IN THE SUPREME COURT OF MISSISSIPPI

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

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

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

APPEAL FROM THE DECISION OF THE
WARREN CIRCUIT COURT

BRIEF FOR APPELLANT

OF COUNSEL:

Charles G. Copeland (MSB #[redacted])
Laurie R. Williams (MSB [redacted])
Andy Lowry (MSB #[redacted])
COPELAND, COOK, TAYLOR & BUSH, P.A.
Post Office Box 6020
Ridgeland, Mississippi 39158
Telephone: 601.856.7200
Facsimile: 601.856.7626

John D. Cosmich (MSB #[redacted])
Michael D. Simmons (MS[redacted])
LaKeysha Greer Isaac (MSB #[redacted])
COSMICH SIMMONS & BROWN, PLLC
Post Office Box 22626
Jackson, Mississippi 39225-2626
Telephone: 601.863.2100
Facsimile: 601.863.2100

CERTIFICATE OF INTERESTED PERSONS

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 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.

2. R. Allen Smith, Jr., Esq. of The Smith Law Firm, PLLC (counsel for Eastman).

3. Timothy W. Porter, Esq., Patrick C. Malouf, Esq., and John T. Givens, Esq., of Porter & Malouf, P.A. (counsel for Eastman).

4. Mississippi Valley Silica Company, Inc. (Appellant).

5. Charles G. Copeland, Laurie R. Williams, and Andy Lowry of Copeland, Cook, Taylor & Bush, P.A. (counsel for Valley).

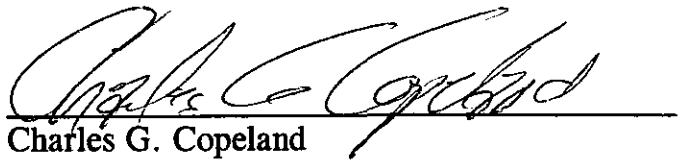
6. John D. Cosmich, Michael D. Simmons, and LaKeysha Greer Isaac of Cosmich Simmons Brown, PLLC (counsel for Valley).

7. Clyde L. "Chaney" Nichols, III, Esq., Matthew Taylor, Esq., and Blayne T. Ingram, Esq. of Scott, Sullivan, Streetman & Fox, P.C. (trial counsel for Valley).

8. John E. Galloway, Esq. of Galloway, Johnson, Tompkins, Burr & Smith (trial counsel for Valley).

9. The Honorable Isadore W. Patrick (trial judge).

Respectfully submitted,



Charles G. Copeland
Attorney of record for Appellant

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STATEMENT OF THE ISSUES

I. When a party dies during pending litigation, a proper party must be substituted within 90 days after a suggestion of death is filed, or else the case must be dismissed. Robert Eastman died before judgment was entered, and a suggestion of death was filed; but rather than move to substitute a proper party, the would-be successors asked instead to substitute a nonexistent estate. Must this case be dismissed, and was the judgment void?

II. In a product-liability case, the supplier of the product has no duty to warn if it has reason to believe that the employer purchasing the product for its employees' use is a sophisticated user aware of the dangers. Mississippi Valley Silica Company, Inc. provided sand to Eastman's employer, a large shipbuilding company which testimony showed knew or should have known of the dangers of silica dust in sandblasting. Did the trial court err in refusing even to instruct the jury on the sophisticated-user defense?

III. Section 85-5-7 of the Mississippi Code requires the jury to allocate fault to "each party" alleged by either side to be at fault. Here, the trial court refused a jury verdict form that listed each party whom the defense argued to be at fault, and instead gave the jury the choice of allocating fault to Mississippi Valley Silica Company, Eastman, or "Others." Was this failure to properly instruct the jury reversible error?

IV. Besides the failure of Eastman's employer to warn him sufficiently or provide safe equipment, Eastman was also harmed by sand from other suppliers and by manufacturers of inadequate safety equipment. Given that he used Valley's sand for only 54% of his career, and at the same time suffered from the negligence of his employer and of those safety-equipment manufacturers, is a 60% allocation of fault to Mississippi Valley Silica Company against the overwhelming weight of the evidence?

V. Because Eastman died before judgment was entered, his suit became a survival action, where the available damages are limited to those incurred during his lifetime. Yet the jury was asked to award actual damages only for his future medical care; no proof was offered of past medical expenses. Was it error for the trial court to enter judgment on this $1.6 million award for damages that the deceased Eastman never could possibly incur?

VI. The trial court allocated to Mississippi Valley Silica Company 60% of the jury's award of $3 million in noneconomic damages, then reduced that to $1 million, the maximum under the statutory damage cap. Was it erroneous as a matter of law for the trial court to use this method rather than to impose the cap on the award first and then allocate 60% of the $1 million?

VII. Do the foregoing issues amount to cumulative error?

VIII. Alternatively, do the foregoing issues demonstrate that a remittitur is proper?

STATEMENT OF THE CASE

I. Course of Proceedings Below

In May 2007, Plaintiff Robert Eastman, Sr. ("Eastman") filed suit against 32 named defendants, including Mississippi Valley Silica Company, Inc. ("Valley"). R.E. 2 (Complaint) at R.23.[1] He alleged damages arising from "exposure to respirable crystalline silica while working as a sandblaster at Letourneau in Vicksburg, Mississippi from 1963 to 1991." R.E. 2 at R.24.

The matter was tried before a jury on November 2-6 and 9, 2009 in Warren Circuit Court (Patrick, J.), with only two of the original 32 defendants going to trial, Valley and American Optical Corporation. R.E. 3 at T.4. After all witnesses for both sides had testified, American Optical settled the claim against it, leaving only Valley. R.E. 3 at T.1002-04. On November 9, the case went to the jury, which on that same day returned a $4.6 million verdict for Eastman, allocating 60% fault to Valley, 0% to Eastman, and 40% to unnamed "Others." R.E. 4 at R.5005A-5005C. Punitive damages were then considered by the jury, which awarded an additional $3 million. R.E. 3 at T.1110-11. Because Valley has zero net worth, the punitive award was reduced to zero, and final judgment was entered for Eastman on April 14, 2010 for $1.96 million. R.E. 7 at R.5289-90.

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[1]Court papers are cited as R.___; the trial transcript as T.___. References to the Record Excerpts for Appellant are by tab number (R.E.__).

Before entry of judgment, however, Eastman had died on February 8, 2010, aged 67. R.E. 6 at R.5343. A suggestion of death was filed and served by Valley on February 16. R.E. 5 at R.5273. In the name of the deceased plaintiff, a motion to substitute was served on February 22, 2010, alleging that counsel was "in the process of opening an estate for Robert Eastman." R.E. 6 at R.5343. No executor or administrator was named in that pleading, and none was ever substituted—not by the time of judgment, not by 90 days after the suggestion of death was filed, and not before this appeal was filed.[2] Judgment was thus entered for a deceased party.

Valley timely filed a Rule 59 motion seeking judgment notwithstanding the verdict, a new trial, or remittitur (and drawing the trial court's attention to the issue of Eastman's demise). These motions were denied on May 6, 2010. R.E. 8 at R.5398. A notice of appeal was timely filed on June 4, 2010. R.5477.

On August 23, 2010, Eastman's wrongful-death beneficiaries filed a wrongful-death suit against Valley and six other defendants. *Eastman v. S. Silica of La.*, No. 10,0129-CI (Warren Circuit Ct.) (Chaney, J.). That suit is pending as of the filing of this brief.

II. Relevant Facts

According to the complaint filed by Eastman,

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[2]By virtue of checking the online docket for this Court, Valley learned that a motion to substitute party was filed in this Court on June 30, 2011, of which more below.

> Plaintiff worked in various industries and **trades that are known by the Defendants to result in increased exposures to silica**. These trades may include, but are not limited to, **abrasive blasting, construction, ship yards, and other heavy industries throughout the United States**. Plaintiff's jobs and tasks required Plaintiff to engage in activities known by the Defendants to produce high levels of respirable silica or work in environments that contained high levels of respirable silica. These tasks may have included, but are not limited to, abrasive blasting, and raw materials handling. Plaintiff's jobs caused him to be exposed to silica from silica containing products, products that produce silica or products that cause the release of silica into the environment.

R.E. 2 at R.37 (emphasis added). Missing from the list of Defendants, and thus from those supposed to partake of this general knowledge about "increased exposure to silica," etc., was Eastman's employer for 28 years, Marathon LeTourneau ("LeTourneau"), the business engaged in said "abrasive blasting and construction" at its Warren County facility.

Valley sold "Valco"-brand sand to LeTourneau and other companies for use in sandblasting. R.E. 3 at T.486, 488. Valley's former president, Frank Bogran, testified that he became aware around 1972 that silicosis could result from the tiny silica particles created in the sandblasting process. R.E. 3 at T.491-92. Valley placed a warning on its bags of sand and dray-tickets around this time, advising buyers that failure to use proper equipment with the sand could endanger one's health. R.E. 3 at T.496. In Bogran's opinion, the sand itself was dangerous only if blasted into microparticles without proper safety equipment. R.E. 3 at T.503-04. Eastman's expert

witness Dr. Edward Karnes agreed: "I mean, you can douse yourself in this stuff and it's not going to create silicosis. It's when you break it up, and abrasive blasting is the most obvious way of breaking it up," that the potentially harmful silica dust is created. R.E. 3 at T.411-12 (punctuation amended). Bogran believed that entities like LeTourneau should have been aware of the dangers they created by blasting the sand and should have taken safety measures accordingly. R.E. 3 at T.504-05.

Naturally, Eastman produced fact and expert witnesses who disagreed with Bogran and Valley, and who claimed that Valley should have provided highly detailed warnings about all the specific hazards associated with vaporizing sand particles and then breathing the vapor, listed the specific safety equipment to be used, *etc.* T.194-765 *passim.* It was never explained how the perils of sandblasting were supposed to have been apparent and obvious to Valley and to other companies selling sand or filters, but not to LeTourneau, the company doing the sandblasting.

Born in 1942, Eastman was a few weeks shy of his 21st birthday when he went to work for LeTourneau in 1963. R.E. 3 at T.700, 702. His work included sandblasting or being active in areas where sandblasting occurred. R.E. 3 at T.702-05. On at least one occasion, LeTourneau had him sandblasting indoors for about six weeks with very poor ventilation. R.E. 3 at T.730-33. Eastman's complaints to LeTourneau about the lack of adequate safety equipment were met with threats that if he "didn't want to use that hood they would get somebody else." R.E. 3 at T.741. He claimed he "mostly"

used Valco sand from 1963 to 1978. R.E. 3 at T.711. He almost never was provided an air-feed hood at work (i.e., a hood with a supply of fresh air, rather than one that simply attempts to filter the ambient air). R.E. 3 at T.713-14, 743-46.[3]

At trial in November 2009, Eastman testified to shortness of breath, though he did not specify when this began. R.E. 3 at T.719-20. He admitted seeing Valley's warnings that its sand could be hazardous to his health, but since the bags didn't say that the sand might kill him, he didn't change jobs or seek better protection. R.E. 3 at T.725-26. Eastman admitted to smoking cigarettes and to having filed asbestos lawsuits as well, alleging damage to his lungs from asbestos. R.E. 3 at T.756. He testified he was diagnosed with asbestosis. R.E. 3 at T.762. He agreed that he used safety equipment manufactured by Defendants Pulmosan, Pangborn, Clemco, Empire, and Mine Safety Appliances as well as by American Optical. R.E. 3 at T.758-59. He also used sand from Clark, Quick Creek, Custom Aggregates, and Southern Silica. R.E. 3 at T.764.

At trial, it was Valley's theory—on opening, motion for directed verdict, and closing—that LeTourneau had to have known that its negligence endangered workers like Eastman, and that as the employer who ordered them to sandblast using silica without adequate safety measures, LeTourneau bore most or all of the responsibility

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[3]Eastman's deposition testimony was that LeTourneau told him an air-feed hood for him would cost too much money, though at trial, Eastman professed not to recall that explanation. R.E. 3 at T.746-47.

for any resulting damages. R.E. 3 at T.187, 188-89, 1006-09, 1065-69. Despite this, the trial court denied Valley the opportunity to instruct the jury on its "sophisticated user" defense and denied Valley a jury form that would have allowed the jury to allocate fault specifically to LeTourneau, as will be seen in the Argument below.

On closing, Eastman's counsel asked the jury to find Valley to be 60% at fault. R.E. 3 at T.1059. It did so. The jury awarded $1.6 million in actual damages and $3 million in noneconomic damages. The trial court entered judgment against Valley for 60% of the $1.6 million in actual damages (60% x $1.6 million = $960,000). On the noneconomic damages, the court did not apply the statutory cap (Miss. Code Ann. § 11-1-60(2)(b)) until *after* allocating 60% of the $3 million award to Valley. As a result, Valley was held liable for the maximum $1 million: 60% x $3 million = $1.8 million, which was then capped at $1 million. The total judgment was thus for $1.96 million ($960,000 actual + $1 million noneconomic = $1.96 million), from which Valley now appeals.

Further facts pertinent to specific issues will be set forth in the Argument.

SUMMARY OF THE ARGUMENT

The most prominent error below is the one reflected on the cover of this brief: there is no Appellee in this case. Eastman died before entry of judgment, and no timely substitution of plaintiff was made prior to judgment. M.R.C.P. 25(a)(1) requires substitution of a proper party within 90 days of a suggestion of death, on pain of dismissal, but no proper party was substituted; counsel offered only a nonexistent, unopened "estate." Dismissal was thus required by Rule 25, and the judgment entered for a deceased person was void.

Alternatively, the trial court committed reversible error on several issues requiring a new trial, including denial of a jury instruction that would have presented Valley's "sophisticated-user" theory of the case. Evidence at trial showed that Eastman's employer, LeTourneau, knew or should have known of the hazards in pulverizing sand into silica dust, but Valley was not permitted to present this theory to the jury—a theory that could have resulted in a defense verdict.

Valley's theory of the case was also frustrated by the trial court's refusal to allow a verdict form that would have let the jury allocate fault to "each party" alleged to be at fault, as § 85-5-7 requires. Instead, the jury could allocate fault only to Valley, Eastman, or unspecified "Others," in violation of the letter and spirit of § 85-5-7 as interpreted by this Court in *Estate of Hunter*.

Presented with that form, the jury went on to allocate 60% of the fault to Valley, despite Eastman's having used Valley sand for only 54% of his sandblasting career, despite the evidence of other defective safety products contributing to his exposure, and despite LeTourneau's negligence. This excessive allocation is against the overwhelming weight of the evidence and calls for a new trial.

The judgment itself was legally erroneous as to Eastman's actual damages, because the only economic damages Eastman sought from the jury were for future medical expenses, most prominently a double-lung transplant, and Eastman's death before entry of judgment made those alleged future medical expenses irrelevant: the $960,000 awarded as actual damages should have been zero.

Likewise, the trial court erred as a matter of law when it apportioned 60% of the noneconomic damages to Valley *before* applying the § 11-1-62(2)(b) cap, resulting in Valley's paying the full amount allowable by law despite having been held 60% at fault. Both that statute and § 85-5-7 require first applying the cap and then apportioning the legally allowable damages, because the cap is on the award to the plaintiff, not on the amounts payable by defendants.

The foregoing errors support reversal all the moreso when considered cumulatively. Valley's defense was so hamstrung that it did not receive a fair trial.

Alternatively, computing the damages correctly, the total judgment should have been for only $600,000, and remittitur to this amount would be proper.

ARGUMENT

Questions of law are reviewed de novo by this Court on appeal. *Madison HMA, Inc. v. St. Dominic-Jackson Mem'l Hosp.*, 35 So. 3d 1209, 1215 (Miss. 2010).

A judgment as a matter of law (or judgment notwithstanding the verdict, JNOV) must be granted, and its denial is reversible error, where the evidence is legally insufficient to allow the verdict:

> The standard of review in considering a trial court's denial of a motion for judgment notwithstanding the verdict is de novo. The trial court must view the evidence in the light most favorable to the non-moving party and **look only to the sufficiency, and not the weight**, of that evidence. * * * When determining whether the evidence was *sufficient*, the critical inquiry is whether the evidence is of such quality that reasonable and fairminded jurors in the exercise of fair and impartial judgment might reach different conclusions.

Poole ex rel. Poole v. Avara, 908 So. 2d 716, 726 (Miss. 2005) (citations omitted & boldfacing added). The evidence is "legally sufficient" only if there is substantial evidence to support the verdict. *Johnson v. St. Dominic-Jackson Mem'l Hosp.*, 967 So. 2d 20, 22 (Miss. 2007). "Substantial evidence is much more than conjecture, speculation, or suspicion." *Miss. State Bd. of Examiners for Social Workers & Marriage & Family Therapists v. Anderson*, 757 So. 2d 1079, 1086 (Miss. Ct. App. 2000).

A new trial is proper where the verdict is against the overwhelming weight of the evidence, or where other considerations dictate a new trial:

> A new trial may be granted in a number of circumstances, such as when the verdict is **against the overwhelming weight of the evidence**, or **when the jury has been confused by faulty jury instructions**, or when the jury has departed from its oath and its **verdict is a result of bias, passion, and prejudice**.

Poole, 908 So. 2d at 726 (quoting *Shields v. Easterling*, 676 So. 2d 293, 298 (Miss. 1996)) (emphasis added). Insofar as the weight of the evidence is concerned, the trial court should order a new trial when "convinced that verdict was contrary to the substantial weight of the evidence so that justice requires that a new trial be granted." *Id.* (citation omitted).

I. Failure to Substitute a Proper Party for the Deceased Plaintiff Required Dismissal.

This Court need not reach the issue of a new trial, because this case should have been dismissed for failure to substitute a proper party after Eastman's death.

A. No Proper Party Was Offered in Substitution.

Valley filed its suggestion of death on February 16, 2010, two days after Eastman's funeral. R.E. 5 at R.5273, 5275. In response, rather than a motion to substitute some party actually in existence, "Plaintiff" moved to substitute an estate that had not been created yet and thus did not even exist. R.E. 6 at R.5343.[4] No motion was filed to substitute a real and existing party for Eastman, who has now been deceased

[4]Although sent to counsel, the February 23, 2010 motion to substitute does not seem to appear on the trial court docket. R.E. 1 at R.20-21. Arguably, it was thus never submitted to the trial court. *See* M.R.C.P. 7(b)(1).

for well over a year. Nor does the record show any notice of hearing was served as also required by Rule 25(a)(1).

Rule 25(a)(1) mandates dismissal where no motion for substitution of a proper party is made within 90 days of the suggestion of death of the sole plaintiff:

> 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). "Shall" of course "means 'shall,' not 'shall sometimes.' " *Poindexter v. S. United Fire Ins. Co.*, 836 So. 2d 964, 971 (Miss. 2003) (construing M.R.C.P. 15(a)).

The 90 days set by Rule 25(a)(1) ran on May 17, 2010. In that time, Eastman served a supposed motion to substitute, but this motion failed to name a party that *actually existed*.[5] This was no better than if Eastman had moved to substitute the Tooth Fairy. The rule allows only substitution of "the *proper* parties" (emphasis added). Not just any party may be substituted under Rule 25(a)(1) and Miss. Code Ann. § 91-7-237, but only the executor or administrator of the deceased plaintiff's estate. *See Roxas v.*

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[5]The motion also sought additional time under Rule 6(b), but the record does not show that the trial court ever granted this relief. Parties who fail to obtain a ruling on a motion are deemed to have abandoned it. *Billiot v. State*, 454 So. 2d 445, 456 (Miss. 1984).

Marcos, 969 P.2d 1209, 1238-39 (Haw. 1998) (discussing majority rule); *Madison v. Vintage Petroleum, Inc.*, 872 F. Supp. 340, 342-43 (S.D. Miss. 1994) (applying federal Rule 25). Lack of diligence in the appointment of an administrator is a basis for dismissal. *Ashley v. Ill. Cent. Gulf R.R. Co.*, 98 F.R.D. 722, 724 (S.D. Miss. 1983) (applying federal Rule 25). *Cf. Fletcher v. Limeco Corp.*, 996 So. 2d 773, 779 (Miss. 2008) (finding federal district courts' construal of parallel federal Rule 5 "highly persuasive").

One cannot be "the administrator of a non-existent estate." *Burley v. Douglas*, 26 So. 3d 1013, 1019 (Miss. 2009) (no standing to file wrongful-death suit as personal representative) (quoting *Delta Health Group, Inc. v. Estate of Pope*, 995 So. 2d 123, 126 (Miss. 2008)). The same logic that rejected standing to file suit in *Burley* and *Estate of Pope* should apply equally to whether one has standing to be substituted in a survival action. Other courts have noted that a non-existent estate cannot be substituted as a party under Rule 25. *Noetzel v. Hudson*, 2001 WL 1288681, at *3 (Ohio Ct. App. Oct. 25, 2001); *Walden v. John D. Archibold Mem'l Hosp., Inc.*, 398 S.E.2d 271, 274-75 (Ga. Ct. App. 1990), *disapproved on other grounds*, *First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc.*, 655 S.E.2d 605, 609 (Ga. 2008).

"Plaintiff" never stated any reason why an estate could not be opened within the 90 days set by Rule 25. No one entered any appearance in this suit as a party to be

substituted. On these facts, there was no excuse for the failure to move to substitute a *proper* party. The recent motion in this Court to substitute a putative administratrix does not suggest good cause for any delay; exhibit A thereto demonstrates that an order granting letters of administration was issued May 25, ***2010***, over one year ago, and *still* no letters of administration have issued. So long as Rutha Eastman "is not formally the Administratrix" (Motion at 1), she cannot act on behalf of the estate, under M.R.C.P. 25 or M.R.A.P. 43; there is no such thing as an informal administratrix. *See Burley*, 26 So. 3d at 1019-20 (distinguishing between petition for letters of administration and formal appointment). Nor would her belated substitution long after the 90 days ran from the suggestion of death change anything in this case. (The motion's claim that the trial court "would not rule on this motion due to the pendency of this appeal," besides being an unsupported avowal, also fails to note that the 90 days set by Rule 25 ran on or about May 17, 2010, well before this appeal was filed. *See also Madison*, 872 F. Supp. at 342 ("there is no administrator of the estate of a deceased person until one is qualified and appointed"); Robert A. Weems, *Miss. Wills & Estates* (3d ed. 1998), at § 2-1 (letters of administration "the document by which an administrator or administratrix is authorized by the court or other proper officer to have the charge and administration of the goods and chattels of an intestate").

A person without formal standing to represent an estate should be no more qualified to substitute for a deceased party than to file suit on a deceased party's behalf,

or to take any other legal action. *Cf. Clark Sand Co., Inc. v. Kelly*, 60 So. 3d 149, 155-56 (Miss. 2011) (no standing to file suit). In short, the June 30, 2011 motion is too little, too late. (See also Valley's response filed in this Court opposing the motion.)

While this Court may not have seen such a lack of diligence since Rule 25 was adopted, the United States Supreme Court, applying the similar federal Rule 25, had no compunction in adhering to the mandatory language of the rule. *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947).[6] This Court should do no less. When the 90 days ran, the trial court, still having jurisdiction, was required to dismiss the suit. Rule 25 "directs the court to dismiss the action if substitution has not been made within that time. That is action required of the court, not of a party." *Anderson*, 329 U.S. at 486.

Therefore, for failure to move for substitution of a proper party, this case should have been dismissed under Rule 25(a)(1). It was reversible error for the trial court not to do so. This Court should reverse and render on that basis. Dismissal, while ordinarily without prejudice under Rule 25(a)(1), should be with prejudice in this case as there is no question the statute of limitations has run. *Cf. Johnson v. Rao*, 952 So. 2d 151, 158 (Miss. 2007) (dismissal with prejudice under Rule 12 proper where limitation period had run).

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[6] *Anderson* even held that no additional time could be granted under Rule 6(b), but the federal rules were later amended, and that later understanding is reflected in the comment to Mississippi's Rule 25. The mandatory nature of the language, however, remains the same.

B. Judgment for a Dead Person Is a Nullity.

Because no substitution was ever made, final judgment was entered in the name of Robert Eastman, Sr. R.E. 7. That judgment was a legal nullity:

> Nearly 150 years ago, this Court ruled, in the case of Gerault v. Anderson, 1 Miss. (Walker) 30 (1818), '*that on the death of the party his interest ceases, and the jurisdiction of the court ceases also.*' (Emphasis added).
>
> In Parker v. Horne, 38 Miss. 215 (1859), this Court held that **a judgment against a dead person is a nullity**. Over the years this Court has consistently so ruled every time the question has arisen. See Tarleton v. Cox, 45 Miss. 430 (1871), and Young v. Pickens, 45 Miss. 553 (1871).

Wells v. Roberson, 209 So. 2d 919, 922 (Miss. 1968) (boldfacing added). The trial court lacked any discretion in the matter, and was bound to set aside the judgment (which it should never have entered). *See Overbey v. Murray*, 569 So. 2d 303, 306 (Miss. 1990). This Court should correct the trial court's error. The judgment below was and is void, and must be set aside.

II. It Was Reversible Error to Deny Valley Its Requested Jury Instruction on the "Sophisticated-User" Defense.

Consistent with its theory of the case, Valley asked the trial court to instruct the jury as follows:

> 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 at R.5005 (instruction MVS-8). The trial court denied the instruction. R.E. 3 at T.1024-26. Thus, Valley was denied the opportunity to go to the jury with a theory central to its defense, namely that Eastman's employer, LeTourneau, knew or should have known the dangers of sand in the workplace, so that there was no legal duty for Valley to warn Eastman directly.

Substantial evidence was before the jury to support that instruction. One of Eastman's own experts, Dr. Edward Karnes, admitted that national safety standards requiring air-feed hoods for sandblasters were published in 1938 and 1959. R.E. 3 at T.413. Despite Dr. Karnes's wriggling as to whether the employer or Valley was "in the best position" to warn Eastman, his testimony furnished sufficient evidence for the jury to find that LeTourneau knew or should have known that the sandblasting it required of its employees could and did place harmful particles in the air which could cause them serious harm.

Dr. David Anderson testified that government standards required the employer to "know about the hazards of that dangerous product," silica. R.E. 3 at T.919. He agreed that the employer "can't go back and say: We didn't know. I'm not sophisticated enough. I don't know." R.E. 3 at T.919-20.

Dr. Ronald Gots also testified for the defense, stating that the perils of sandblasting were known no later than the 1930s. R.E. 3 at T.807. Legislation requiring air-feed hoods for sandblasters in certain professions was enacted in 1959.

R.E. 3 at T.809. Dr. Gots opined that LeTourneau, a large employer of over 2,400 people, "had to know" about the necessity for air-feed hoods by the time Eastman became its employee. R.E. 3 at T.813-14, 848-49. He based that opinion in part on deposition testimony from officers of the employer. R.E. 3 at T.813. There was no question, based on Eastman's own testimony, that LeTourneau did not provide the necessary protections. R.E. 3 at T.815. Even after 1971 when air-feed hoods were legally required, LeTourneau did not provide them. R.E. 3 at T.848.

Dr. Gots noted the testimony of one supervisor who

> . . . had as many as 20 people in his crew and he would have 4 air-supplied respirators for them. So, I guess, 4 out of the 20 would be properly protected and the other 16 wouldn't. So they knew but the[y] just didn't do it.
> Q. **They didn't have a lack of knowledge, did they?**
> A. **It didn't appear to be**. They bought some air-supplied respirators.
> Q. They didn't have a lack of knowledge, they had a lack of air-feed hoods?
> A. **Or indifference for their workers**. . . .

R.E. 3 at T.815-16 (emphasis added).

Given this testimony, it was reversible error for the trial court to deny Valley the opportunity to instruct the jury on an important defense that, if accepted by the jury, would have insulated Valley from any liability in this case. Under settled Mississippi law, a party has a right to present its theory of the case if the evidence supports it. *Tharp v. Bunge Corp.*, 641 So. 2d 20, 27(Miss. 1994).

The sophisticated-user defense is the same as the learned-intermediary defense, though the latter term is more often used in product-liability suits involving pharmaceuticals. "Generally, the cases discussing the learned intermediary theory which do not involve prescription drugs involve products which have injured employees on the job and the manufacturer's reliance on the employer to warn the employee of the dangers of the product." *Swan v. I.P., Inc.*, 613 So. 2d 846, 852-53 (Miss. 1993). The "knew or should have known" language in the proffered instruction parallels the language of the Restatement (Second) of Torts, § 388. *Id.* at 852.[7] Mississippi's products-liability statute has a similar provision: the manufacturer is not liable for failure to warn if the danger "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). In the context of the evidence presented, instruction MVS-8 comported with § 11-1-63(e).

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[7]The Restatement includes two other elements that Eastman could not dispute: that the employer had no reason to believe Eastman knew of the dangers of silica particles, and that the employer failed to exercise reasonable care to inform Eastman of said danger. Thus, the jury instruction fairly stated the only disputed issue as regards this defense.

This Court will note that *Swan* was misinterpreted by the Fifth Circuit as requiring a positive duty for the manufacturer to warn the intermediary (here, the employer, LeTourneau). *Curtis v. M & S Petroleum, Inc.*, 174 F.3d 661, 675-76 (Miss. 1999). The Fifth Circuit misread the Restatement, correctly quoted in *Swan*, which states that the supplier must sufficiently warn the intermediary only if said supplier "has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition." *Swan*, 613 So. 2d at 852 (quoting Restatement (2d) § 388).

In numerous other cases involving sandblasting, the supplier of the sand has pleaded the sophisticated-user defense. *See, e.g., Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 741 (3d Cir. 1990) (cited in *Swan*); *Goodbar v. Whitehead Bros.*, 591 F. Supp. 552, 557 (W.D. Va. 1984). Both *Smith* and *Goodbar* in fact saw summary judgment granted for the sand supplier on that basis, whereas the present issue is merely whether a jury question existed—a much easier call. Many other cases from around the United States have reached similar holdings with regard to sand suppliers. *Haase v. Badger Mining Corp.*, 669 N.W.2d 737, 744-45 (Wis. Ct. App. 2003) (affirming directed verdict); *Damond v. Avondale Indus., Inc.*, 718 So. 2d 551, 552-53 (La. Ct. App. 1998) (reversing denial of summary judgment); *Beale v. Hardy*, 769 F.2d 213, 214-15 (4th Cir. 1985) (affirming summary judgment).

Valley provided plain old harmless bags of *sand* to Eastman's employer. As Eastman's own expert conceded, it was only in the use of that sand for blasting that an innocuous substance was transformed into potentially lethal particles. R.E. 3 at T.411-12 ("you can douse yourself in the stuff [as supplied by Valley] and it's not going to create silicosis"). Based on the testimony of Drs. Karnes and Gots, there was at the very least a jury question whether Valley had any reason to believe that a shipbuilding company like LeTourneau would be oblivious to the widely-publicized dangers of silicate microparticles.

Because there was sufficient evidence before the jury that it could have found LeTourneau knew or should have known of the dangers and should have warned Eastman accordingly, the trial court erred in denying instruction MVS-8. Valley was denied its right to have the jury consider a defense supported by the evidence. The trial court's ruling "eviscerated the defense" and was reversible error. *Blake v. Clein*, 903 So. 2d 710, 720 (Miss. 2005). A new trial is necessary.

III. The Trial Court Must Be Reversed for Allowing the Jury to Allocate Third-Party Fault Only to Unnamed "Others."

As we've seen, Valley's defense in this case rested in large part on the fact that Eastman's long-term exposure to silica was owing to many parties other than Valley. Eastman and his own experts testified that other parties provided sand or inadequate hoods/respirators. R.E. 3 at T.408-09, 650-652, 758-59, 764. The evidence presented at trial also showed that Eastman's employer, LeTourneau, never provided him with an air-feed hood despite his requesting one and despite legislation requiring air-feed hoods, and indeed was categorically negligent the entire time he worked there. R.E. 3 at T.741-46. Moreover, the manufacturer of a respirator used by Eastman, American Optical, was a defendant during the presentation of Eastman's case in chief, and thus the jury heard considerable evidence of its alleged fault.

It was crucial to Valley's defense that it be afforded its right under Miss. Code Ann. § 85-5-7 to have fault allocated against those parties, particularly LeTourneau and

American Optical. The trial court denied Valley that right when it refused Valley's proposed verdict form, which would have included parties who, according to Eastman's own experts and Eastman himself, were potentially at fault. R.E. 10 at R.5008-09. Instead, the trial court left the jury to allocate fault between Valley, Eastman, and unspecified "Others." R.E. 4 at R.5005B.

At trial, Valley objected to this procedure, only to be overruled by the trial court:

> You have the line items listed by other possible person at fault or company at fault. They [Eastman] just say others. I think in this case, since there was—we started the trial with two defendants, that were named, and now we're down to one. . . . The only thing they [the jury] need to know, was there, if any, they are assigning fault to Mississippi Valley.

R.E. 3 at T.1014, 1018. In so doing, the trial court erred by failing to honor § 85-5-7(5): "In actions involving joint tort-feasors, the trier of fact *shall* determine *the* percentage of fault for *each party* alleged to be at fault without regard to whether the joint tort-feasor is immune from damages" (emphasis added). If the jury *shall* determine *the* percentage of fault for *each party*, then lumping other parties into "others" does not allow *the* percentage for *each* party to be ascertained.

This Court interpreted § 85-5-7(5) in its landmark *Estate of Hunter* decision:

> ... § 85-5-7(7)[8] provides that the trier of fact should allocate fault to **each party** "alleged to be at fault." 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**. This State's system of civil justice is based upon the premise that **all parties to a lawsuit should be given an opportunity to present their versions of a case to a jury**, and the interpretation of § 85-5-7 urged by the plaintiffs would seriously infringe upon a defendant's rights in this regard in many cases.

Estate of Hunter v. Gen. Motors Corp., 729 So. 2d 1264, 1273-74 (Miss. 1999) (emphasis added). This Court thus held that "the term 'party,' as used in § 85-5-7(7), refers to *any participant* to an occurrence which gives rise to a lawsuit, and not merely the parties to a particular lawsuit or trial." *Id.* at 1276 (emphasis added).

Therefore, § 85-5-7(5) applies to parties against whom fault was argued at trial, whether parties to the lawsuit or not. The trial court's concern about being "down to one" defendant in the actual trial was beside the point. And the language of § 85-5-7(5) is clear that "each party" must be separately considered in fault allocation. "[T]he 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." *Estate of Hunter*, 729 So. 2d at 1273 (emphasis added).

Were this Court to affirm the trial court's verdict form, the future harm would not only be to defendants. Plaintiffs are entitled to insist that the jury allocate fault to

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[8]At the time, subsection (7) read as subsection (5) does now. The statute was amended in 2004 and the subsections renumbered accordingly. Miss. Laws 2004, 1st Ex. Sess., Ch. 1, § 6.

third parties only as it's supported by the evidence. If the jury is allowed to assign fault to mere "others," then who can say what "others" the jury had in mind and whether the assignment of fault was supportable?

The use of "others" on the verdict form left the jury unclear as to whom it could allocate fault—arguably contributing to the unsupportable allocation of 60% against Valley alone, which we will show in issue IV below to be grossly contrary to the overwhelming weight of the evidence. It did not satisfy the statutory requirement for allocation against "*each* party" for whom there was evidence supporting a verdict, and *only* to such parties. Certainly, given that the jury's finding of 60% against Valley was inconsistent with the evidence, it appears that Valley was prejudiced by the failure to include the other parties against whom fault was shown, not least LeTourneau.

This Court should thus reverse and remand for a new trial in which the jury will be properly instructed to allocate fault to "each party" against whom evidence of fault is presented.

IV. Allocation of 60% Fault to Valley Was Against the Overwhelming Weight of the Evidence.

Unsurprisingly, given the defective verdict form, the jury simply entered 60% against Valley as urged by Eastman at closing. However, the evidence at trial showed that Eastman was exposed to sand for 28 years, 1963-91. R.E. 3 at T.711. Eastman's own testimony was that he used Valley sand no later than 1978. R.E. 3 at T.712. He

admitted using "Clark and Quick Creek" sand as well. R.E. 3 at T.713. Further, one of Eastman's experts, Dr. Vernon Rose, testified that the American Optical respirators that Eastman did wear would have contributed to his sand exposure. R.E. 3 at T.613-14.

Eastman's own expert implicated other sand suppliers: Dr. Karnes conceded that Eastman used sand from four other companies. R.E. 3 at T.408. He conceded that those four suppliers' warnings were as inadequate as he alleged Valley's to be. R.E. 3 at T.408-09, 410.

Nor did the proof at trial support Valley's bearing sole liability for the 54% of Eastman's years of sand exposure during which Valley sold sand that Eastman could have used, given that his employer, LeTourneau, was the *sole* party actually telling Eastman to pulverize harmless sand into deadly microparticles. R.E. 3 at T.713-14. Eastman's own testimony provided damning evidence that LeTourneau never provided the necessary safety equipment or education to protect him from silica dust. R.E. 3 at T.741, 752-53. For Valley to bear *more* liability than LeTourneau (whose fault—*if the jury even considered it*—was figured in with the 40% allocated to "Others") is simply staggering, and contrary to what any reasonable juror could infer from the evidence.

On those facts, even 54% liability for the time during which Eastman could have used Valley sand is "so contrary to the overwhelming weight of the evidence that to allow it to stand would constitute an unconscionable injustice." *Poole*, 908 So. 2d at

726. Yet the jury in this case, inadequately instructed by an improper verdict form, held Valley to be 60% at fault. That is simply not possible based on the testimony of Eastman's own witnesses and of Eastman himself.

Therefore, a new trial should be granted.

V. No Economic Damages Survived Eastman's Death.

Judgment as a matter of law should have been granted as to Eastman's economic damages. The only economic damages offered at trial were for future care and medical treatment. "Actual amount of damages?" asked his counsel during closing: "Two point one million. Two point one million was what we put forth proof that he is more probable than not to suffer from *in the future* and in order *to be able to sustain himself.*" R.E. 3 at T.1061 (emphasis added). In other words, future care and medical treatment, as set forth at trial exhibit 9 (life care plan), whose "total *projected* costs" of $2,123,812.43 were the evident source for the $2.1 million figure stated by Eastman's counsel in closing.

Upon the demise of Eastman, his suit automatically became a survival action. Eastman's death rendered the actual damages moot, so that judgment should not have been entered for "projected care" damages that Eastman will never incur. Mississippi's survival statute provides only for "personal injury suffered by [a plaintiff] during his lifetime." *Wilks v. Am. Tobacco Co.*, 680 So. 2d 839, 843 (Miss. 1996). It cannot

support an award for future medical expenses that, at time of the entry of judgment, the trial court knows will never be incurred due to the plaintiff's death. This position accords with the Restatement (Second) of Torts, § 926: "the death of the injured person limits recovery for damages for loss of impairment of earning capacity, emotional distress and *all other harms*, to harms suffered before the death" (emphasis added). The trial court erred in entering judgment allowing actual damages that will never be incurred due to Eastman's prejudgment death, and in denying Valley's Rule 59 motion. This Court should reverse and render on this issue.

VI. The Noneconomic-Damages Cap Must Be Applied Prior to Apportionment of Fault.

As a matter of law, the trial court also incorrectly calculated the allowable non-economic damages in the final judgment. Section 11-1-60(2) limits noneconomic damages to a $1 million cap. Although the trial court did apply the cap, it did so only *after* allocating 60% fault against Valley. Therefore, instead of being liable for 60% of $1 million in noneconomic damages (60% x $1 million = $600,000), Valley was allocated 60% of $3 million (60% x $3 million= $1.8 million), which was then reduced to $1 million based on the cap. R.E. 7 at R.5289-90. Valley moved for application of the cap and included a proposed judgment that applied the cap correctly, which was denied. R.5074, 5101. After the judgment was entered with the incorrect

calculation of the noneconomic-damages award, Valley included that issue in its Rule 59 motion, thus preserving the error. R.5332.

The trial court's method was erroneous because, according to the statute, the cap on noneconomic damages is not applied to each defendant. Rather, it limits the "award" to the plaintiff. Miss. Code Ann. § 11-1-60(2)(b). This Court stressed that language in holding that the cap applies to "noneconomic damages recoverable by 'the plaintiff.' " *Estate of Klaus v. Vicksburg Healthcare, LLC*, 972 So. 2d 555, 559 (Miss. 2007).[9] In the present case, the jury found the total noneconomic damages "recoverable" to be $3 million. It is *that* amount which should have been reduced to $1 million per the statutory cap, *before* the trial court allocated 60% of the noneconomic damages to Valley.

The Colorado Supreme Court has interpreted its own state's very similar damages cap in the manner advocated here: first apply the cap to the jury award, then apportion the capped award according to a party's allocation of fault. *Garhart v. Columbia/Healthone, LLC*, 95 P.3d 571, 591-92 (Colo. 2004).

Logic requires this method of computation. Suppose that three defendants had been in the case, not just Valley, and the trial court had allocated fault equally on the $3 million award *before* imposing the cap. That would have resulted in an allocation of $1 million to each defendant—but what then? Either the plaintiff walks away with

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[9]*Klaus* concerned the medical-malpractice portion of the noneconomic damages cap, but the only difference is the amount of the cap.

$3 million despite the $1 million statutory cap, or else the trial court must engage in a *second* round of fault allocation. That makes no sense and has no foundation in law. Allocation based on percentage of fault should be done once, *after* the cap is imposed and the total "award" thus limited according to the statute.

Further, the fault-allocation statute also requires a cap-first computation. Because the statute provides for a maximum noneconomic-damages award of $1 million, a defendant should be required to pay only its own share of that total award, pursuant to § 85-5-7(2) (defendant "shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault"). The trial court's method turns § 85-5-7(2) on its head, making Valley liable for the maximum award of noneconomic damages allowable by law, even though the jury found that Valley was liable for only 60% of those damages.

Thus, this Court should reverse the trial court's award of $1 million in noneconomic damages and render a judgment for $600,000 on that element—that is, in the event that this Court does not grant a new trial, as argued above.

VII. Cumulative Error Requires a New Trial.

In the event that this Court finds error in some or all of the foregoing issues, but does not consider that any *single* error rises to the level of reversible error, Valley submits that the combined effects of these errors led to a patently unjust verdict of over

$4 million against it. *See Blake*, 903 So. 2d at 732 ("While any of these errors standing alone might not require reversal, the cumulative effect of errors deprived the defendants of a fair trial."). In particular, Valley's right to present its theory of the case was severely hindered without just cause or any legal basis. A new trial is therefore warranted, free of the errors cited above.

VIII. Alternatively, Remittitur Should Be Granted.

An alternative path to relief is for this Court to enter a remittitur as regards the erroneous awards of economic and noneconomic damages. Mississippi law provides that "an additur or remittitur may be ordered by the trial judge upon a finding that the jury verdict as to damages 'was influenced by bias, prejudice, or passion, *or* that the damages awarded were contrary to the overwhelming weight of credible evidence.' " *Dedeaux v. Pellerin Laundry, Inc.*, 947 So. 2d 900, 904 n.2 (Miss. 2007) (quoting Miss. Code Ann. § 11-1-55) (emphasis added).[10]

Given that, as shown above, judgment was entered on economic damages of $1.6 million that the deceased Eastman could never incur—given that Valley was improperly held liable for the maximum noneconomic damages available under the

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[10]*Dedeaux* quoted the statute's language to correct the erroneous line of cases holding that § 11-1-55 requires a threshold showing of "bias, prejudice, or passion" on the jury's part. *Cf. Odom v. Parker*, 547 So. 2d 1155, 1157 (Miss. 1989). In fact, as the word "or" in the quotation indicates, damages "contrary to the overwhelming weight of credible evidence" are an *independent* basis for remittitur, whether the jury was biased, etc., or not.

statutory cap despite its having been found "only" 60% at fault—*and* given that even this 60% figure was itself against "the overwhelming weight of the credible evidence"—a remittitur would correct at least some of the error in this wayward trial.

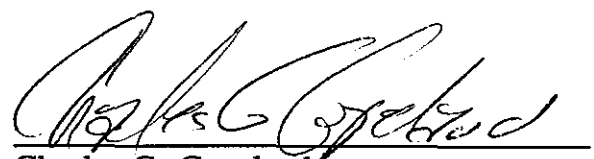
If this Court will not reverse and render, or remand for a new trial, then the $960,000 awarded for economic damages should be discarded, and remittitur should be ordered for the $600,000 in noneconomic damages properly allocable to Valley under the damage-cap statute. Six hundred thousand dollars for pain and suffering is more than sufficient on the facts of this case, as opposed to a jackpot of nearly $2 million against a defendant who sold a product conceded by Eastman's own experts to be harmless until LeTourneau converted it into a danger to its employees.

CONCLUSION

For all the reasons set forth above, 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 *7th* day of July, 2011.

MISSISSIPPI VALLEY SILICA COMPANY, INC.

By: 

Charles G. Copeland
Counsel for Appellant

Of Counsel:

Charles G. Copeland (MSB # [redacted])
Laurie R. Williams (MSB [redacted])
Andy Lowry (MSB # [redacted])
COPELAND, COOK, TAYLOR & BUSH, P.A.
Post Office Box 6020
Ridgeland, Mississippi 39158
Telephone: 601.856.7200
Facsimile: 601.856.7626

John D. Cosmich (MSB # [redacted])
Michael D. Simmons (MSB # [redacted])
LaKeysha Greer Isaac (MSB # [redacted])
COSMICH SIMMONS & BROWN, PLLC
Post Office Box 22626
Jackson, Mississippi 39225-2626
Telephone: 601.863.2100
Facsimile: 601.863.2100

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:

The Honorable Isadore W. Patrick
WARREN CIRCUIT COURT
Post Office Box 351
Vicksburg, Mississippi 39181-0351

R. Allen Smith, Jr., Esq.
THE SMITH LAW FIRM, PLLC
661 Towne Center Boulevard, Suite B
Ridgeland, Mississippi 39157

Timothy W. Porter, Esq.
Patrick C. Malouf, Esq.
John T. Givens, Esq.
PORTER & MALOUF, P.A.
Post Office Box 12768
Jackson, Mississippi 39236-2768

So certified, this the *7th* day of July, 2011.

Andy Lowry