IN THE SUPREME COURT OF MISSISSIPPI

MISSISSIPPI VALLEY SILICA COMPANY, INC. **APPELLANT**

V. **NO. 2010-CA-00924-SCT**

ROBERT EASTMAN, SR., Deceased **APPELLEE**

APPEAL FROM THE DECISION OF THE WARREN CIRCUIT COURT

REPLY BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Rules:

Other Authority:

STATEMENT REGARDING ORAL ARGUMENT

The appellee's brief fails to conform to M.R.A.P. 34(b). In any event, Valley believes that oral argument is appropriate in this case due to the following issues of first impression:

- whether a nonexistent entity can be a "proper party" under M.R.C.P. 25(a)(1);
- the availability of a sophisticated-user jury instruction under the Mississippi Products Liability Act and the Restatement (Second) of Torts;
- the trial court's duty to allow a defendant to seek allocation of fault to specific nonparties, not merely to amorphous "others"; and
- the proper sequence for applying the § 11-1-60 noneconomic-damages cap where fault is to be allocated: before allocation, or after?

This Court's resolution of the foregoing issues will have serious consequences for countless litigants in Mississippi. Oral argument will aid the Court in resolving any questions inadvertently left unaddressed or underdeveloped in the parties' briefs.

REBUTTAL ARGUMENT

Robert Eastman's employer exposed him to pulverized sand that ultimately caused him to contract silicosis. The present appeal is from a $1.96 million judgment against one of the companies that provided ordinary, harmless sand to that employer, on the theory that Mississippi Valley Silica Company ("Valley") was supposed to warn Eastman that its harmless product might become harmful depending on what his employer did with it and whether he was provided adequate safety equipment.

Before turning to the rebuttal argument, Valley notes that it moved on September 30, 2011 to strike the brief filed on behalf of the appellee because, due to the failure of Eastman's widow to post her administration bond in chancery court, no letters of administration have issued and there is thus no party that could file a "brief of appellee"—indeed, there is no Appellee at all. On October 7, this Court ruled that it would pass that motion for consideration with the merits of this case. As of the date of this reply brief, the Warren Chancery Court's docket (# 75CH1:10-pr-00056-vrb) continues to show no issuance of letters of administration.

I. FAILURE TO SUBSTITUTE A PROPER PARTY REQUIRES REVERSAL.

Failure to substitute a proper party for Eastman both required dismissal under M.R.C.P. 25 and resulted in entry of a void judgment for a deceased person.

A. The Judgment Entered for the Deceased Eastman Was Void.

As Valley showed in its initial brief, a rule almost as old as this State holds that a court has no authority to enter judgment for a dead party. *Wells v. Roberson*, 209 So. 2d 919, 922 (Miss. 1968) (citing *Gerault v. Anderson*, 1 Miss. (Walker) 30

(1818)). Jurisdiction over Eastman ceased at the moment of his death. *Id.* For lack of jurisdiction, therefore, and in the absence of a proper substitution, the trial court should have dismissed the case. It had no power to enter a judgment for Eastman.

"Eastman" (as we will call the nonexistent Appellee) does not distinguish *Wells* and the cases cited therein, but instead points to a defunct statute, Miss. Code Ann. § 11-7-25, that once allowed entry of a decree after a party's death. Eastman at 9-10.[1] Eastman cites *White v. Smith*, 645 So. 2d 875 (Miss. 1994), which applied § 11-7-25. But *White* does not aid Eastman. First, *White* was clear that the common-law rule was in fact that the death of a party prior to final judgment cancels the suit. *White*, 645 So. 2d at 880-81. Second, *White* therefore relied upon § 11-7-25, a statute that was repealed as superseded by, or conflicting with, this Court's procedural rules. 1991 Miss. Laws ch. 573, § 141. *White* therefore fails entirely to support Eastman, who cites no other authority on this point. The judgment below was and is void. The only recourse for avoiding dismissal would have been substitution of a proper party, which was not done.

B. No Proper Party Was Substituted.

1. Dismissal Was Mandatory and Needed No Motion.

Eastman argues that no dismissal under M.R.C.P. 25(a)(1) was required because Valley did not move to dismiss. But he cites no authority that any such motion was required. Rule 25(a)(1) uses the words "upon motion" with regard to the trial court's substitution of a proper party. It does not say that dismissal for failure to substitute a proper party is to be made "upon motion." On the contrary, the

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[1]We cite the Brief of Appellee as "Eastman" and our initial brief as "Valley."

language of the rule is mandatory: the case "shall be dismissed without prejudice as to the deceased party" if the motion for substitution is not timely made. The point of our citation to *Anderson v. Yungkau*, 329 U.S. 482 (1947), was to show that the Supreme Court of the United States, interpreting part of federal Rule 25 with similar language to the Mississippi rule ("shall be dismissed"), held that the trial court was compelled by that language to dismiss the suit: "That is action required of the court, not of a party." *Anderson*, 329 U.S. at 486. Hence, no motion is required under M.R.C.P. 25(a)(1) for the trial court to dismiss the case. Likewise, in a case regarding a statutory mandate for the award of postjudgment interest, this Court found that no motion was necessary for the trial court to be required to do what the statute said it "shall" do. *Miss. Dep't of Mental Health v. Hall*, 936 So. 2d 917, 929-30 (Miss. 2006) (applying Miss. Code Ann. § 75-17-7). The same principle applies here.

2. The Suggestion of Death Was Valid.

Eastman also argues that the 90-day time clock for substitution of a proper party never began to run, because Valley's suggestion of death was not served on the Eastman estate. Eastman relies upon Justice McRae's opinion for this Court in an opinion since overruled. *Hurst v. S.W. Miss. Legal Servs. Corp.*, 610 So. 2d 374 (Miss. 1992), *overruled on other grounds, Rains v. Gardner*, 731 So. 2d 1192, 1194-96 (Miss. 1999) (general answer does not waive challenge to sufficiency of process). The *Hurst* opinion held that Rule 25(a)(1)'s reference to service of the suggestion of death on "persons not parties" meant that nonparties must be served, so that a suggestion not served upon the estate of the deceased person was of no effect. *Hurst*,

610 So. 2d at 386. This is a strange rule, but read properly, that is not what Rule 25 requires, and *Hurst* is distinguishable from the present case.

It's a strange rule because, taken literally, *Hurst* sets an impossible duty upon anyone who would like to file a suggestion of death: what nonparties must be served? The identities of parties to a suit is a well-defined set; the set of *nonparties* to any given suit would seem to be "everyone else in the world." Rule 25(a)(1) cannot be taken to require service upon "persons not parties" and then leave the serving party guessing as to just what nonparties must be served.

The better rule is clear from careful consideration of the text of Rule 25(a)(1):

> 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 record by service** of a statement of the fact of the death **as herein provided for the service of the motion**.

(emphasis added). Eastman's misapplication of this rule arises from the fact that service of the suggestion of death is described at the end of subsection (a)(1) by reference back to service "as herein provided for" of the motion for substitution. Substitution may be sought "by any party" to the case or by certain non-parties, "the successors or representatives of the deceased party." In the event that a party is the one seeking substitution, the nonparty "successors or representatives" obviously have an interest in who's substituted, so they too must be served, *if they exist*.

Immediately after a party's death, however, the death can be suggested on the record, but where the suggestor is an unrelated party, the suggestor can't know who the "successors or representatives" are. There can thus be no just requirement that they be served for the suggestion of death to be valid. Rule 25(a)(1) cannot and should not be read to impose any such requirement, for as the present facts prove all too clearly, it may be months or years before any such nonparty appears.

Returning to *Hurst*, that case is also distinguishable because there, the suggestor failed to serve the estate of Hurst, whose administrator had been appointed. *Hurst*, 610 So. 2d at 386. But in the present case, there was no estate for Valley to serve with the suggestion of death. Eastman died February 8, 2010; Valley suggested the death on February 16; judgment was entered April 14; and only *then* did Rutha Eastman even petition to open Eastman's estate, on April 16. And as this Court knows, letters of administration had not been issued by the time this case was appealed (or to this day). With no person legally entitled to act on behalf of the estate, Valley had no duty to do the impossible and serve a nonexistent nonparty.[2]

Also, the sole authority besides Rule 25 relied upon in *Hurst* (on this issue) was the Fifth Circuit's interpretation of federal Rule 25 in *Ransom v. Brennan*, 437 F.2d 513 (5th Cir. 1971). But *Ransom* had a material difference that made it inapposite to the facts in *Hurst*: the *Ransom* case involved service of a motion for substitution, not a suggestion of death. *Ransom*, 437 F.2d at 515. The issue was thus not the valid service of a suggestion of death, but rather the issue of personal

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[2]Nor can it be the case that Valley somehow had a duty to identify, locate, and serve all of Eastman's heirs before it could suggest his death upon the record. As the heirship proceedings in the matter of Eastman's estate indicate, such determinations are not easy to make for Eastman's relatives—how much less so for a defendant!

jurisdiction where a motion for substitution had been filed but not properly served. *Id.* at 516-17. Thus, as we saw in studying the text of Rule 25(a)(1), a different set of facts existed: in *Ransom*, indeed, the movant was not only aware of the decedent's personal representative, but was trying to substitute her. Service upon a nonparty was thus reasonably required. But that holding in *Ransom* cannot carry over to the service of a suggestion of death upon a nonparty where no estate has been opened or no personal representative has authority to act on behalf of the estate.

Nor is Eastman's argument helped by the fact that, on his own theory of how to apply *Hurst*, the motion for substitution of parties was not properly served, either. The certificate of service names only "all counsel of record." R.E. 6 at 5344. But as we've demonstrated, that at least was not a defect, because there was no estate or personal representative on whom to serve the motion. We note by the way that Eastman never disagrees with Valley's observation that the motion for substitution was never actually filed with the trial court. Valley at 12 n.4; see R.E. 1 (trial court docket), R.E. 6 (motion lacks file stamp). This was a graver defect.

3. The Nonexistent Estate Could Not Be a Proper Party.

Finally, Eastman fails to offer any relevant argument or authority demonstrating that the motion to substitute named a *proper* party, as the rule requires. Valley showed in its initial brief that Rule 25 does not allow substitution of *any* party, but only of a *proper* party, and that a nonexistent estate was not and could not be a proper party. Because Eastman never moved to substitute a proper party, the case should have been dismissed by operation of Rule 25.

"It goes without saying," Eastman says, "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." Eastman at 9. So one might have thought, before meeting with the facts of this case. As it turns out, an estate was opened May 25, 2010, and there is *still* no administrator who can "act on behalf of the estate." Moving to substitute the nonexistent estate and its nonexistent administrator was no more the substitution of a *proper* party than would have been the substitution of a unborn and hence nonexistent child of Eastman's. If Eastman's estate was to be substituted, then it was first necessary to *open Eastman's estate.* This was not done until the 98th day after Eastman's death was suggested upon the record. And even then, there was (and is) no one to substitute, because no letters of administration were issued.

Any apparently harsh result must be weighed against the utter lack of diligence shown by the would-be successor to Eastman. Rule 25(a)(1) gives 90 days to move for substitution of a proper party, and thus 90 days to secure the existence of a proper party. This is not a case where a diligent party tried to comply in good faith but got bogged down in a crowded docket. When Rutha Eastman finally got around to petitioning for an estate to be opened, the chancery court granted the request in only five weeks (contingent upon Rutha's posting the legally required bond, still not done more than a year later). Legal deadlines may sometimes seem "harsh" in their results, but they must be honored nonetheless. *Miss. Dep't of Public Safety v. Stringer*, 748 So. 2d 662, 667 (Miss. 1999) (statute of limitations).

For failure to timely move for substitution of a proper party, therefore, the case below should have been dismissed.

II. THE SOPHISTICATED-USER INSTRUCTION WAS WRONGLY DENIED.

"A party is entitled to have the jury instructed regarding a genuine issue of material fact so long as there is credible evidence in the record which would support the instruction." *First Investors Corp. v. Rayner*, 738 So. 2d 228, 234 (Miss.1999) (quoting *DeLaughter v. Lawrence County Hosp.*, 601 So. 2d 818, 824 (Miss. 1992)). The question is thus whether the denied jury instruction MVS-8 correctly stated the law and was supported by credible evidence. *Hill v. Dunaway*, 487 So. 2d 807, 809 (Miss. 1986).

A. The Instruction Correctly Stated the Law.

We begin with the Mississippi statute on duty to warn:

> In any action alleging that a product is defective pursuant to paragraph (a)(i)2 of this section, **the manufacturer or seller shall not be liable if the danger posed by the product is known or is open and obvious to the user or consumer of the product, or should have been known** or open and obvious **to the user or consumer of the product**, taking into account the characteristics of, and the ordinary knowledge common to, the persons who ordinarily use or consume the product.

Miss. Code Ann. § 11-1-63(e) (emphasis added). Compare the language of the rejected jury instruction: "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.E. 9 (emphasis added). Instruction MVS-8 was a correct statement of Mississippi law.[3]

But, Eastman argues, the danger was not known to Eastman himself. That is where the sophisticated user (or learned intermediary) doctrine arises, as discussed

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[3]Eastman's citation to a Minnesota case that added additional policy considerations not found in § 11-1-63(e) is not on point. Eastman at 14.

by this Court in *Swan v. I.P., Inc.*, 613 So. 2d 846 (Miss. 1993), and as likewise recognized by numerous other courts. In *Swan*, this Court applied § 388 of the Restatement (Second) of Torts and held, on the facts of that case, that summary judgment for the manufacturer was error: "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. Material issues of fact exist in this case as to whether [the manufacturers'] reliance on [the intermediary] was reasonable." *Swan*, 613 So. 2d at 856. Hence the issue should have gone to trial. That is what should have happened in the present case: the jury should have had the opportunity to find that Eastman's employer, LeTourneau, knew or should have known that its treatment of the sand provided by Valley created a danger.

Swan correctly quotes pertinent language of § 388's comment (k):

> *When warning of defects unnecessary.* One who supplies a chattel to others to use for any purpose is **under a duty to exercise reasonable care to inform them of its dangerous character** in so far as it is known to him, or of facts which to his knowledge make it likely to be dangerous, **if, but only if**, he has **no reason to expect** that those for whose use the chattel is supplied will discover its condition and realize the danger involved....

Swan, 613 So. 2d at 852 (boldfacing added) (quoting Rest. (2d) Torts § 388, cmt. (k)). Applying this principle, the jury should have held Valley liable "if, but only if," Valley had "no reason" to expect that LeTourneau knew the danger involved with silica. It's in this context that one should understand the *Swan* Court's holding that "[t]he learned intermediary defense does not relieve the manufacturer of its duty to warn, however, unless the manufacturer's reliance on the intermediary is reasonable." *Id.* at 856.

Given that LeTourneau was the one creating the danger, Valley had every reason to expect that LeTourneau was at least as conversant as Valley with the danger of silica dust. (See also section II.B below.) It was an abuse of the trial court's discretion for it to refuse to allow the jury even to consider whether or not LeTourneau's knowledge superseded any duty for Valley to warn LeTourneau. One might as well hold an ammunition supplier liable for failing to warn a rifle user that causing the ammunition to fire from the barrel of the gun might hurt someone.

Eastman tries to distinguish *Smith v. Walter C. Best, Inc.*, 927 F.2d 736 (3d Cir. 1990), on the basis that the sand in *Smith* was supplied in bulk, not in bags. But the *Smith* court was affirming summary judgment; Eastman cannot cite one relevant factor from *Smith* to support an argument that the jury should not even have been allowed to consider, on the entirety of the facts (including bags vs. bulk sand), whether or not LeTourneau knew or should have known of the risks.

As the Wisconsin court of appeals held, there are "sound policy reasons" for the duty to warn to rest upon the intermediary in a silica case like the present one:

> First, it places the duty to warn on the party arguably in **the best position to ensure workplace safety**, the purchaser-employer. Second, the burden falls upon the party **in the best position to know of the product's potential uses**—thereby enabling that party to communicate safety information to the ultimate user based upon the specific use to which the product will be put.

Haase v. Badger Mining Corp., 669 N.W.2d 737, 743-44 (Wis. Ct. App. 2003) (affirming directed verdict for silica supplier). Likewise, the Louisiana court of appeals found that as to the danger of silicosis, a sandblasting employer was "surely much more" aware than the supplier of the dangers created by sandblasting.

Damond v. Avondale Indus., Inc., 718 So. 2d 551, 552-53 (La. Ct. App. 1998) (reversing denial of summary judgment). That court too recognized that

> Sand is not unreasonably dangerous per se. A natural substance, it constitutes a playground on the beach, and it has many uses from filling gardens and lawns to mixing with concrete to filling sandboxes. That sand may be a danger to a sandblaster is not the fault of the sand but in the use to which the sand is put.

Id. at 552. The Louisiana court held that evidence of the employer's knowledge was sufficient that summary judgment was proper. Here, Valley argues only that the issue should have gone to the jury. The Fifth Circuit has reversed a district-court judgment for failure to instruct the jury that the employer's knowledge of the dangers in a product it purchased would absolve the supplier of any duty to warn the employee. *Davis v. Avondale Indus., Inc.*, 975 F.2d 169, 174 (5th Cir. 1992). Also relevant to the present case is that the Fifth Circuit held the supplier may properly suppose an employer will warn its own employees "where the purchaser is a sophisticated user and the third parties are employees of the purchaser whom it has a duty to warn or protect." *Id.* at 173. In addition to the evidence of LeTourneau's knowledge, it was undisputed that LeTourneau was Eastman's employer and had a corresponding duty to warn or protect him.

The law thus supported the jury instruction. This takes us to the second prong of this Court's inquiry on the present issue: whether credible evidence supported Valley's proposed instruction.

B. Credible Evidence Supported the Instruction.

As this Court saw in Valley's initial brief, the jury at the very least had substantial, credible evidence from which it could have found that LeTourneau knew

or should have known of the hazard it was creating by blasting sand into dust. The present case was obviously an ideal instance of when the sophisticated-user instruction would be proper: when in fact the product in question presented no danger whatsoever until transformed by the intermediary into hazardous micro-particles. All of the danger involving Valley's sand was *created* by Eastman's employer, LeTourneau, which (1) pulverized sand into silica dust and (2) failed to provide Eastman with an air-feed hood.

Eastman claims "[t]here was minimal evidence of LeTourneau's knowledge." Eastman at 15. But Valley's expert witness Dr. Gots testified to the jury that LeTourneau "had to know" of the danger of silicosis as early as when Eastman began working for it. R.E. 3 at T.813-14, 848-49. That expert opinion was admitted into evidence, and Eastman has not cross-appealed to argue it should have been excluded. There alone, the jury thus had sufficient evidence from which it could have found that LeTourneau "realized the danger involved." *See Busick v. St. John*, 856 So. 2d 304, 319 (Miss. 2003) (party entitled to present her theory of case in jury instruction where "substantial evidence" supported instruction).

Moreover, as Dr. Gots noted, LeTourneau did purchase air-feed hoods for its employees, just not enough to go around. R.E. 3 at T.815-16. Eastman's own expert, Dr. Karnes, testified that air-feed hoods were required by national safety standards years before Eastman began working for LeTourneau and saw his first bag of Valley sand. R.E. 3 at T.413. Dr. Gots agreed with Dr. Karnes that the risks were known by the 1930s. R.E. 3 at T.807. Where both Eastman's and Valley's experts testified that

the danger was known long before Eastman was hired, it makes no sense to argue that the jury *could not have found* that LeTourneau was a sophisticated user.

Yet that is just what the trial court ruled in denying the instruction, having overlooked this crucial evidence. It erred unless no reasonable jury could have found that LeTourneau knew or should have known that it was dangerous to its employees for them to sandblast without adequate safety equipment. *Splain v. Hines*, 609 So. 2d 1234, 1239 (Miss. 1992) (citing *Hill*, 487 So. 2d at 809). As this Court has stated, a party is entitled to present its theory of the case if there is enough supporting evidence to support it that a reasonable jury could find for that party on that theory. *Tharp v. Bunge Co.*, 641 So. 2d 20, 27 (Miss. 1994). The jury could have chosen to credit Eastman's own expert and believed that LeTourneau knew or should have known of the hazard it was subjecting Eastman to, and thus relieved Valley of any liability whatsoever. Indeed, Eastman cannot plausibly argue that the danger of silicosis was common knowledge in 1963, so that Valley was liable, but somehow unknown to LeTourneau, the one *creating the dangerous condition.*

C. The Defect Was Not Curable by Allocation-of-Fault Instructions.

The jury instructions as a whole could not cure the defect in denying instruction MVS-8, where the other instructions (says Eastman) merely allowed the jury to assign fault to parties other than Valley,[4] but never explained that, if it found as a matter of fact that LeTourneau was aware of the risks, then the jury was *required* to find for Valley. No mere allocation instruction could convey the same

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[4]But see the next issue regarding the jury's being confined to assigning fault to Valley, Eastman, or "others."

meaning as an instruction that would have taken any fault for Valley completely off the table. Eastman argues that the jury had instructions that would have allowed it to find for Valley, but that's not the legal standard here: Valley was entitled to present its "theory of the case," and the allocation instructions did not do so.

Nor is it relevant, except to emphasize the gravity of the error, that Valley argued the sophisticated-user theory to the jury. The law is that Valley is entitled to an *instruction* setting forth its theory of the case. *Busick*, 856 So. 2d at 319.

Valley had a legal and factual basis for its proposed instruction on the sophisticated-user defense, and it was reversible error for the trial court to deny Valley an instruction on its theory of the case. This Court should so hold.

III. VALLEY WAS ENTITLED TO REQUEST SPECIFIC ALLOCATION OF FAULT.

The trial court denied Valley a verdict form that would have allowed specific allocation to its erstwhile co-defendant, American Optical; to Eastman's employer, LeTourneau; and to various other named parties such as other suppliers of sand. Instead, the jury was allowed to allocate only to Valley, Eastman, or "Others."

Eastman merely asserts without authority that Miss. Code Ann. § 85-5-7 has "no requirement that each alleged tortfeasor have an individual line for fault on the verdict form." Eastman at 16. But that doesn't honor the statute's directive that "each party" be allocated fault, at least not if "each" has a singular meaning as the dictionaries say. Nor does his assertion fit with this holding by our Court of Appeals:

> Regardless of the uncertainty surrounding whether someone exempt from tort liability can nonetheless have fault allocated to him, it is clear that **a nonexempt contributor to an injury must have fault allocated if that is requested by a party to litigation.** Ladner could have joined both Gregory and Peterson, and absent a settlement, **both might have had the existence and amount of**

> **liability imposed at trial**. As it was reversible error to refuse to instruct the jury to apportion liability **among Ladner, Gregory and Peterson** for Ladner's injuries, we reverse and remand for a new trial on the issue of apportionment of fault.

Peterson v. Ladner, 785 So. 2d 290, 293 (Miss. Ct. App. 2000) (emphasis added). The court held that "a" nonparty alleged to be at fault "must have fault allocated if that is requested," and noted that the plaintiff "could have joined both" of the nonparties, so that "*both* might have had the existence and amount of liability imposed at trial." An "Others" blank on the verdict form does not satisfy the statute.

Like in *Peterson*, Valley could have joined LeTourneau as a party, and had it done so, the jury would have been provided the opportunity to allocate fault specifically to LeTourneau; so too with all the nonparties whom Valley sought to have named on the verdict form. *Peterson* properly applies § 85-5-7 and *Estate of Hunter* in requiring that in the allocation of fault, a nonparty must be treated *just as if it had been a party at trial.* That means specific allocation of fault to specific nonparties, not vague "others" about whose number and identities the jury can only speculate. Where "a jury verdict would be based on speculation and/or conjecture. Mississippi law is clear and unambiguous that such a verdict cannot stand." *Moore ex rel. Moore v. Miss. Valley Gas Co.*, 863 So. 2d 43, 46 (Miss. 2003).

Yet in this case, the trial court expressly placed allocation of fault to nonparties on a different, lower level than allocation to Valley: ". . . I'm not asking [the jury] to allocate fault to the others in and of itself. I'm asking them to allocate what they find fault that was not to be allocated to [Valley]." R.E. 3 at T.1014. Plainly, this was contrary to the letter and spirit of § 85-5-7, which requires that "each party" be allocated fault and, as the court held in *Peterson*, that each nonparty

be treated equally with parties present in the case. The trial court was thus mistaken when it mused that "they don't have to over burden them and go try to figure it out between Clark and Pangborn. To me, that over burdens them. That's something they should not have to do." T.1017. Under § 85-5-7, that is something the jury most definitely has to do. No fair allocation is possible otherwise.

Nor does Eastman cite authority to support his notion that the error in question was harmless because 40% of the fault was indeed allocated to those "others." Valley could just as well retort that the jury would have allocated even less fault to it had those "others" been named and the jury invited to link the evidence against particular parties with the particular entities named on the verdict form.

Finally, Eastman simply ignores the problem identified by Valley in its brief if allocation to "others" were approved by this Court. How is a reviewing court to know whether allocation to nonparties was supported by the evidence if the nonparties are not specified? Presumably this Court would have to scour the record in each such case to find any mention of a nonparty who might conceivably have been at fault. Or it could presume that the jury allocated fault to the invisible "Not Me" on whom the children blamed mishaps in the classic *Family Circus* comic. Pointing the finger at "Not Me" did not satisfy the parents in that cartoon, and a defendant's pointing fault at "others" should not satisfy this Court. Fault must be allocated to someone if it's allocated at all.

The verdict form denied Valley its rights under § 85-5-7, and this Court should reverse for a new trial with proper opportunity for allocation of fault.

IV. VALLEY'S 60% SHARE OF FAULT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

The rebuttal by Eastman simply compares Eastman's exposure period (54% of his years at LeTourneau) with the allocation of fault at 60%, and notes that the jury heard testimony that the earliest exposure was the most harmful. Given that this Court is reviewing a jury verdict for Eastman, Valley would be ignoring the standard of review if it contested those points, for which there was record evidence.

But that's not the end of the issue, because the only parties to whom fault could be allocated were not merely sand suppliers. Throughout Eastman's time at LeTourneau, he used safety equipment that, he argued at trial, was completely inadequate. And throughout his employment, his employer was directing Eastman to work in dangerous conditions. On those indisputable facts—nowhere did Eastman argue, or the jury hear, that LeTourneau did *not* provide a dangerous work environment that exposed Eastman to respiratory contamination by silica dust—the allocation of *sixty percent* of the fault to Valley alone, a mere supplier of sand that Eastman's own expert admitted was harmless as delivered, R.E. 3 at T.411-12, shocks the conscience. It was contrary to the overwhelming weight of the evidence, and the trial court erred in entering judgment on it rather than ordering a new trial.

V. IT WAS ERROR TO ENTER JUDGMENT FOR NONEXISTENT DAMAGES.

Because Eastman died between the jury's verdict and the entry of final judgment, this Court is presented with an issue that fortunately seldom arises: is it error for the trial court to enter judgment on a verdict for future medical expenses where the plaintiff's death intervenes and those expenses will never be incurred? Valley does not question that, had final judgment been entered upon the verdict, the

award would have been final as well. Eastman therefore raises irrelevant fears when his brief claims that "jury verdicts awarding future damages could be attacked at almost any time if a Plaintiff subsequently died." Eastman at 20. The issue presented in this case is strictly whether a court errs by entering judgment on an award of future expenses (here, medical expenses) where the court knows that the plaintiff has died after verdict but prior to entry of judgment. Such damages are an impossibility, and no valid judgment can be awarded upon them.

Eastman having cited no authority in rebuttal, there is no authority for Valley to refute under this issue. The question for this Court is simply whether a trial court is correct to enter judgment for what it knows to be a windfall for a plaintiff's heirs when the jury's intent was to award damages, not for the heirs' enjoyment, but for the plaintiff's actual future damages. *See Reilly v. United States*, 863 F.2d 149, 165 (1st Cir. 1988) (tort law disfavors windfalls). Collecting a judgment for future expenses that cannot possibly occur smacks of a double recovery. "[A] party is not entitled to a recovery of damages if it would constitute a windfall or 'double recovery.' " *Garris v. Smith's G & G, LLC*, 941 So. 2d 228, 232 (Miss. Ct. App. 2006).

The moment of entering judgment is the last opportunity to correct such an injustice, and that opportunity existed here. This Court should hold that, on the peculiar and rare facts of this case, no windfall for Eastman's survivors was proper: they can recover his damages for pain and suffering, they can file (as they have) a wrongful-death suit, but the law should not bestow upon them "future medical expenses" that the trial court *knows*, at the time it enters judgment, will not and cannot be incurred.

In the alternative, on the facts of this case, remittitur was proper to reduce the verdict by the amount of the future expenses (see issue VIII below).

VI. SECTION 11-1-60 LIMITS THE JURY'S AWARD, NOT THE ALLOCATION OF DAMAGES.

Section 11-1-60(2)(b) states that the jury "shall not award the plaintiff more than One Million Dollars ($1,000,000.00) for noneconomic damages." The award in this case was $3 million in noneconomic damages. It says so on the verdict form:

> QUESTION NO. 4
>
> Please calculate the TOTAL dollar amount to compensate Robert Eastman, Sr., for the injuries and harms received after considering the instructions of the Court, and write that amount here:
>
> $ 1.6 million — Actual Economic Damages as previously defined.
>
> $ 3 million — Pain and Suffering Damages as previously defined.[5]
>
> $ 4.6 million — TOTAL OF THE ABOVE TWO.

R.E. 4 at 5005C. The jury had allocated fault in response to Question No. 3, but its award to Eastman was "the TOTAL dollar amount to *compensate*" him, not the amount that Valley was *directed to pay*. Section 11-1-60 caps "the total amount of recoverable damages," as the defendant argued in *Estate of Klaus v. Vicksburg Healthcare, LLC*, 972 So. 2d 555, 557 (Miss. 2007), not just the damages against one defendant. (*Klaus* concerned the materially identical language in the medical-malpractice portion of § 11-1-60, but that difference does not matter for the present issue.) *Cf. Oakes v. Nat'l Heritage Realty, Inc.*, 2007 WL 2826963 at *2 (S.D. Miss.

[5] "Noneconomic" is crossed out and "Pain and Suffering" written in; additional text initially inserted after "Damages" was crossed out.

Sept. 25, 2007) (plaintiff & defendants agreed med-mal cap limits noneconomic damages to $500,000 despite multiple defendants).

The plain language of § 11-1-60 does not support the idea that each allocation of fault to a defendant is an "award"; rather, the jury makes one "award" in its verdict, which must then be reduced. One plaintiff's noneconomic damages do not merit a $2 million award rather than a $1 million award simply because two defendants happened to be liable. Nothing in § 11-1-60 suggests any such intention on the part of the Legislature.

As for Eastman's case law, the *Venton* case does not address the issue of when apportionment should take place, and it does not appear that the trial court was placed on notice of any error in the apportionment. *Delta Reg'l Med. Ctr. v. Venton*, 964 So. 2d 500, 503 (Miss. 2007). Assuming however that the two nonparty physicians who were allocated 50% of the fault were likewise protected by the Mississippi Tort Claims Act as employees of Delta Regional, it was error for the trial court not to impose the $250,000 cap before allocating fault. This Court has held that the MTCA's cap on sovereign liability applies to what a plaintiff can recover, not to the separate liability of each government co-defendant. *Miss. Dep't of Transp. v. Allred*, 928 So. 2d 152, 154-55 (Miss. 2006). In that case, the IHL Board had paid what was then the statutory maximum of $50,000, and its joint tortfeasor the Department of Transportation moved for summary judgment accordingly; had Eastman's theory of allocation-first been applied, the plaintiff could have been awarded $100,000, allocated 50% to the IHL Board and 50% to the Department, and each would have been liable in that amount. But this Court held otherwise.

Likewise, in the Maryland-law case adduced by Eastman, the issue of when to apply the cap (before apportionment, or after) does not appear to have been raised; the issue before the district court rather was whether choice-of-law principles allowed a Maryland damages cap to be applied in a Mississippi courtroom, this being in 1994 and thus well prior to Mississippi's own cap. *Rieger v. Group Health Ass'n*, 851 F. Supp. 788, 791-92 (N.D. Miss. 1994).

But if Eastman really wants this Court to follow the Maryland approach, then by all means, let us look to Maryland. Its statute, which Eastman seems to think is similar in important respects to Mississippi's (see addendum to his brief), says "an award or verdict under this subtitle for noneconomic damages . . . may not exceed $650,000." *Lockshin v. Semsker*, 987 A.2d 18, 33 (Md. 2010) (quoting Md. Code Ann. § 3–2A–09(b)). Given a release that specified the "*pro rata* reduction of any verdict or judgment of any non-settling tortfeasor," the Maryland high court reasoned as follows:

> The section **mandates that a jury's verdict may not exceed the statutory cap**. Thus, any verdict rendered by a jury exceeding the amount of the non-economic damages cap **inherently is a verdict in the amount of the cap from the moment it is rendered**. Under this construction, the reference in the release to a "verdict" cannot mean the uncapped jury's verdict which exceeds the statutorily-mandated cap; § 3–2A–09(b) states explicitly that **there can be no such verdict**.

Id. (emphasis added). "Thus, the appropriate order of operations is to apply first the cap to the jury's verdict for non-economic damages, followed by a credit for the joint tortfeasor settlement." *Id.*

Section 11-1-60 speaks only of an "award," not of "award or verdict," and says the jury "shall not award" a verdict above the cap, not that the award "shall not

exceed" as in the Maryland statute. But there's no difference between an award and a verdict; an "award" in § 11-1-60 is arrived at by the "trier of fact," which is the same entity which issues a verdict. (A "judgment," by contrast, issues from the court, not the jury.) And if the jury cannot award an amount above the cap, then the Maryland court's logic is applicable: there *never is any such award* for the trial court to apportion, because it "inherently is a verdict in the amount of the cap from the moment it is rendered." Wording aside, the meaning of the two statutes appears to be the same, and the same holding should apply in the present case as the Maryland court applied in *Lockshin*.

California follows the same rule: apply the cap first, and then apportion the total damages allowable under the cap according to each defendant's allocated fault. *Mayes v. Bryan*, 44 Cal. Rptr. 3d 14, 32-33 (Cal. Ct. App. 2006) ("trial court here properly reduced the non-economic verdict to the $250,000 MICRA cap before it applied the Proposition 51 percentage to the settlement").[6] So does Colorado, as we stated in our initial brief. Eastman's complaint that the Colorado rule is "not on point since it involved caps on noneconomic damages in a medical malpractice case," Eastman at 22, is immaterial: the area of law does not matter, but rather the sequence of capping and then apportioning the verdict.

Eastman does not address the hypothetical we raised (Valley at 29-30) regarding three defendants and a $3 million award, in which apportionment prior to applying the cap results in $1 million against each. This is scarcely consistent with

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[6]Proposition 51 abolished joint and several liability for noneconomic damages and required allocation in proportion to fault. *Mayes*, 44 Cal. Rptr. 3d at 31.

the "tort reform" rationale behind § 11-1-60's caps. *Klaus*, 972 So. 2d at 561 (Diaz, J., dissenting) (noting aim to lower insurance premiums).

The trial court erred by apportioning a legally impermissible verdict. The verdict should first have been reduced to what § 11-1-60 allowed the jury to award, and then apportioned 60% to Valley. This Court should so hold.

VII. ALTERNATIVELY, CUMULATIVE ERROR MERITS REVERSAL.

Eastman flatly asserts that there were no errors below, harmless or otherwise. That Valley disagrees has been sufficiently shown above. Valley was denied the opportunity to go to the jury on a dispositive issue; was not allowed to ask the jury to apportion fault to named tortfeasors whose liability was proved at trial; was held to bear the *majority* of fault for Eastman's damages just because it supplied harmless sand to a sandblasting company that shirked its duty to protect its own employees; and was the victim of a backwards damages computation that cost it hundreds of thousands of dollars. If those errors are not individually sufficient for reversal to be proper, their combined effect certainly is.

VIII. ALTERNATIVELY, REMITTITUR IS PROPER.

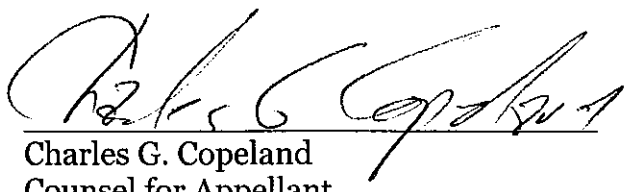
Eastman's argument on remittitur is simply that he thinks otherwise. Valley stands by its argument in its initial brief.

CONCLUSION

For all the reasons set forth above and in its initial brief, Mississippi Valley Silica Company asks that the final judgment entered by the Warren Circuit Court be reversed, and a judgment rendered for Defendant below; or alternatively, that the judgment below be reversed, and a new trial be granted; or alternatively, that the judgment below be set aside and judgment rendered for Plaintiff below for $600,000; or alternatively, that this Court reverse the judgment and direct the trial court to enter a remittitur to $600,000.

Respectfully submitted, this the ***27th*** day of October, 2011.

MISSISSIPPI VALLEY SILICA COMPANY, INC.

By: 

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellant hereby certifies that he has caused a true and complete copy of the foregoing document to be served via United States mail (postage prepaid) upon the following:

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