2010-CA-00924

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate the possible disqualifications or recusal.

1. Rutha M. Eastman, Lavette Eastman, and all other heirs-at-law or wrongful-death beneficiaries of Robert Eastman, Sr., Deceased, *Appellees*.

2. Timothy W. Porter, Esq., Patrick C. Malouf, Esq., and John T. Givens, Porter & Malouf, P.A., *counsel for Appellees*.

3. R. Allen Smith, Esq., The Smith Law Firm, *counsel for Appellees*.

4. Mississippi Valley Silica Company, Inc., *Appellant*.

5. Charles G. Copeland, Esq., Laurie R. Williams, Esq. and Andy Lowry, Esq., Copeland, Cook, Taylor & Bush, P.A., *Counsel for Appellant*.

6. John D. Cosmich, Esq., Michael D. Simmons, Esq. and LaKeysha Greer Issac, Esq., Cosmich Simmons Brown, PLLC, *Counsel for Appellant*.

7. Clyde L. Nichols, III, Esq., Matthew Taylor, Esq. and Blayne T. Ingram, Esq., Scott, Sullivan, Streetman & Fox, P.C., *Trial Counsel for Appellant*.

8. John E. Galloway, Esq., Galloway, Johnson, Tompkins, Burr & Smith, *Trial Counsel for Appellant.*

9. The Honorable Isadore W. Patrick, *Trial Judge.*

Respectfully submitted,

John T. Givens
Attorney for Appellees

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STATEMENT OF THE CASE

I. Relevant Facts

Robert Eastman was sandblasting and around sandblasting from 1963 to 1991 at LeTourneau. Robert Eastman was exposed to respirable silica for 28 years, 1963-1991. T. 711. Mr Eastman testified he used the Defendant's sand at LeTourneau from 1963 to 1978. T. 711. Mr. Eastman testified that he believed it was the only sand there from 1963 to 1978. T. 712. This is an exposure period of 15 years out of a 28 year work period, or almost 54% of the time. Due to his exposure to Defendant's sand, Mr. Eastman developed silicosis and progressive massive fibrosis. T. 209. Steven Stogner, M.D. was Plaintiff's expert pulmonologist. Dr. Stogner testified that Plaintiff's condition, silicosis and progressive massive fibrosis is an incurable lung disease. T. 225. Due to this disease process, it was Dr. Stogner's opinion that Mr. Eastman would require a lung transplant in the future.

T. 229. Mr. Eastman was a very sick individual who suffered from a serious lung disease (that turned out to be fatal) which was caused by the Defendant's negligence.

Frank Bogran testified at the trial of this matter. Mr. Bogran went to work for the Defendant in 1960 as a sales manager. T. 486. In 1964, Mr. Bogran became the President of Mississippi Valley Silica Company. T. 487. Mr. Bogran remained employed by the Defendant until 1976. T. 488. It was Mr. Bogran's testimony that the he, and therefore the Defendant, did not become aware of the dangers of silicosis from sandblasting until 1972. T. 489. At this point in time, the Defendant decided to place a warning on its bags of sand. T. 493. Therefore, Mr. Eastman used the Defendant's sand for approximately ten years (1963 to 1972) when no warning whatsoever was on the Defendant's bags of sand.

Candidly, Mr. Bogran admitted that they did not want to put the terms silicosis, disability, or death in the warning because the Defendant was worried it would affect its sales. T. 494-96. Mr. Bogran left Mississippi Valley Silica in 1976 because he decided that blasting with silica sand could not be done safely. T. 505. Mr. Bogran wrote a letter stating that sand should be banned from un-confined sandblasting. T. 510, P-15. He further stated that all of the silica industry should have known the dangers of silicosis since the early 1970's. *Id.* In the letter, Mr. Bogran stated "I was part of the problem for which I am not proud but I have spent the last 18 years trying to convince users to switch to alternative abrasives." T. 511, P-15.

Even though the Defendant knew by 1972 that its product could cause an incurable lung disease which could be fatal, the Defendant never placed that information in a warning. T. 514. It is clear from Mr. Bogran's testimony that the Defendant placed its profits above the need to provide accurate and complete warnings to Mr. Eastman. Money over safety was the Defendant's business practice. This is a classic example of why people like Mr. Eastman are protected by the laws of this

State from actions of Defendants such as these.

SUMMARY OF THE ARGUMENT

The Defendant failed to move for dismissal in the trial court for Plaintiff's alleged failure to comply with Miss. R. Civ. P. 25(a). Therefore, the Defendant can not raise this alleged error for the first time on appeal since it was not presented to the trial judge for his decision.

Regardless of this procedural hurdle, Plaintiff's counsel timely complied with Miss. R. Civ. 25(a) by filing a motion for substitution within 6 days of the Suggestion of Death upon the record. Substitution is not required in 90 days, only a motion for substitution. In addition, the Defendant failed to comply with Rule 25(a) because it failed to serve the Suggestion of Death on the Estate as provided in Miss. R. Civ. P. 4. Due to this failure, the 90 day requirement never began to run. In fact, it still has not began to run because the Defendant has still failed to serve the Estate with the Suggestion of Death.

Plaintiff's counsel moved for the Estate of Robert Eastman to be substituted as the real party in interest. Since the jury's verdict was for damages personal to Robert Eastman, the Estate would be the only proper party to receive those damages. The final judgment entered by the trial court is not a nullity because the case had been fully tried and finally decided on the merits by the trier of fact. The only thing that remained to be done was the entry of a final judgment. The entry of the final judgment based on the jury's findings caused no miscarriage of justice and was not a nullity.

The trial court properly refused the Defendant's sophisticated user jury instruction for four reasons. First, the jury instructions as a whole properly instructed the jury as to the applicable rules of law. Two, the proposed instruction was not an accurate statement of the law since it argued that the Defendant would have no duty to warn of dangers associated with its blasting sand. Third, the Defendant failed to offer any credible evidence that its reliance upon LeTourneau was reasonable.

Fourth, the Defendant has failed to demonstrate that the refusal of the instruction had any affect on the outcome of the case.

The verdict form given by the trial court complied with Miss. Code Ann. § 85-5-7 as it clearly allowed the jury to allocate fault to all potential tortfeasors whether present at trial or not. The trial court did not abuse its discretion by giving a verdict form that listed "other parties" instead of each individual potential tortfeasor. Even if this Court finds the verdict form as given was error, it was harmless error that does not require reversal.

As admitted by the Defendant, if the testimony is viewed in the light most favorable to the Plaintiff, Mr. Eastman was exposed to the Defendant's sand for 54% of his career. In addition, the exposure to Defendant's sand occurred in the first 15 years of his work. According to Dr. Rose, the early exposures are the most dangerous. The jury heard all the evidence and assigned 60% of the fault to the Defendant. Therefore, at most there was a six percent (6%) variation between Plaintiff's exposure to Defendant's product and the jury's allocation of fault. This is far from being against the overwhelming weight of the evidence.

The jury's verdict was returned while Robert Eastman was alive. His subsequent death three months later did not change or alter the jury's findings based on the evidence presented at trial. The trial court had no discretion to disregard the jury's findings. At the time of the jury's verdict, this was Robert Eastman's personal injury action, so any future damages awarded survive his death. If this Court was to accept Defendant's arguments, jury verdicts for future damages could be attacked at any time if the Plaintiff died at any point after the verdict. This is simply not allowed under the laws of this State.

The trial court correctly applied the caps on noneconomic damages found in Miss. Code Ann. § 11-1-60. The statute is silent on whether fault is apportioned prior to or after the application of the

caps. The only requirement is that no award of noneconomic damages should exceed $1,000,000.00. The award entered by the trial court did not exceed $1,000,000.00. Therefore, the trial court correctly applied the noneconomic cap found in 11-1-60.

There was no error during the trial, definitely not cumulative error. Therefore, this Court should affirm the jury's verdict which was based on the law and evidence presented at trial. Finally, the Defendant is not entitled to any remittitur because the jury's verdict was based on credible and substantial evidence and was not the result of any bias or prejudice.

ARGUMENT

I. The Plaintiff Complied with Miss. R. Civ. P. 25(a), and therefore, Dismissal was Not Proper.

Since the Plaintiff complied with Miss. R. Civ. P. 25(a), there was no basis for dismissal of the action in the trial court. Therefore, this Court should consider the rest of the issues on appeal.

A. The Defendant Failed to Move for Dismissal in the Trial Court, and therefore, the Issue is Not Properly Before This Court.

The Defendant argues that the trial court should have dismissed this action because of Plaintiff's alleged failure to comply with Miss. R. Civ. P. 25(a). The problem with this argument is that the Defendant never filed a Motion to Dismiss based on Plaintiff's failure to comply with Rule 25 with the trial court. "This Court has stated that a trial judge cannot be put in error on a matter not presented to him for his decision." *Bender v. North Meridian Mobile Home Park,* 636 So.2d 385, 389 (Miss. 1994); citing *Mills v. Nichols,* 467 So.2d 924, 931 (Miss. 1985). Further, if an issue is not presented to the trial court, it cannot be raised on appeal. *Bender,* 636 So.2d at 389; citing *Parker v. Miss. Game and Fish Comm'n,* 555 So.2d 725, 730 (Miss. 1989).

It is clear from the record the Defendant never filed a Motion to Dismiss based on Rule 25(a). All the Defendant argued was that "Judgment should only be entered after an appropriate estate is

opened and substituted as the party as requested by plaintiff's counsel . . . ." R. 5321. Based on clear precedent of this Court, the issue of whether the case should have been dismissed pursuant to Rule 25(a) is not properly before this Court as the issue was not raised in the trial court and there is no ruling from the trial court. Therefore, this Court should decline to consider this issue.

B. The Plaintiff's Motion for Substitution was Timely and Complied with Rule 25(a).

If this Court is inclined to address the issue, the Plaintiff would respectfully submit that he complied with Rule 25(a). The Defendant filed a Suggestion of Death on February 16, 2010. R. 5273. Plaintiff's counsel filed a Motion for Substitution on or about February 22, 2010 well within the 90 days required by Rule 25(a). R. 5343. Rule 25(a) states:

> If a party dies and the claim is not thereby extinguished, the court shall, upon motion, order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of summons. **The action shall be dismissed without prejudice as to the deceased party if the motion for substitution is not made within ninety days** after the death is suggested upon the records by service of a statement of the fact of the death as herein provided for the service of the motion.

(Emphasis added). As the rule clearly states, Plaintiff's counsel is only required to serve the Motion for Substitution within 90 days of the filing of the Suggestion of Death. A case relied upon by the Defendant supports this interpretation. "Rule 25 requires that **the motion for substitution be made not later than ninety (90) days** after the death is suggested upon the record. *Ashley v. Illinois Cent. Gulf R. Co.,* 98 F.R.D. 722, 724 (D.C. Miss. 1983). The Motion for Substitution was made within 6 days of the Suggestion of Death. Therefore, Rule 25(a) was complied with by the Plaintiff and dismissal would not be proper.

The Defendant cites and relies upon *Anderson v. Yungkau* without fully disclosing the

version of Fed. R. Civ. P. 25(a) the U.S. Supreme Court was interpreting. 329 U.S. 482 (1947). The Supreme Court in *Anderson* was applying the prior version of Rule 25(a) which stated: "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party." 329 U.S. at 484. The prior version of Rule 25(a) stated that "if substitution is not made within that time the action 'Shall be dismissed' as to the deceased." *Id.* at 485. There is clearly a distinction from the previous version of 25(a) and current version of 25(a). The prior version relied on in *Anderson* required substitution within 2 years. The current version of 25(a) only requires a Motion for Substitution to be filed within 90 days. There is simply no requirement the substitution must occur within 90 days.

Further, the Defendant itself failed to comply with Rule 25(a). "The suggestion of death must be in writing and must be served on parties in accordance with Rule 5 and upon persons not parties as provided in Rule 4 for the service of a summons." *Comment*s to Rule 25. In *Hurst v. Southwest Miss. Legal Services,* the Defendants argued that dismissal was warranted because no motion for substitution was filed with 90 days after service of the suggestion of death. 610 So.2d 374, 386 (Miss. 1992) (overruled on other grounds). This Court held that "Southwest did not fulfil Rule 25's requirement concerning service on non-parties when it mailed the Suggestion of Death to the plaintiff's attorney." *Hurst,* 610 So.2d at 386. The Plaintiff's attorney in *Hurst* had not been appointed counsel for the estate. *Id.* "Since Southwest did not properly serve the Estate of Josie Conerly, **the ninety-day limitations period never began to run."** *Id.*

In the present case, the Defendant never served the Estate of Robert Eastman, his wife Rutha Eastman, or any other heir-at-law. R. 5273-74. It is clear that the Defendant only served Plaintiff's counsel and Judge Patrick. R. 5274. The Defendant failed to fulfil the service requirements of Rule

25, and therefore, the ninety-day period for substitution never began to run. Therefore, this issue is completely without merit, and the relief sought by the Defendant should be denied.

C. The Only Proper Party Was Offered in the Motion for Substitution.

As acknowledged by the Defendant, this is clearly a survival action. In a disrespectful manner the Defendant argues that Plaintiff's Motion for Substitution was akin to asking to substitute the Tooth Fairy. Regardless of the disrespectful tone of Defendant's arguments, the statement is not based in law or fact. The only proper party for a survival action is the decedent's Estate. Any recovery from a survival action becomes an asset of the estate. *In Re England,* 846 So.2d 1060, 1067 (¶21) (Miss. Ct. App. 2003). Any recovery for Robert Eastman's injuries caused by the Defendant belong to the estate under the survival statute. *Id.* at 1068 (¶26). At the time of the jury verdict, the Defendant's actions had not caused Robert Eastman's death, therefore only "the estate may recover for personal injuries caused by [Defendant's actions]." *Id.* at 1069 (¶29).

Further, this Court has made it clear that the estate is entitled to recover certain damages. The **estate** is entitled to recover medical expenses. *Long v. McKinney,* 897 So.2d 160, 169 (¶33) (Miss. 2005). Under certain circumstances, recoveries are to be had by the estate. *Long,* 897 So.2d at 175 (¶62). Therefore, based on clear precedent of this Court, the proper party to be substituted was the Estate of Robert Eastman.

The Defendant's arguments appear to focus on the fact that an estate had not been opened and no administrator or executor had been appointed. The Defendant makes such arguments that one cannot be "the administrator of a non-existent estate." The Defendant cites several cases for the proposition that a non-existent estate cannot be substituted as a party under Rule 25. Plaintiff's Counsel was not attempting to substitute an administrator of a non-existent estate or to substitute a non-existent estate. In contrast, the Motion for Substitution stated "Once the Estate has been opened,

Counsel moves that the Estate of Robert Eastman be substituted as the real party in interest in this matter." R. 5343. It goes without saying that if an estate is opened in Chancery Court that an administrator or executor will have been appointed to act on behalf of the estate. This Court maintains that "'[a] court must look to the content of the pleading to determine the nature of the action. Substance is considered over form.... The label is not controlling.'" *Meadows v. Blake,* 36 So.3d 1225, 1231 (¶11) (Miss. 2010); quoting *Am. Bankers Ins. Co. of Fla. v. Booth,* 830 So.2d 1205, 1214 (Miss.2002); (quoting *Arnona v. Smith,* 749 So.2d 63, 66 (Miss.1999)). The Motion filed by the Plaintiff was sufficient to put the Defendant on notice of the proper party to be substituted.

D. The Judgment Entered by the Trial Court is not a Nullity.

This Court has repeated the federal rule, which states that "a judgment is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." *Bryant, Inc. v. Walters,* 493 So.2d 933, 938 (Miss. 1986). The trial court clearly had subject matter jurisdiction. The trial court clearly had jurisdiction over the parties due to having presided over the trial which resulted in the jury's verdict. The trial court did not act inconsistent with due process of law. The Defendant was given its due process right to a trial by jury. The jury rendered its verdict against the Defendant and for the Plaintiff. The Trial Court simply reduced the jury's verdict for Robert Eastman to its final form. Therefore, the judgment was not a legal nullity. The jury returned its verdict and findings while Robert Eastman was alive. The trial court's final judgment did nothing more than reduce the jury's findings for Robert Eastman to final form.

This Court has addressed an analogous situation in a divorce action before. Applying § 11-7-25 (since repealed), this Court determined that "in a case such as this, where the case has been

fully tried and finally decided on its merits and nothing remains to be done except the entry of a decree, the decree would follow as if both parties were living." *White v. Smith,* 645 So.2d 875, 881 (Miss. 1994); quoting *Thrash v. Thrash,* 385 So.2d 961, 962 (Miss. 1980). Like *White* and *Thrash,* this case had been fully tried and finally decided on its merits by the jury. Nothing remained but the trial court entering final judgment.

This Court further concluded "that, in the absence of some special circumstances such as would cause a miscarriage of justice by so doing, the provisions of that section [§ 11-7-25] apply in a case such as this, the death of the husband having occurred long after the formal decision of all issues by the trier of facts. To hold otherwise, we think, would work a manifest miscarriage of justice." *White,* 645 So.2d at 881; quoting *Thrash,* 385 So.2d at 964. In this case, Robert Eastman died three months after all issues had been resolved by the trier of fact. Based on the above precedent, it would be a manifest miscarriage of justice to render the trier of fact's verdict a nullity because Robert Eastman subsequently died.

II. It Was Not Reversible Error to Refuse Defendant's "Sophisticated-User" Instruction.

"It is well settled that jury instructions generally are within the discretion of the trial court, so the standard of review for the denial of jury instructions is abuse of discretion." *Newell v. State,* 49 So.3d 66, 73 (Miss.2010). "Jury instructions must fairly announce the law of the case and not create an injustice against the defendant. This rule is summed up as follows: 'In other words, if all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law, no error results.' " *Davis v. State,* 18 So.3d 842, 847 (Miss.2009) (quoting *Milano v. State,* 790 So.2d 179, 184 (Miss.2001)). Further, any alleged error is only reversible if "the challenged instruction ... affected the outcome of the case." *Jowers v. Lincoln Elec. Co.,* 617 F.3d 346, 353 (5th Cir. 2010); quoting *Bender v. Brumley,* 1 F.3d 271, 277 (5th Cir. 1993).

For four reasons, the trial court did not abuse its discretion in refusing the Defendant's "Sophisticated-User" instruction. First, the instructions as a whole properly instructed the jury as to the applicable rules of law. Two, the proposed instruction was not an accurate statement of the law since it argued that the Defendant would have no duty to warn of dangers associated with its blasting sand. Third, the Defendant failed to offer any credible evidence that its reliance upon LeTourneau was reasonable. Fourth, the Defendant has failed to demonstrate that the refusal of the instruction had any affect on the outcome of the case.

First, the jury instructions taken as a whole announced the applicable rules of law. The jury was clearly allowed to consider the fault of Plaintiff's employer, LeTourneau, in rendering its verdict. The jury was instructed that "others" could be assigned fault. R. 4999 (Jury Instruction P-17). This was also included on the verdict form filled out by the jury where it allocated 40% of the fault to "others." R. 5005-B (Verdict Form). Counsel for the Defendant spent half of his closing statement arguing that LeTourneau was to blame, not the Defendant. T. 1065-74. The jury heard the evidence and heard counsel's closings arguments. The jury was instructed it could assign fault to "others" which included LeTourneau. By refusing the "sophisticated-user" instruction, the trial court did not prevent the Defendant from successfully arguing to have fault allocated to Plaintiff's employer. Therefore, this issue is without merit.

Second, the sophisticated user instruction was not an accurate statement of the law. The trial judge may refuse any instruction that incorrectly states the law. *Murphy v. State,* 566 So.2d 1201, 1207 (Miss. 1990). The instruction proposed by the Defendant stated "If the purchaser of silica knew or should have known the dangers that may be associated with silica, then the purchaser is a sophisticated user, and a supplier **has no duty to warn of those dangers.**" R. 5005. Even if the sophisticated user doctrine applied, it does not relieve a manufacturer of the duty to warn.

Mississippi law imposes upon the manufacturer of a product the duty to warn "anyone who may reasonably be expected to be in the vicinity of the product's probable use and to be endangered by it if defective." *Coca Cola Bottling Co v. Reeves,* 486 So.2d 374, 378 (Miss.1986). The manufacturer's duty to warn under Mississippi law is non-delegable. *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 514, n.14 (5th Cir. 1984) (construing Mississippi law) (superceded in part by *Jackson v. Johns-Manville,* 750 F.2d 1314, 1317 (5th Cir. 1985) but not as to Part II "Strict Liability in Tort."). Thus, the "seller's warning must be reasonably calculated to reach such persons and the presence of an intermediary party will not by itself relieve the seller of its duty." *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1091 (5th Cir.1973). In this case, Mississippi law imposed a duty upon the Defendant to warn Mr. Eastman of the dangers associated with the use of its blasting sand. This absolute and non-delegable duty required the Defendant to warn Mr. Eastman that the dust he inhaled while blasting with Defendant's sand could cause lung diseases. The Defendant in this case failed to provide any warning until 1972, almost **ten years after** Mr. Eastman's first exposure.

Section 402A of the Restatement (Second) of Torts states that:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to its property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to its property if:
   (a) the seller is engaged in the business of selling such a product; and
   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
   (a) the seller has exercised all possible care in the preparation and sale of his product; and
   (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Lack of an adequate warning is a defect that makes a product unreasonably dangerous for strict

liability purposes. *Jackson v. Johns-Manville Sales Corp.,* 727 F.2d 506, 515 (5th Cir. 1984); *Gordon v. Niagra Machine & Toolworks,* 574 F.2d 1182, 1190 (5th Cir. 1978). Mississippi has extended this duty to bystanders, holding that the duty imposed by 402A "exists in favor of anyone who may reasonably be expected to be in the vicinity of the product's probable use and to be endangered by it if it is defective." *Coca Cola Bottling Co., Inc., v. Reeves,* 486 So.2d 374, 378 (Miss. 1986). *Swan v. I.P. Inc.,* 613 So.2d 846, 852 (Miss. 1993). The duty to warn under 402A is non-delegable, and therefore sale to an intermediary does not relieve the manufacturer of responsibility for its failure to warn.

The Court has held that a manufacturer or seller can be held strictly liable for its failure to warn under Section 402A. *Swan v. I.P. Inc.,* 613 So.2d 846 (Miss. 1993). ("Lack of an adequate warning is a defect which makes a product unreasonably dangerous for strict liability purposes.") In *Swan*, the Court held that "The learned intermediary defense does not relieve the manufacturer of its duty to warn, however, **unless the manufacturer's reliance on the intermediary is reasonable**." (Emphasis added) *Id.* at 856. This Court went on to find that material issues of fact existed whether the manufacturer's reliance on Miri, a professional applicator were reasonable. *Id.* Further, the Court found that the record was devoid of any evidence whether the sprayers of the products at issue had knowledge of the hazards. *Id.* **Also it was disputed whether the manufacturers sent any information or warnings to Miri, which the learned intermediary doctrine still required of the manufacturers.** (Emphasis added) *Id.* It is undisputed that the Defendant here did not provide warnings to the Plaintiff from 1963 through 1972. T. 489, 712. Therefore, the sophisticated user doctrine is not applicable due to the complete failure to provide any warnings to the intermediary or Mr. Eastman for approximately 10 years. In addition, the Defendant's proposed instruction relieved it of any duty to warn directly in contrast to this Court's

holding in *Swan.* Therefore, the trial court was within its discretion to refuse the instruction.

Other jurisdictions have held he sophisticated user doctrine does not completely relieve the manufacturer of the duty to warn. For example, the Supreme Court of Minnesota has held that the sophisticated user defense (also called the sophisticated intermediary defense by this court) is only available where the supplier can demonstrate that it used reasonable care in relying upon the third party to give the warning to the end user. Such a showing mandates contemplation of 1) the purpose for which the product is to be used, 2) the magnitude of the risk, 3) the burden of providing direct warnings to end users and 4) the reliability of the intermediary as a conduit. *Gray v. Badger Mining Corp.,* 676 N.W.2d 268, 278 (Minn. 2004) (citing Restatement (Second) of Torts § 388, cmt.n (1965)). In this case, there was no question the sand supplied by the Defendant was to be used for sandblasting. Everyone who testified at trial acknowledged the magnitude of risk associated with sandblasting. In this instance, the sand sold by the Defendant was in bags. T. 711. Therefore, the burden of providing a warning to Mr. Eastman was practically non-existent. It only had to be placed on the bag. Finally, there was no credible evidence offered at trial that LeTourneau was a reliable conduit of information. In fact as noted by the Defendant on numerous occasions in its brief, LeTourneau appeared anything but a reliable conduit of information. The Defendant wholly failed to present credible evidence that any reliance on LeTourneau was reasonable. The test is not whether LeTourneau was sophisticated or a learned intermediary. The test is whether the Defendant's reliance was reasonable. The record is void of the Defendant's reliance.

See also, *East Penn Mfg. Co v Pineda,* 578 A.2d 1113, 1126 (D.C. App. 1990) (the manufacturer's duty to provide a non-defective product may not be delegated to another distributor farther down the stream of commerce, because the duty runs to the ultimate user, not the immediate purchaser); *Van Buskirk v. Carey Canadian Mines,* 760 F .2d 481, 497 (3rd Cir. 1985) ("But in the

strict liability context, the duty to provide a non-defective product is non-delegable, if the duty is non-delegable, it cannot be shifted. Therefore in a strict liability situation, a third-party's failure to warn will not constitute a superseding cause); *Jackson v. Coast Paint & Lacquer Co.*, 499 F.2d 809, 814 (9th Cir.1974) ("We hold that the duty to warn runs ... directly to the painter, and is not discharged when the employer alone is informed of the danger.")

Fourth, the Defendant has no evidence that the refused instruction affected the outcome of this case. The jury clearly felt fault lay with others, including Plaintiff's employer LeTourneau. This is evidenced by the fact 40% of the fault was assigned to others. As stated *Supra,* the Defendant offered no credible evidence of its reliance upon LeTourneau. Therefore, the jury had no evidence to consider in regard to the sophisticated user doctrine. There was minimal evidence of LeTourneau's knowledge, but no evidence of the Defendant's reliance upon said knowledge. There is simply no evidence that if the sophisticated user instruction had been given that the Defendant's percentage of fault would have been any lower. Finally, the Defendant did not provide "plain old harmless bags of sand to Eastman's Employer." Appellant's Brief at P. 21. The sand's intended use was for the inherently dangerous occupation of sandblasting. This was the business the Defendant was in, and it knew of the dangers associated with its "harmless bags of sand" while using them for sandblasting.

The Defendant reliance upon *Smith* v. *Walter C. Best, Inc.*, 927 F.2d 736 (3rd Cir. 1990) is misplaced. That case is easily distinguishable from the present case. In *Smith,* the sand was delivered in bulk and was unpackaged, thereby, making it nearly impossible to issue reliable direct warnings. 927 F.2d at 740. Therefore, the reasoning in *Smith* is not applicable to this case.

When the jury instructions are considered as whole, the jury was accurately informed of the laws applicable to this case. The jury was allowed to consider, and did consider, LeTourneau's fault

in this case. Further, the trial court was within its discretion to refuse the Defendant's instruction because it was an inaccurate statement of the law, and it was not based on any credible and reliable testimony at trial. T. 1025 (Judge Patrick "As, one, we didn't have any testimony to that effect.").

III. The Verdict Form Given by the Trial Court Complied with Miss. Code Ann. § 85-5-7.

"It is well settled that jury instructions generally are within the discretion of the trial court, so the standard of review for the denial of jury instructions is abuse of discretion." *Newell v. State,* 49 So.3d 66, 73 (Miss.2010). The Defendant was afforded its rights under Miss. Code Ann. § 85-5-7. The jury was allowed to allocate fault not only to others, but also to Robert Eastman himself. R. 5005B. Therefore, the Defendant can not meet its burden that the trial court abused its discretion.

The Defendant argues that it was essential to their defense that it be afforded the right under Miss. Code Ann. § 85-5-7 to have fault allocated against individual parties as opposed to "others." There is no requirement that each alleged tortfeasor have an individual line for fault on the verdict form. Instead 85-5-7 only requires that the jury be able to consider the individual fault of all potential parties. This was clearly done here and argued in closing by the Defendant. The Defendant was not denied any right by the trial court's refusal of the Defendant's proposed verdict form. In fact, the Defendant was able to successfully have forty percent (40%) of the fault allocated to other parties it alleged to be at fault.

The Defendant's reliance upon *Estate of Hunter v. General Motors Corp.,* 729 So.2d 1264 (Miss. 1999) is misplaced. This Court's decision in *Hunter* supports the jury verdict form given in this case. One of the main holdings of *Hunter* was that "there is no indication that the Legislature intended to reserve for plaintiffs the sole and exclusive right to make allegations of fault before a jury and to deprive defendants of the opportunity to persuade a jury that fault for a given accident lies elsewhere." 729 So.2d at 1273-74 (¶34). The Defendant here was not deprived of any rights or

defenses in regard to apportionment of fault. The Defendant was given the opportunity to persuade the jury that fault lies elsewhere. The Defendant was able to have 40% of the fault allocated to other parties.

In *Hunter,* the Plaintiff argued that the trial court erred in allowing fault to be allocated to a settling defendant. *Id.* at 1272 (¶29). This Court held that "the policy considerations underlying the comparative fault doctrine would best be served by the jury's consideration of the negligence of all participants to a particular incident which gives rise to a lawsuit.." *Id.* at 1273 (¶32). Under 85-5-7(7), absent tortfeasors who contributed to a plaintiff's injuries "must be considered by the jury when apportioning fault." *Smith v. Payne,* 839 So.2d 482, 486 (Miss.2002). The jury was clearly given the opportunity to consider all tortfeasors when it apportioned fault. Nobody was excluded. In fact, everyone under the sun was included by using the term "others."

The jury clearly considered the negligence of all participants, even absent ones, by only assigning 60% of the fault to the Defendant. Assuming the verdict form did not comply with 85-5-7, the error should be considered harmless since the Defendant was able to argue and the jury was able to assign fault to all potential parties, including the Plaintiff. Therefore, this Court should not reverse and remand based on the form of the verdict because it was not error, and even if it was error, it was harmless.

IV. The Jury's Allocation of Fault Was Not Against the Overwhelming Weight of the Evidence.

The standard of review for a motion for judgment notwithstanding the verdict requires this Court to "consider the evidence in light most favorable to the [Plaintiff], giving the [Plaintiff] the benefit of all reasonable inferences that may be reasonably drawn from the evidence." *Miss. Power & Light Co v. Cook,* 832 So.2d 474, 478 (¶6) (Miss. 2002). The evidence has to be so

overwhelmingly in favor of the Defendant that "reasonable jurors could not have arrived at a contrary verdict" for this Court to reverse the jury's decision. *Cook,* 832 So.2d at 478 (¶6). "If there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, this Court must affirm." *Id.*

The verdict in this case was clearly not against the overwhelming weight of the evidence. The Defendant admits the evidence showed that Eastman was exposed to sand for 28 years, 1963-1991. T. 711. Mr Eastman's testified he used the Defendant's sand at LeTourneau from 1963 to 1978. T. 711. Mr. Eastman testified that he believed it was the only sand there from 1963 to 1978. T. 712. This is an exposure period of 15 years out of a 28 year work period, or almost 54% of the time. The jury's verdict was 60% fault to the Defendant. R. 5005B. Viewing the evidence in the light most favorable to Mr. Eastman, the verdict was clearly not against the overwhelming weight of the evidence.

It is also of significant note that Mr. Eastman's first exposure to silica was from Defendant's product. Plaintiff's expert, Dr. Rose was qualified and accepted as an expert in industrial hygiene. T. 590-91. Dr. Rose testified about the dose response relationship for respirable silica. T. 609-10, 657-58. Dr. Rose's expert opinion was that the early exposures to respirable silica are the most dangerous. T. 609-10. Dr. Rose stated that this was well accepted in the field of worker health and safety. T. 610. Dr. Rose stated that it is the earliest exposures that cause Plaintiff's initial lung problems and begin showing up when the lung condition progresses. T. 610. This testimony was not objected to nor rebutted by the Defendant at trial. Based on the testimony at trial, Mr. Eastman was exposed to Defendant's sand for the first 15 years of his career, or almost 54% of his career. Dr. Rose stated that these initial exposures were the most dangerous and the ones to first cause

problems. Therefore, the jury finding the Defendant 60% at fault is not against the overwhelming weight of the evidence when the evidence is viewed in the light most favorable to Mr. Eastman.

This Court should affirm the jury's finding that the Defendant was 60% at fault because reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusion. The Defendant has certainly not met its burden to show "reasonable jurors could not have arrived at a contrary verdict." Reasonable minds will differ over what amounts to a 6% difference between the amount of exposure and the allocation of fault, especially considering Dr. Rose's testimony that the first exposures are the most dangerous.

V. All Economic Damages Awarded by the Jury Survived Eastman's Death.

The Defendant's arguments on this point gloss over a key point. Robert Eastman was alive when the jury rendered its verdict. Robert Eastman died in February 2010, approximately three months after the jury rendered its verdict. R. 5273. The jury's verdict was based on the evidence at trial. The trial court performed its duty and entered final judgment on the jury's findings. It is not within the trial court's discretion to disregard the jury's findings if they are supported by the evidence.

Significantly, the Defendant does not challenge the amount of the future economic damages in its brief. It only argues they can not be properly awarded. Again, it is not within the trial court's discretion to review the evidence, consider a new fact (Robert Eastman's death), and then based on this new fact reevaluate the jury's findings which were based on the evidence presented at trial.

In a typical survival action, the injured person is dead prior to the trial of the case and a jury's verdict. Since the injured person is deceased, it is correct that no future damages could be awarded by a jury. The only case cited by the Defendant is *Wilks v. Am. Tobacco Co.*, 680 So.2d 839, 840 (Miss. 1996) where the heirs brought a wrongful death action pursuant to Miss. Code Ann. § 11-7-

13. The injured person in that case was clearly not alive during the pendency or trial of that lawsuit.

At the time of the jury's verdict, this was not a survival action or even a wrongful death action. It was Robert Eastman's personal injury action for the damages he incurred as a result of the Defendant's negligence. The jury heard the evidence in regard to future damages and rendered its verdict accordingly. Since the verdict was returned prior to Robert Eastman's death and was based on substantial and credible evidence which is not challenged in this appeal, this Court should affirm the trial court's award of the economic damages. If this Court was to accept the Defendant's arguments, jury verdicts awarding future damages could be attacked at almost any time if a Plaintiff subsequently died. This is clearly not the law in this State.

VI. The Trial Court Correctly Applied the Noneconomic Damages Cap.

The trial court correct applied Miss. Code Ann. § 11-1-60 to the verdict rendered by the jury. Prior to assessing damages, the jury answered Question No. 3 on the verdict form assessing 60% of fault to the Defendant. R. 5005B. The jury then answered Question No. 4 assessing a total of $4,600,000.00 in total damages. R. 5005C. The Jury's verdict included $3,000,000.00 in noneconomic damages. *Id.* Based on the jury's determination, it held the Defendant liable for 60% of $3,000,000.00 which equals $1,800,000.00. This amount was reduced by the trial court pursuant to §11-1-60 to $1,000,000.00. This was clearly the correct procedure for the trial court to use.

Mississippi Code Annotated Section 11-1-60 does not address the issue of apportionment of damages, but the statute's intention is clear that the award on noneconomic damages shall not exceed $1,000,000.00. That did not happen in this case. Further, 11-1-60(2)(c) states "The trier of fact shall not be advised of the limitations imposed by this subsection (2) and the judge shall appropriately reduce any award of noneconomic damages that exceeds the applicable limitation." Therefore, the only guidance contained with the statute is for the trial court to appropriately reduce any award above

$1,000,000.00. It does not tell the trial court how to reduce the award or how to consider apportionment issues. Therefore, the Plaintiff would submit that it is within the trial court's discretion when applying the reduction. The Plaintiff would submit that the trial court did not abuse its discretion in this circumstance.

It is clear the jury expected the Defendant to pay $1,800,000.00 in noneconomic damages. In contrast to Defendant's arguments, the $1,800,000 is the award of the jury against the Defendant when the allocation of fault is taken into consideration. Since the noneconomic damages had already been apportioned by the jury, this was the only amount of damages available to be capped.

This Court's decision in *Estate of Klaus v. Vicksburg Healthcare, LLC,* 972 So.2d 555 (Miss. 2007) is not applicable to this case. The only issue determined in that case was whether the $500,000 cap found in §11-1-60(2)(a) applied to the recovery of all plaintiffs or if each individual plaintiff could recover $500,000. *Klaus,* 972 So.2d at 559 (¶11). This Court did not address any issues of apportionment. There was only one plaintiff in this case to which the cap could be applied.

While it did not appear to be an issue on appeal, this Court has issued an opinion that involved apportionment of fault and application of a cap. In *Delta Reg' Med. Ctr. v. Venton,* fault was apportioned pursuant to Miss. Code Ann. § 85-5-7 between two physicians and Delta Regional Medical Center, a tort claims facility. 964 So.2d 500, 503 (¶3) (Miss. 2007). "The court awarded Venton's estate $1,000,000 in damages, with $500,000 assessed against DRMC" based on the apportionment of 50% of the fault to DRMC. *Id.* Pursuant to the MTCA, this amount was reduced to $250,000. *Id.* Therefore, the trial court in that case first apportioned the damages then reduced to the capped amount. The procedure advocated by the Defendant in this case was clearly not followed in the *Venton* case.

This issue has been addressed by the Northern District of Mississippi applying Maryland law.

In *Reiger v. Group Health Association,* the jury awarded $1,500,000.00 in noneconomic damages. 851 F.Supp. 788, 790 (N.D. Miss. 1994). The jury found the Plaintiff 35% liable for her damages and the defendant 65% liable. *Id.* The Court determined that the Plaintiff's noneconomic damages would be $975,000.00 which is 65% of $1,500,000.00. *Id.* Maryland law capped an award for noneconomic damages at $350,000. *Id.* at 791; citing *Md. Cts. & Jud. Proc.* § 11-108(b). The Court applied the cap after apportionment and entered judgment in the full amount of $350,000.00. *Id.* at 793. The Court noted Maryland's statute merely capped the recovery at $350,000, and the cap is applied after apportionment of fault. *Id.* at FN7. Maryland's statute has been reproduced to this Court as Addendum 1. It is not clear from the Court's opinion in *Reiger* which version of the statute applied so the Plaintiff has reproduced the 1986 version, 1988 version, and the 1989 version. It is clear from all three versions that apportionment is not mentioned.

Regardless, by 1988, Maryland's statute is similar to Mississippi's in two regards. First, the jury is not informed of the limitation. *Md. Cts. & Jud. Proc.* § 11-108 (d)(1) (1988 Version). Second, if an award exceeds the limitation, the court reduces the amount to conform to the limitation. § 11-108 (d)(2). That is what occurred in this case. The trial court reduced the award to the limitation of $1,000,000.00. The Plaintiff requests this Court to follow the reasoning in *Reiger* and determine the Defendant was not entitled to any further reduction based on apportionment. *See also General Electric Co. v. Niemet,* 866 P.2d 1361, 1367-68 (Colo. 1994) (holding "a trial court should apportion pro rata liability among the defendants and plaintiff before it applies the statutory cap of section 13-21-102.5")

The Colorado Supreme Court decision cited by the Defendant is not on point since it involved caps on noneconomic damages in a medical malpractice case. *Garhart v. Columbia/Healthone, LLC,* 95 P.3d 571, 591-92 (Colo. 2004). The cap in that case was found in

Colorado's Health Care Accountability Act (HCAA) 13-64-302, unlike in *Neimet* which involved the general damages statute found in 13-21-102.5. *Garhart,* 95 P.3d at 591. Therefore, the Plaintiff would request this Court to adopt the reasoning in *Neimet* which involved product liability law which is what is involved in this case. 866 P.2d at 1362.

The Defendant argues that fault allocation should be done once. Appellant's Brief at P. 30. That was exactly what was done in this case. The jury, not the trial court, allocated 60% of the fault to the Defendant and awarded $3,000,000 in noneconomic damages. Further, this is not in violation of Miss. Code Ann. § 85-5-7(2) because the jury awarded $1,800,000.00 to Robert Eastman against the Defendant. This was reduced to $1,000,000.00. Therefore, the Defendant paid $800,000 less than the amount allocated to it by the jury. 85-5-7(2) has clearly not been turned on its head.

One final note, the issue of the constitutionality of Miss. Code Ann. § 11-1-60 is currently on appeal to this Court. The Plaintiff would respectfully submit that the Court's ruling in that case would have significant impact on the issue in this case.

VII. There is Not Cumulative Error Requiring a New Trial.

There was simply no error at trial that requires reversal, definitely not cumulative error. The jury's verdict was reasonable and not against the overwhelming weight of the evidence. It was based on the law and evidence presented at trial. Therefore, this Court should not reverse the jury's verdict because there simply is no error, certainly not cumulative error.

VIII. The Defendant is not Entitled to a Remittitur.

The Defendant argues that this Court should order a remittitur by discarding the award of economic damages of $960,000.00. There is no basis in law or fact to discard the jury's award which was based on credible and substantial evidence. The Defendant also requests a remittitur of the noneconomic damage award of $1,000,000.00 which is nothing more than a rehash of Issue VI. As

previously discussed extensively, the trial court was correct in its application of Miss. Code Ann. § 11-1-60 to the jury's verdict. Further, there is certainly no evidence of bias or prejudice on behalf of the jury that would justify a remittitur in this case. Based on the damage evidence presented at trial, the jury's verdict was very reasonable. Therefore, the Defendant's request for a remittitur should be denied in all respects.

CONCLUSION

For all the reasons set forth above, the Plaintiff respectfully requests this Court to affirm the jury's verdict and the trial court's final judgment in their entirety. The Plaintiff further respectfully requests this Court to not grant any remittitur in this case as the verdict was supported by the evidence presented at trial.

Respectfully submitted, this the 28th day of September, 2011.

ROBERT EASTMAN, SR., DECEASED,
APPELLEE

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellees hereby certifies that a true and correct complete copy of the above and foregoing *Brief of Appellees* has this day been served via United States Mail, first class postage prepaid, to the following:

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Code, Courts and Judicial Proceedings, § 11-108

ANNOTATED CODE OF MARYLAND, 1986

COURTS AND JUDICIAL PROCEEDINGS.
TITLE 11. JUDGMENTS.
Subtitle 1. Judgments — Miscellaneous.

§ **11-108**. Personal injury action — Limitation on noneconomic damages.

(a) *Noneconomic damages.* — In this section:

(1) "Noneconomic damages" means pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury and;

(2) "Noneconomic damages" does not include punitive damages.

(b) *Limitation of $350,000 established.* — In any action for damages for personal injury in which the cause of action arises on or after July 1, 1986, an award for noneconomic damages may not exceed $350,000.

(c) *Award under § 3-2A-06 included.* — An award by the health claims arbitration panel in accordance with § 3-2A-06 of this article shall be considered an award for purposes of this section.

(1986, ch. 639.)

NOTES, REFERENCES, AND ANNOTATIONS

Editor's Note. — Section 2, ch. 639, Acts 1986, provides that "every insurer providing professional liability insurance to a health care provider in this State shall submit to the Insurance Commissioner information on the nature and cost of reinsurance, the claims experience by category of health care providers, the amount of claims settlements and claims awards, the amount of reserves for claims incurred and incurred but unreported claims, the number of structured settlements used in payment of claims, and any other information relating to health care malpractice claims as prescribed by the Insurance Commissioner in rule and regulation. The Insurance Commissioner may require, by rule and regulation, insurers of other lines of liability insurance to submit such reports. The Insurance Commissioner shall report its findings as to the impact of this act on the availability and affordability of health care malpractice and other liability insurance in this State to the Legislative Policy Committee of the General Assembly by October 31 of each year. This section shall remain effective through October 31, 1996, and with no further action required by the General Assembly, this section shall be abrogated and of no further force and effect."

Section 3 of ch. 639 provides that the act shall take effect July 1, 1986.

Code, Courts and Judicial Proceedings, § 11-108
MD CTS & JUD PRO § 11-108

END OF DOCUMENT

Code, Courts and Judicial Proceedings, § 11-108

ANNOTATED CODE OF MARYLAND, 1988

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(2) If the jury awards an amount for noneconomic damages that exceeds the limitation established under subsection (b) of this section, the court shall reduce the amount to conform to the limitation.

(1986, ch. 639; 1989, ch. 5, § 1; ch. 629.)

NOTES, REFERENCES, AND ANNOTATIONS

Effect of Amendments. — Chapter 5, Acts 1989, approved Mar. 9, 1989, and effective from date of passage, in (a) (1), inserted the semicolon following "nonpecuniary injury" and deleted the semicolon following "and."

Chapter 629, Acts 1989, effective July 1, 1989, added (d).

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Section 19, ch. 5, Acts 1989, provides that "except for §§ 5, 6, 10, and 11 of this Act, the provisions of this Act are intended solely to correct technical errors in the law and that there is no intent to revive or otherwise affect law that is the subject of other acts, whether those acts were signed by the Governor prior to or after the signing of this Act."

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