and loss of reputation").

Finally, Plaintiff (at 45-47) points to a 1990 Superior Court case ordering additur and out-of-State cases that have upheld large jury verdicts. But the 1990 Order stated that in 1990 dollars, the maximum award that had *ever* been granted was $4,750,000. *See* Answering Br. 45. That is a bad fact for Plaintiff. Even accounting for inflation, the jury's compensatory award here is greater than four times the next closest asbestos award *ever* issued in Delaware. *See CPI Inflation Calculator*, Bureau of Labor Statistics, https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=100&year1=199003&year2=201801 (last visited June 12, 2019) (showing the dollar has inflated 92.5% from March 1990 to January 2018). Moreover, verdict amounts accepted as reasonable in Washington State and New Jersey under other facts and under other states' laws have little bearing on Delaware's standards or the specific facts of this case.

The Superior Court rationalized the jury's shocking verdict only by looking to the amount of liability that the jury had apportioned to Ford. That was legal

error. This Court should remand for a new trial on damages, or in the alternative, order remittitur.

CONCLUSION

This Court should hold that Ford was entitled to judgment as a matter of law, or alternatively, grant a new trial or remittitur.

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