IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2010-TS-01465

PHILLIPS 66 COMPANY et al. **APPELLANTS**

vs.

TROY LOFTON **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF JONES COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons 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. Defendant/Appellant, Chevron Phillips Chemical Company LP, successor-in-interest to ConocoPhillips Company f/k/a Phillips Petroleum Company and Phillips 66 Company formerly d/b/a Drilling Specialties Company ("CPChem").

2. Mr. Troy Lofton – Plaintiff/Appellee

3. Mr. Gregory N. Jones – Counsel for Mr. Lofton

4. Mr. J. Robert Sullivan – Counsel for Mr. Lofton

5. Mr. S. Robert Hammond, Jr. – Counsel for Mr. Lofton

6. Mr. J. Jeffrey Trotter – Counsel for CPChem

7. Mr. Holmes S. Adams – Counsel for CPChem

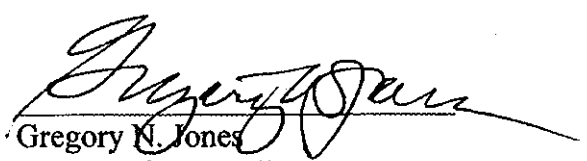
8. Mr. Alex E. Cosculluela – Counsel for CPChem

9. Mr. Bernard H. Booth IV – Counsel for CPChem

10. Mr. Terry L. Caves – Counsel for CPChem

11. Honorable Billy Joe Landrum – Circuit Court Judge

Signed on this the 24th day of August, 2011.



Gregory N. Jones
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STATEMENT OF ISSUES

1. Troy Lofton filed his claims well within the three-year statute of limitations. Mr. Lofton became aware of his disease in late 2003, when his treating physician informed him for the first time that he had asbestosis. *Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704, 709 (Miss. 1990).

2. The judgment in favor of Mr. Lofton on his design defect claim should be affirmed. Each of CPChem's following arguments fail:

   A. The inherent characteristic defense does not apply to CPChem's asbestos product, Flosal, which was capable of being and was defectively designed. *See McConnell v. Union Carbide Corp.*, 937 So.2d 147 (Ct. App. Fla. 2006); *Arena v. Owens-Corning Fiberglass Corp.*, 63 Cal. App. 4th 1178 (Ct. App. Cal. 1998).

   B. Flosal failed to function as expected.

   C. Evidence of a feasible alternative design was presented.

   D. Mr. Lofton's 20 years of exposure to CPChem's asbestos-containing product satisfied the "frequency, proximity and regularity" standard of *Gorman-Rupp*.

3. Mr. Lofton's claim for negligent infliction of emotional distress was supported by the evidence and is not subsumed by the Mississippi Product Liability Act ("MPLA").

4. CPChem received a fair and impartial trial; remand of the case for a new trial is inappropriate.

   A. Jones County is an appropriate venue. The *Bailey* factors support the trial court's denial of CPChem's motion to change venue.

   B. The Court did not err during the venire qualification and voir dire process.

   C. The testimony of Dr. Kenneth Cohen was sufficient to satisfy *Daubert/McLemore*.

   D. The trial court did not err in its treatment of Exhibit 950.

   E. CPChem waived its factual sufficiency argument related to the jury's allocation of fault. Nevertheless, the jury's verdict was not against the overwhelming weight of the evidence.

5. Remittitur is inappropriate in this case; the jury's verdict was based on and supported by the evidence.

STATEMENT OF THE CASE

This case stems from severe injuries sustained by Troy Lofton due to his 20 years of occupational exposure to Appellant CPChem's asbestos product, Flosal. This case was tried to a jury in March and April of 2010. After almost two weeks of testimony, the jury returned a verdict in favor of Mr. Lofton and assessed total damages in the amount of $15,200,000.00.[1] Thereafter, CPChem filed various post-judgment motions, to which Lofton responded, and the trial court denied.

CPChem manufactured, distributed, marketed, and sold the asbestos drilling mud additives that caused Troy Lofton's injuries. From November 1963 through 1984, CPChem, through a subsidiary named Drilling Specialties, sold 50-pound bags consisting of nearly 100% asbestos under the name Flosal for use on drilling rigs.[2] (Tr. 850:17-21). The 50-pound bags of Flosal, when rebranded by distributors, were also sold by CPChem under the trade name Visquik, IMCO Shurlift, and IMCO Best. (Tr. 851:12-852:2).

Troy Lofton began working on oil and gas drilling rigs in 1964. (Tr. 272:5-10). From 1964 to approximately 1984, Mr. Lofton worked with asbestos drilling mud additives. (Tr. 294:28-295:1). As detailed below, Mr. Lofton dumped 50-pound bags of the asbestos products sold by CPChem on a frequent and regular basis for 20 years. (Tr. 272:5-335:19).

Because of studies published in the 1920s, 1930s, 1940s, 1950s and 1960s, there is little doubt that companies like CPChem, in the business of selling asbestos, knew or should have known of the dangers from their products. (Tr. 701:3-706:4; 526:17-20). In fact, the evidence is

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[1] Following a slight reduction in the total economic damages, this number was reduced to $15,198,407.66 in the subsequent judgment entered by the Court.

[2] Citations to the Clerk's Record are designated "CR-___." Citations to Record Excerpts are designated "RE-____." Citations to the trial transcript are designated "Tr. ___." Unless otherwise designated, citations to Trial Exhibits are designated Px. ___ and Dx. ___, respectively.

clear that CPChem knew decades ago that those exposed to its products could get asbestosis, lung cancer and mesothelioma. (Px. 13; RE-6, Px. 17; RE-7, Px. 19; Px. 29; RE-9, Px. 36; RE-11, Px. 40; Px. 42; Px. 104). Sadly, workers at the rig level in the oil and gas drilling industry did not know of the dangers of asbestos during the years CPChem's products were on the market. (RE-3, Tr. 930:13-931:8). This is true for Mr. Lofton as well. (RE-1, Tr. 281:4-26, 306:15-307:15, 363:2-18, 364:14-23, 372:3-7, 373:7-19, 408:5-409:6, 409:14-24, 409:29-410:7).

Dr. Steven Stogner, Troy Lofton's treating physician, diagnosed him with asbestosis. (RE-2, Tr. 763:13-15, 769:25-772:6, 775:2-782:15, 787:27-788:15, 801:25-802:29, 809:26-812:12). An individual with exposure to asbestos generally does not develop the initial signs that later turn into asbestosis until between 15 and 30 years from his initial exposure. (Tr. 795:10-23). Over several decades, scarring builds up in the lungs due to a number of mechanisms in the body responding to the presence of asbestos fibers in the lungs. (Tr. 554:10-559:7). Mr. Lofton's asbestosis, a progressive disease, resulted in him having to begin using oxygen at night in 2005. (Tr. 268:7-20). He is now at the point that he is on oxygen 18 to 20 hours a day and has to be on oxygen any time he has to exert the slightest effort. (Tr. 324:18-20). If Mr. Lofton gets an infection, he will have to wear oxygen 24 hours a day and will be at a high risk of smothering. (RE-2, Tr. 811:20-812:12). Mr. Lofton's breathing problems will never improve. (*Id.*). His breathing problems will only get worse. (RE-2, Tr. 782:8-15).

Mr. Lofton's asbestosis has resulted in him being a "pulmonary cripple." (Tr. 593:11-17). His quality of life is greatly deteriorated. Mr. Lofton's asbestosis is very painful and a source of tremendous anguish to him. (Tr. 322:23-323:3). It is also a known fact that asbestos-exposed individuals have a significantly increased risk of getting lung cancer. In fact, an individual like Mr. Lofton, one with an asbestosis diagnosis, is much more likely to develop lung

cancer. (Tr. 556:9-13). As detailed below, Mr. Lofton has significant worry and fear of getting cancer, and this has greatly impacted his life. Additionally, Dr. Stogner testified that Mr. Lofton's life expectancy is reduced from what the average life expectancy is for a person of Mr. Lofton's age. (RE-2, Tr. 809:26-812:12).

SUMMARY OF THE ARGUMENT

In an asbestosis case, the statute of limitations begins to run when there is an asbestosis diagnosis and the plaintiff has knowledge of the injury or disease. *Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704 (Miss. 1990). In this case, Mr. Lofton was not diagnosed with asbestosis until late 2003, at the earliest; he timely filed his claim on May 19, 2004, well within the three-year statute of limitations.

Mr. Lofton proved the elements of his design defect claim. The inherent characteristic defense does not apply to this case. As other courts have already concluded, the asbestos manufactured in this case had an "intended design" and does not qualify as an inherent characteristic. *McConnell v. Union Carbide* Corp., 937 So.2d 148 (Ct. App. Fla. 2006); *Garza v. Asbestos Corp., Ltd.*, 161 Cal. App. 4th 651 (Ct. App. Cal. 2008); *Arena v. Owens-Corning Fiberglass Corp.*, 63 Cal. App. 4th 1178 (Ct. App. Cal. 1998). CPChem's Flosal product also failed to function as expected. It was not expected that CPChem's product would cause disease or injury to its users, but the product did, in fact, injure Mr. Lofton. Because Flosal caused Mr. Lofton's injury, contrary to its intended function, contrary to CPChem's design, and contrary to Mr. Lofton's expectations, the product failed to function as expected. Clear evidence of a feasible alternative design of Flosal was presented at trial from CPChem's own employee as well as from Mr. Lofton's expert. Finally, Mr. Lofton's 20 years of exposure to Flosal satisfied the "frequency, proximity and regularity" standard of *Gorman-Rupp*. Mr. Lofton detailed his work

history, his exposure to and use of Flosal, and described the conditions in which he worked with the product. Mr. Lofton's exposure to Flosal was more than sufficient to satisfy the standard in Mississippi.

Mississippi case law is clear that the MPLA does not abrogate common law negligence claims, and CPChem's argument to the contrary is simply incorrect. Additionally, Mr. Lofton provided ample evidence to support his negligent infliction of emotional distress claim, including manifestation of a disease, scientific evidence proving a rational basis for the fear, and evidence of emotional distress. *Brooks v. Stone Architecture, P.A.*, 934 So.2d 350, 352 (Miss. App. 2006).

CPChem argues that the judgment should be reversed and the case remanded for a new trial for several reasons; however, remand is inappropriate because CPChem received a fair and impartial trial. First, Jones County is an appropriate venue. CPChem cannot and does not show that bias or prejudice was present in Jones County to justify a change of venue. CPChem obtained a defense verdict in Jones County just months prior to the trial of this case. Additionally, the factors discussed in *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31 (Miss. 2004), are not present in this case and support the trial court's decision to deny CPChem's motion to change venue. Next, CPChem argues that the trial court erred during the venire qualification and voir dire process. Not only did no error occur in each of the instances complained of by CPChem, but CPChem fails to show how any of the alleged errors prejudiced the trial. CPChem also complains about the general causation testimony offered by Dr. Kenneth Cohen, an industrial hygienist. Dr. Cohen's testimony easily passes muster under the *Daubert/McLemore* standard, and he is amply qualified to offer such testimony. Next, CPChem complains about the trial court's treatment of an exhibit that was used to cross-examine one of its expert witnesses. The use of this exhibit on cross-examination to support Mr. Lofton's work

history and occupational exposure to asbestos was proper, and the trial court properly overruled its objections. Finally, CPChem argues that the verdict is against the overwhelming weight of the evidence because the jury failed to apportion fault to any parties beyond the sole defendant. First, CPChem has waived this argument. Second, the jury's verdict perfectly conforms to CPChem's strategy at trial, which was to argue that Mr. Lofton did not suffer asbestosis.

Lastly, CPChem argues that remittitur is appropriate because the jury's verdict was the result of "bias, prejudice, or passion." However, CPChem offers no evidence for this assertion beyond the size of the award. The case law confirms that remittitur is inappropriate in this case.

ARGUMENT

I. THE JUDGMENT SHOULD BE AFFIRMED.

A. TROY LOFTON'S CLAIMS WERE BROUGHT WELL WITHIN THE STATUTE OF LIMITATIONS.

CPChem's strategy during trial was to claim that Troy Lofton did not have asbestosis at all. (Tr. 242:12-27). Yet, in its post-trial motions and on appeal to this Court, CPChem now claims Troy Lofton had asbestosis several years before he filed suit. There is no support for CPChem's argument. Mississippi Code Section 15-1-49(2) states that "in actions . . . which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury." MISS. CODE ANN. § 15-1-49(2) (Rev. 2003). In an asbestosis case, the statute of limitations does not begin to run until, at the earliest, there is an asbestosis diagnosis and plaintiff has knowledge of the injury or disease. *Owens-Illinois, Inc. v. Edwards*, 573 So.2d 704, 709 (Miss. 1990). Mr. Lofton was never diagnosed with asbestosis prior to September of 2003. Troy Lofton was never told he had asbestosis prior to September of 2003, and no doctor ever indicated he suffered from an asbestos-

related disease prior to late-2003. Mr. Lofton filed his case on May 19, 2004.[3] Given the statute of limitations in Mississippi, Plaintiff's lawsuit was timely filed.

CPChem attempts to confuse the issue by citing this Court's opinions in *Lincoln Electric Co. v. McLemore*, 54 So.3d 833, 838 (Miss. 2010), and *Angle v. Koppers, Inc.*, 42 So.3d 1, 7 (Miss. 2010), in which this Court held that knowledge of an injury's or disease's cause is not necessary to initiate the running of the statute of limitations.[4] In *McLemore*, this Court held that the plaintiff's cause of action began to accrue on the day a doctor diagnosed him with Parkinsonism, informed him that his symptoms could be related to welding, and suggested he hire an attorney. *McLemore*, 54 So.3d at 838. This Court also noted that shortly after the plaintiff's visit with this doctor, he hired an attorney and filed a lawsuit claiming "serious neurological injury," which was additional evidence that the plaintiff was aware of his injury. *Id.* Similarly, in *Angle*, this Court held that the plaintiff's cause of action accrued on the date she was last diagnosed with an injury or disease. *Angle*, 42 So.3d at 7. Additionally, *Edwards* is cited approvingly in both of these opinions. *Angle*, 42 So.3d at 5-6; *McLemore*, 54 So.3d at 836-37. In its brief, CPChem seems to argue that because Mr. Lofton experienced "characteristic symptoms" of asbestosis and was seen by several doctors, that the statute of limitations began running before he was ever diagnosed with the disease. (CPChem's Brief at 11-14). Of course, this argument is completely contrary to this Court's recent case law, to which CPChem cites, which holds that a cause of action begins to accrue when a plaintiff is diagnosed with a disease.

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[3] The parties stipulated that this lawsuit was filed on May 19, 2004. (Tr. 379:20-26). A review of the Court's file also reflects that the case was filed on May 19, 2004.

[4] Perhaps the source of CPChem's confusion on this point stems from the fact that the disease of asbestosis is related to asbestos exposure from a diagnostic standpoint. But this does not change the clear fact that Mr. Lofton filed suit shortly after learning, for the very first time, that he suffered from the disease of asbestosis.

McLemore, 54 So.3d at 838; *Angle*, 42 So.3d at 6-7 ("We note that the proper inquiry under the statute should have been the plaintiff's discovery of the injury or disease (i.e., a diagnosis of cancer), not the discovery of a causative relationship between smoking and the cancer."). CPChem also argues that the fact that Mr. Lofton eventually understood that asbestos was "dangerous" somehow affects the limitations inquiry. Of course, this argument takes this Court's case law and turns it on its head: the case law states that once a plaintiff learns he suffers from a disease, limitations will begin to run, regardless of when the plaintiff learns of the cause of his disease (i.e., asbestos exposure). The case law does not hold that a plaintiff's cause of action will begin to run years before he suffers an injury simply because he is aware that exposure to asbestos could cause an injury. Not only is the case law completely contrary to this argument, but the argument simply makes no sense.

CPChem suggests that references to fibrosis in x-rays and CT scans in 1995, 1996, and 2001 should have started the statute of limitations on Mr. Lofton's case. There is no basis in Mississippi law for that claim. These radiology studies were done while Mr. Lofton was seen for gall bladder, heart and other issues. (Dx. 1, CPChem00509, CPChem00515, CPChem00751). The only references to any disease found are mentions of COPD and general emphysema, not asbestosis. (Dx. 1, CPChem00509, CPChem00515, CPChem00751, CPChem00196). At trial, CPChem's pulmonologist, Dr. Robert Ross, claimed that the x-ray and CT scan reports from 1995 forward are not consistent with asbestosis. (Tr. 1171:14-21). Fibrosis in the lungs can have many causes. (Tr. 732:10-15). Dr. Ross, claimed that Mr. Lofton has fibrosis in his lungs possibly due to rheumatoid arthritis, bacterial infection, sarcoidosis, usual interstitial pneumonia, or some medication instead of asbestosis. (Tr. 1135:20-1138:11). Dr. Ross claimed that even the radiology reports from treating physicians are not indicative of asbestosis. (Tr. 1117:5-16).

CPChem's expert claimed that, while Mr. Lofton suffers from pulmonary fibrosis, it is not asbestosis. (Tr. 1110:3-16). But, CPChem now says Mr. Lofton should have filed suit earlier because there is some mention of fibrosis in earlier x-ray reports.

Dr. Steven Stogner has been Mr. Lofton's treating physician for the last seven years. (RE-2, Tr. 756:29-763:25). Mr. Lofton first saw Dr. Stogner in September of 2003. (RE-2, Tr. 763:16-18; Tr. 309:24-27). Dr. Stogner was the first doctor that ever spoke with Mr. Lofton about asbestosis. (Tr. 309:25-311:12; 315:17-21). That conversation occurred in late 2003. (Tr. 315:17-21. The record is clear there was *never* any diagnosis of asbestosis prior to Mr. Lofton seeing Dr. Stogner. In fact, no physician or anyone else ever mentioned to Mr. Lofton that he had fibrosis, or scarring, in his lungs prior to seeing Dr. Stogner in September of 2003. (Tr. 399:24-400:12). No one has ever told Mr. Lofton what causes fibrosis in the lungs. (Tr. 411:2-9). Even if a physician had mentioned the fibrosis or potential causes, that would not have amounted to a diagnosis of asbestosis. The presence of so-called "radiographic markers" of asbestosis in a handful of medical records does not amount to a diagnosis of asbestosis, as the records themselves reveal. Mr. Lofton does not even know what fibrosis in the lungs is. (Tr. 411:2-4). Dr. Stogner's, Dr. Holstein's, and Dr. Brody's review of Mr. Lofton's prior medical records, as well as their trial testimony concerning those records, have zero bearing on the legal question that frames the statute of limitations inquiry: when *the plaintiff* has discovered, or by reasonable diligence should have discovered, the injury (i.e., asbestosis). There is absolutely no basis for the argument that the statute of limitations began to run at any time prior to late-2003, when Mr. Lofton first learned he might have asbestosis.

B. LOFTON PROVED THE ELEMENTS OF HIS DESIGN DEFECT CLAIM.

CPChem argues that the judgment should be reversed and rendered as to Mr. Lofton's design defect claim for a number of reasons. The elements for a design defect claim are found in MISS. CODE ANN. § 11-1-63(a)(i)-(iii), (f). The Mississippi Supreme Court summarized the requirements for proving a design defect claim in *Williams v. Bennett*, 921 So.2d 1269, 1274 (Miss. 2006), as follows:

> The Act provides that in a design defect claim, a manufacturer is not liable unless the design of the product is both defective and unreasonably dangerous. In most cases, the unreasonable danger presented by a product's design is the factor that makes the design defective. However, a defect in design may not necessarily be unreasonably dangerous. A product may not perform as intended by the manufacturer because of a faulty design, but the faulty design may present no unreasonable risk of harm. The term "unreasonably dangerous," especially in the context of a design defect, is a term of art. The product's design is unreasonably dangerous only if the Appellee proves the required elements of a claim as set forth by the Act. In logical sequence, these elements [...] are the following: (1) the danger presented by the product's design was known or should have been known to the manufacturer (i.e., the danger was foreseeable); (2) the product failed to function as expected (as a result of a design characteristic); (3) an alternative design existed that would not impair the product's usefulness or desirability; and (4) the alternative design would have to a reasonable probability prevented the harm.

CPChem attacks Mr. Lofton's evidence by claiming he failed to prove a number of elements of his design defect claim. This Court reviews the denial of a motion for judgment notwithstanding the verdict under the following standard:

> This Court will consider the evidence in light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.

Coho Res., Inc. v. Chapman, 913 So.2d 899, 904 (Miss. 2005).

1. The inherent characteristic defense does not apply to Flosal.

CPChem first argues that asbestos, like sand, gravel, or kerosene, cannot be defectively designed and, thus, Mr. Lofton's claim must fail. As described by CPChem, the viscosifier at issue in this case was comprised almost entirely of chrysotile asbestos. CPChem argues that, because asbestos is a "natural mineral," it is incapable of human design. There is no law in Mississippi to support CPChem's argument that asbestos lawsuits are essentially prohibited. An instruction was given to the jury on this issue for its consideration, and the jury apparently disagreed with CPChem's position on this issue. This is not the first time that asbestos suppliers have made this argument; in fact, Union Carbide Corporation ("UCC"), a settling defendant in this case, made the very same argument in a recent Florida case, to no avail. *See McConnell v. Union Carbide Corporation*, 937 So.2d 148 (Ct. App. Fla. 2006); *see also Garza v. Asbestos Corp., Ltd.*, 161 Cal. App. 4th 651 (Ct. App. Cal. 2008); *Arena v. Owens-Corning Fiberglas Corp.*, 63 Cal. App. 4th 1178 (Ct. App. Cal. 1998).

In *McConnell*, UCC argued that "'raw' asbestos is not a product capable of being defectively manufactured or designed for products liability purposes." *McConnell*, 937 So.2d at 149. The Florida court of appeals, in disagreeing with UCC, noted that UCC's Calidria asbestos had an "intended design." A product so designed may properly be deemed "'defective' within the meaning of Florida products liability law." *Id.* at 151. The California court of appeals has come to a similar conclusion. In *Garza* and *Arena*, the California courts confronted the argument by Asbestos Corporation, Ltd. ("ACL") that because asbestos is "'a natural immutable mineral' . . . [it] does not 'fit the analytical mold of products-liability principles.'" *Garza*, 161 Cal. App. 4th at 659. Furthermore, ACL argued "raw asbestos is no more 'designed' than is sodium . . . [or] lead." *Id.* at 660. To this end, ACL attempted to liken the mining of asbestos to

case law analyzing the liability of bulk suppliers of raw materials where the raw material had been substantially altered during the manufacturing process of a finished product. *Id.* at 661. The California court responded with the following analysis:

> It is not just a possible design defect in the manufactured end product that caused the injury, but a defect in the raw asbestos contained in the product. Moreover, asbestos is not a component material that is usually innocuous, such as sand, gravel, nuts, or screws. . . . [I]t is the asbestos itself that produces the harmful dust.

Arena, 63 Cal. App. 4th at 1190. Thus, courts that have been confronted with the exact argument presented by CPChem here have rightfully concluded that manufacturers and suppliers of raw asbestos products can be held liable for design defects.

Of course, CPChem does not cite to these asbestos cases, but instead relies on a Wisconsin case dealing with a different raw material—lead. In *Godoy v. W.I. DuPont de Nemours & Co.*, 2009 WL 2018791, at *6 (Wis. Jul. 14, 2009), the Wisconsin Supreme Court held that white lead carbonate pigment cannot be defectively designed merely because of the presence of lead, because lead is a characteristic ingredient of the pigment. In this regard, the *Godoy* case is similar to the case law considered and rejected by the *McConnell*, *Garza* and *Arena* courts in the context of asbestos. Additionally, in reaching its conclusion, the *Godoy* court distinguished a case in which a plaintiff sued the manufacturer of latex gloves. In that case, the court noted that the defect complained of was the excessive level of latex in the gloves and the addition of cornstarch, which allowed the latex to be airborne. *Id.* Thus, the Wisconsin court recognized that defective design claims may properly be based on the presence of so-called "characteristic" ingredients. At its core, the *Godoy* case on which CPChem relies is utterly distinguishable from asbestos cases like this one.

Testimony presented in the trial of this case supports the fact that Flosal was designed by CPChem. As was the case in *McConnell*, evidence was admitted that CPChem utilized a proprietary process of mining and processing its asbestos that even produced a United States patent. (RE-3, Tr. 889:13-890:26; RE-12, Px. 125; RE-14, Px. 507; RE-15, Px. 611) ("Flosal contains a special proprietary mixture of asbestos fiber and other chemicals which have been blended, compounded and finally palletized for its particular unique use in the drilling fluids industry. We do not regard Flosal, in any way, as raw asbestos fiber."). Additionally, in an attempt to reduce the amount of dust that resulted from use of the Flosal product, CPChem altered the manufacturing process to include a pellet-form Flosal, flake form, and granulated form. (Px. 24; RE-8, Px. 26; RE-10, Px. 38; Px. 42, 75, 132, 338, 500; RE-14, Px. 507; Px. 556, 568, 569, 635, 640). The Flosal asbestos viscosifier was "developed" in CPChem's "Research Laboratory." (RE-4, Px. 14). Flosal even had an ionic charge. (Px. 129). The evidence shows that the asbestos product at issue in this case had a specific design within the meaning of products liability law.

Additionally, even if the inherent characteristic defense applied to this case, CPChem would also be required to prove "the inherent characteristic of the product which is a generic aspect of the product . . . and which is recognized by the ordinary person with the ordinary knowledge common to the community." MISS. CODE ANN. § 11-1-63(b) (Supp. 2008). It should also be noted that the so-called inherent presence of asbestos, by itself, though potentially dangerous, is not the design defect that renders the products unreasonably dangerous. It is the fact that CPChem's product, Flosal, in ordinary use produced breathable asbestos fibers in the breathing zones of workers. (RE-1, Tr. 304:7-305:17, 306:3-14; RE-3, Tr. 888:4-890:24, 892:22-24, 894:7-907:23, 908:6-917:26; RE-5, Px. 15; RE-6, Px. 17; RE-7, Px. 19; Px. 29, RE-

10, Px. 38; RE-11, Px. 40; Px. 42; Px. 333; Px. 481; Px. 500). There are other applications of asbestos that might not directly expose workers to breathable dust.[5] (Tr. 708:1-22). However, a product designed and manufactured of dry asbestos fibers, in a bag that could leak when handled, that was intended and marketed to be cut open and poured into a hopper thereby creating breathable dust, is defective and unreasonably dangerous.

As detailed above, CPChem's own documents and witnesses indicate CPChem's longstanding knowledge that its asbestos products were dusty and that asbestos caused cancer, mesothelioma, asbestosis and other diseases. In addition to the fact that asbestos is not a generic aspect of viscosifiers, the dangers from the asbestos products must be "recognized by the ordinary person with the ordinary knowledge common to the community" for there to be consideration of calling it an "inherent characteristic." The average person was not aware of the true dangers of asbestos during the time it was on the market. (RE-3, Tr. 930:13-932:7). Mr. Ziegler, someone considerably more educated than the usual oilfield worker, did not learn of the health hazards associated with asbestos until 1979. (RE-3, Tr. 930:13-932:7). Mr. Lofton likewise did not know asbestos could cause his severe lung injuries 30 years later during the time he used CPChem's products. (RE-1, Tr. 372:6-7). Simply stated, the inherent characteristic defense does not apply to Mr. Lofton's claims.

2. Flosal failed to function as expected.

CPChem also argues there is no proof that its product failed to function as expected. In support of this contention, CPChem argues that the product at issue functioned well as a drilling mud additive. However, CPChem's argument completely misses the mark. The uncontroverted

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[5] Even Mississippi courts have acknowledged that asbestos could be designed in a non-friable form where it is not respirable. *See Brooks v. Stone Architecture*, 934 So.2d 350, 352 n.2 (Miss. App. 2006).

evidence at trial conclusively established that CPChem's products were intended to perform their function *without causing asbestos-related disease.* (RE-3, Tr. 853:2-7, 916:22-917:2). Mississippi courts have made clear that the failure-to-function-as-expected requirement is to be viewed from the vantage point of *the user* and is related to the existence of a feasible alternative that could have prevented the injury. *Williams v. Bennett*, 921 So.2d 1269, 1278 (Miss. 2006) ("the claimant must provide evidence that the product failed to function as expected by way of producing evidence of a feasible design alternative that could have reasonably prevented the claimant's injury"); *Smith v. Mack Trucks, Inc.*, 819 So.2d 1258, 1265 (Miss. 2002) (noting that the proper inquiry is whether the truck failed to function as expected by its users). Thus, whether the product performed its function simply as a drilling mud additive is not the operative inquiry; instead, the question is whether the products failed to function as expected by causing the complained-of injury. Even the cases cited by CPChem support this conclusion. *See Wolf v. Stanley Works*, 757 So.2d 316, 321 (Miss. Ct. App. 2006) (noting that the court should examine the expectations of the user of the complained-of product in light of the product's need for periodic mechanical adjustments); *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 330 n.* (5th Cir. 2004) (noting that the forklift at issue is expected to function without injuring its operator); *cf. Austin v. Will-Burt Co.*, 361 F.3d 862, 874 (5th Cir. 2004) (holding that a crane's mast functioned as expected only because the plaintiff/user unequivocally had been made aware of the risk of electrocution when using the mast). This reasoning is not "circular;" it is the law of this State.[6]

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[6] According to CPChem's argument, manufacturers can avoid design defect liability by simply insuring that their products perform well, regardless of whether they also cause injury. For example, the manufacturers of a bulldozer with a defectively designed component could successfully argue that, because the bulldozer effectively moved and hauled dirt, they are not liable for an injury caused by the bulldozer because it "functioned as expected." This is not the law.

The evidence at trial overwhelmingly supports the conclusion that CPChem's asbestos products—which released asbestos fibers into the breathing zones of workers during ordinary use—caused asbestos-related disease, including Mr. Lofton's severe asbestosis. (RE-1, Tr. 304:7-305:17, 306:3-14; RE-3, Tr. 888:4-890:24, 892:22-24, 894:7-907:23, 908:6-917:26; RE-5, Px. 15; RE-6, Px. 17; RE-7, Px. 19; Px. 29, RE-10, Px. 38; RE-11, Px. 40; Px. 42; Px. 333; Px. 481; Px. 500). Mr. Lofton's own treating physician diagnosed him with asbestosis and attributed the asbestosis to Mr. Lofton's oilfield exposure to asbestos drilling mud. (RE-1, Tr. 304:7-305:17, 306:3-14, 763:13-25; RE-3, Tr. 888:4-890:24, 892:22-24, 894:7-907:23, 908:6-917:26). Also, Dr. Edwin Holstein testified that from his interview of people who used asbestos drilling mud additives, his knowledge of how they were used in the oilfield, and his accumulated knowledge over several decades of studying thousands of asbestos workers, there was no doubt that Mr. Lofton was exposed to enough asbestos to cause disease.[7] (Tr. 719:15-722:4). Additionally, CPChem was aware that the dust created by using Flosal was dangerous. (Px. 13; RE-6, Px. 17, RE-7, Px. 19; Px. 29; RE-9, Px. 36; RE-11, Px. 40; Px. 42; Px. 104) ("develop a safe method" for use of Flosal; "it would be a good practice to habitually use a small dust respirator when working in the mud house;" "if you handle loose Flosal fiber for a cumulative total of seven or more hours per year," you are an "asbestos worker" who is entitled to an annual medical exam; "[i]n late 1969, we became aware that asbestos dust was a potential carcinogen"). In an attempt to reduce the amount of dust that resulted from use of the Flosal product, CPChem altered the manufacturing process to include a pellet-form Flosal, flake form, and granulated form, thus attempting to reduce the amount of dust that it knew could cause disease in its users.

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[7] Dr. Holstein began his medical career on the staff of Dr. Irving Selikoff, the doctor who researched and wrote the 1964 article related to asbestos diseases sustained by insulation workers. (RE-13, Px. ID 384).

(Px. 24; RE-8, Px. 26; RE-10, Px. 38; Px. 42, 75, 132, 338, 500; RE-14, Px. 507; Px. 556, 568, 569, 635, 640). Conversely, Mr. Lofton had no knowledge of the dangers of CPChem's product during the years it was on the market, and could not have expected to be injured as a result of his use of the product. (RE-1, Tr. 281:4-26, 306:15-307:15, 363:2-18, 364:14-23, 372:3-7, 373:7-19, 408:5-409:6, 409:14-24, 409:29-410:7; RE-3, Tr. 930:13-931:8). Thus, because Flosal caused Mr. Lofton's injury, contrary to its intended function, contrary to CPChem's design, and contrary to Mr. Lofton's expectations, it failed to function as expected.

3. Evidence of a feasible alternative design was presented.

The evidence at trial also clearly proved that feasible alternative designs were readily available that would not have caused Mr. Lofton's asbestos-related injury.[8] The evidence was clear and unequivocal that viscosifiers and hole-sweeping materials that did not contain asbestos existed during the years 1964 through 1985 for use on drilling rigs. (Tr. 852:13-22; RE-3, Tr. 890:27-892:21, 917:3-26). Because these alternative products did not contain asbestos, they did not release hazardous fibers into the breathing zones of workers. Mr. Lofton's oilfield expert testified that other products were on the market from 1964 to 1985, including bentonite, polymers and lime for use as viscosifiers. (RE-3, Tr. 890:27-892:21, 917:3-26). None of these products contained asbestos. (Tr. 852:13-22; RE-3, Tr. 890:27-892:21, 917:3-26). J.C. Floyd, CPChem's own employee, testified that Gel, Bentonite, cellulosic polymers, and high viscosity cellolosic polymers were used in the late 1950s to increase the weight of spud mud and that those same products are still on the market today. (Px. 2003, 165:9-22). Mr. Floyd further testified that before and after Flosal, there were other non-asbestos products for increasing viscosity. (Px.

[8] As the *Williams* court made clear, proof of these elements satisfies the unreasonably dangerous requirement.

2003, 202:1-4. Additionally, Mr. Floyd testified there were other non-asbestos products used to control fluid loss. (Px. 2003, 205:5-10). Mr. Floyd also agreed that non-asbestos viscosifiers and loss of circulation materials existed from 1964 to 1985. (Px. 2003, 223:16-25). Mr. Lofton's oilfield expert testified that these non-asbestos viscosifiers would have eliminated the risk of asbestos related disease without impairing the usefulness or desirability of the product. (Tr. 917:3-26). There was ample evidence presented at trial that non-asbestos drilling mud additives were readily available in the industry as an alternative to asbestos-containing viscosifiers and were actually often preferred.[9] Clearly, a feasible alternative design existed that did not impair the "utility, usefulness, practicality, or desirability" of these products.

4. Mr. Lofton's 20 years of exposure to CPChem's asbestos-containing product satisfied the "frequency, proximity and regularity" standard of *Gorman-Rupp*.

The "frequency, regularity, and proximity" test regarding a claimant's exposure is the correct test applied to asbestos litigation in the state of Mississippi. *Gorman-Rupp Company v. Hall,* 908 So.2d 749, 757 (Miss. 2005). In *Gorman-Rupp,* summary judgment was granted because there was *no* evidence to demonstrate that the appellee had *ever* been exposed to any of Gorman's asbestos products. In fact, there was *no* evidence that Gorman's products were ever present at the appellee's work site. *Id.* The Mississippi Supreme Court later added product identification to the "frequency, regularity, and proximity" test. *Monsanto Company v. Hall,* 912

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[9] CPChem apparently argues that Mr. Lofton needed to prove an alternative design without removing the defectively designed component of the product, i.e., the asbestos. In support of its argument, CPChem cites to the white lead carbonate pigment example discussed in the "inherent characteristic" defense portion of its brief. However, in that case, the court found the lead to be an inherent characteristic of the product, the removal of which would "transform it into a different product." The same cannot be said in this case, where the asbestos used in CPChem's products was defectively designed. CPChem attempts to improperly conflate the "inherent characteristic" defense with the feasible alterative design element. The product at issue—and the product for which a feasible alterative design existed and was proved—is a drilling mud viscosifier.

So.2d 134, 137 (Miss. 2005). In *Monsanto*, appellee failed to identify the appellant's product as being a product to which he was exposed. The Court thus found that summary judgment was appropriate. *Id.* In *Gorman-Rupp*, the Court referenced, among other cases, the *Lohrmann* case, which stands for the proposition that there must be exposure to a specific product on a regular basis over some extended period of time in proximity to where the appellee actually worked. *See Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). This *Lohrmann* standard of "frequency, regularity, and proximity" is the legal standard in Mississippi.[10] *Monsanto*, 912 So.2d 134.

CPChem claims that Mr. Lofton did not have enough exposure to meet the *Gorman-Rupp* threshold. Unlike the plaintiff in *Gorman-Rupp*, who had no exposure to the defendant's asbestos product, Mr. Lofton had 20 years of frequent exposure on a regular basis in close proximity to the asbestos fibers of CPChem's product. His exposure occurred daily much of that time. Given that Mr. Lofton was exposed to CPChem's product during the entire 20 years it was on the market, he easily meets the *Gorman-Rupp* "frequency, regularity and proximity" standard.

From November 1963 through 1984, CPChem sold 50-pound bags consisting of nearly 100% asbestos under the name Flosal for use on drilling rigs. (Tr. 850:17-20). Some of the 50-pound bags of Flosal, when rebranded by distributors, were also sold by CPChem under the trade name Visquik, IMCO Shurlift, and IMCO Best.[11] (Tr. 851:27-29). CPChem held its product out as "versatile," and it was used throughout the drilling process. (Px. 335). There were times

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[10] A subsequent opinion from the Fourth Circuit, where *Lohrmann* was decided, stated that the *Lohrmann* standard was met if a co-worker testified that the deceased worked for nine months around pipes that had asbestos covering. *Haislip v. Owens-Corning Fiberglas Corporation*, 86 F.3d 1150, 1162 (4th Cir. 1996).

[11] Therefore, when the term "Flosal" is used in CPChem's documents and in the briefing herein, the reference is also applicable to the products Visquik, IMCO Shurlift, and IMCO Best since those are also CPChem's Flosal product in another bag.

these asbestos drilling mud additives were used daily throughout the drilling process, sometimes over 100 of the 50-pound bags were used a day (5,000 pounds). (RE-16, Px. 950-A-M). Hundreds of bags were frequently used on a single well. (RE-16, Px. 950-A-M).

Troy Lofton began working on oil and gas drilling rigs in 1964. (Tr. 272:5-10). His first job was with Four States Drilling in Jones County. (Tr. 272:11-18). Mr. Lofton's use of Flosal began in 1964 at that very first job. (Tr. 277:1-5). Mr. Lofton mixed mud in a mud house. (Tr. 274:3-10). The mud house did not have any ventilation. Mr. Lofton described his experience in the mud house as follows,

> But mixing that mud in there, it's hard to breathe. It's going everywhere. We didn't have nothing, no mask to put on our face or nothing. And like I say, you cutting them sacks, when you got to cut them sacks and mix it fast it's just going everywhere.

(Tr. 276:14-19). After mixing CPChem's products, Mr. Lofton looked "like a snowman when [he came] out of there." (Tr. 275:23-24).

Mr. Lofton mixed a significant amount of Flosal, the dusty asbestos-containing drilling mud additive, from the start of his drilling career forward. (Tr. 277:1-21). Mr. Lofton worked for Four States Drilling Company from 1964 to 1967. (Tr. 327:6-9). He used Flosal and Visquik while working for this employer. Mr. Lofton worked for Penrod Drilling in 1965, 1966 and 1973. (Tr. 327:16-19). Mr. Lofton used Flosal with this employer. (Tr. 327:25-26). Mr. Lofton worked for Teledyne Movable Offshore in 1966 and used Flosal. (Tr. 327:27-328:12). Mr. Lofton used asbestos drilling mud additives in 1967 while working for David New Drilling and Reading & Bates. (Tr. 328:13-20). He likewise used asbestos drilling mud additives while working for Justiss Oil Company in 1967, 1970, 1974, 1979, 1980 and 1983. (Tr. 328:21-26). In 1967, Mr. Lofton used asbestos drilling mud additives while working for Rowan Companies. (Tr. 329:7-11). Mr. Lofton worked for T.L. Drilling Company in 1968 and used asbestos drilling

mud additives while working for them. (Tr. 329:12-28). In 1968, Mr. Lofton worked with Flosal on offshore drilling rigs for Sharp Gulf Drilling Company. (Tr. 329:29-330:11). In 1971, Mr. Lofton used asbestos drilling mud additives on every rig with Big Chief Drilling. (Tr. 330:12-20). In 1972 and 1974, Mr. Lofton used asbestos drilling mud additives while working for Exeter Drilling Company. (Tr. 330:21-331:4). Mr. Lofton used Flosal while working for Dual Drilling in 1972, 1976 and 1980. (Tr. 331:5-14). Mr. Lofton used Visquik and Flosal in 1973 while working for Two R Drilling. (Tr. 331:22-28). In 1974, 1976 and 1979, Mr. Lofton used Flosal and Visquik while working in Texas for Murco Drilling. (Tr. 331:29-332:5). Mr. Lofton used Flosal while working for Chesley Pruet from 1974 to 1979. (Tr. 332:6-10). Mr. Lofton used Flosal while working for Noble Drilling in 1975. (Tr. 332:25-333:9). Mr. Lofton used Visquik while working for Exeter Drilling from 1976 to 1978. (Tr. 333:10-19). Mr. Lofton used Visquik in 1978 while working for Rapid Drilling. (Tr. 333:20-334:7). Mr. Lofton used Flosal while working for Marion Drilling Services from 1980 to 1983. (Tr. 334:8-18). He also used asbestos drilling mud additives while working for Tesoro Drilling in 1980. (Tr. 334:19-335:6).

Mr. Lofton mixed the asbestos drilling mud additives in mud houses that were completely enclosed, other than a small door on the end. (Tr. 274:3-277:7). He looked like a snowman when he finished mixing the asbestos. (Tr. 275:23-24). These products were very dusty. (Tr. 277:6-7). In addition to being dusty to mix, the products were dusty to carry when unloading them at the rig sites and carrying them to the storage area or hopper. (Tr. 279:1-29). This resulted in Mr. Lofton inhaling asbestos fibers whether he was just carrying the bags or actually dumping them into a hopper. (Tr. 279:23-280:26). Between 1964 and 1984, Mr. Lofton worked on approximately 250 different wells. (Tr. 318:15-19). This included drilling rigs in

Mississippi, Alabama, Florida, Texas, Louisiana, Oklahoma and Kentucky. (Tr. 320:2-13). Mr. Lofton also worked two to three years on offshore drilling rigs during that time. (Tr. 320:17-23).

Mr. Lofton and the rig crew mixed spud mud on every rig Mr. Lofton ever worked on. (Tr. 335:7-10). In making spud mud, five to fifteen sacks (250 to 750 pounds) of asbestos drilling mud additives were generally used. (Tr. 293:12-17). Sweeps/pills were always mixed. (Tr. 335:11-13). Depending upon the formation, sweeps/pills might consist of two sacks (100 pounds) of Flosal and were mixed every two hours on the drilling rig. (Tr. 298:1-300:5). Mr. Lofton used large amounts of Flosal and Visquik for loss of circulation on his rigs because lost circulation was a common occurrence. (Tr. 335:14-28). In a loss of circulation, it was routine to use 50 to 150 bags (2,500 to 7,500 pounds) of Flosal or Visquik to correct the problem. (RE-1, Tr. 304:25-305:12). In the lost circulation scenario, Mr. Lofton dumped the bags fast creating significantly more dust. (RE-1, Tr. 305:13-17).

Mr. Lofton used "thousands of bags" of Flosal during the 20 years the product was on the market. (Tr. 335:29-336:6; 320:24-321:1). Mr. Lofton mixed 200 to 250 bags (10,000 to 10,250 pounds) of Flosal or Visquik on many of the wells he drilled. (Tr. 335:29-336:6). Flosal, Visquik and Visbestos were the most commonly used asbestos drilling mud additives on Mr. Lofton's rigs. (Tr. 369:17-19).

CPChem complains that Mr. Lofton's exposure testimony was not detailed enough, despite the fact that Mr. Lofton is describing what happened on drilling rigs 25 to 45 years ago. There is no legal requirement in Mississippi regarding one having to recall the exact number of bags of asbestos mixed on an exact day at an exact minute 45 years ago, and CPChem cites no authority for such an approach. Mr. Lofton specifically identified exposure to CPChem's asbestos products for a 20-year period. Mr. Lofton described the dusty nature of his work,

specific products used at specific sites, and how he used hundreds of bags of these asbestos products on each of the over 250 wells he worked on. Mr. Lofton provided sufficient detail regarding his frequent and regular asbestos exposure over a 20-year period while in close proximity with CPChem's asbestos products.

CPChem alleges that Mr. Lofton's testimony is not reliable because no co-workers testified at trial. But, the jury certainly found Mr. Lofton's testimony to be reliable. Mr. Lofton's testimony is also consistent with CPChem's own documents and the testimony of Mr. Ziegler, an oilfield expert with 45 years of experience in the oilfields, who testified that Mr. Lofton's description of his use of the products was very typical of Mr. Ziegler's experiences in the oilfields. (Tr. 887:29-889:7). CPChem's own documents state Flosal was to be mixed "as fast as mixing facilities permit." (RE-5, Px. 15). Additionally, CPChem was aware from prior experiences in mud houses that "sacks of mud [were] being opened and added hurriedly and in large amounts by one of several roughnecks." (RE-7, Px. 19). "Under these conditions, the roughnecks were covered with mud dust, the floor was covered with several inches of mud and cluttered with empty sacks and the atmosphere was so dusty it was difficult to see and breathe." (RE-7, Px. 19). CPChem's own industrial hygienist stated that "working on drilling rigs doing typical jobs seems to represent exposure." (RE-6, Px. 17). By CPChem's own admission, Flosal "produced unacceptable dust levels" the first ten years it was on the market. (Px. 42). Even after CPChem modified Flosal, it continued to expose workers to "cloud[s] of dust." (RE-8, Px. 26). CPChem's bags also habitually leaked dust resulting in them being dusty when simply being carried. (Px. 45). Even more disturbing, CPChem went so far as to medically test its own employees if they had in excess of seven hours of asbestos exposure a year. (RE-9, Px. 36). CPChem took these measures to protect its own workers while letting workers like Troy Lofton,

with 20 years of almost daily exposure, continue to use these products. There were times these asbestos drilling mud additives were used daily throughout the drilling process, sometimes over 100 of the 50-pound bags (5,000 pounds) a day, and hundreds of bags during the drilling a single well. (RE-16, Px. 950-A-M).

Dr. Edwin Holstein, an expert in asbestos exposure whose experience began in 1964, reviewed Mr. Lofton's testimony and Social Security work records and combined that with his own knowledge regarding air measurements in Mr. Lofton's type of work and in similar kinds of work in other industries. (Tr. 719:22-27). Dr. Holstein testified that Mr. Lofton had sufficient exposure to CPChem's Flosal asbestos product to cause his asbestosis. (Tr. 719:15-722:4). Mr. Lofton's testimony, CPChem's own documents, and the expert testimony at trial all indicate that Mr. Lofton had sufficient exposure to satisfy *Gorman-Rupp*, the law in Mississippi.

C. LOFTON'S CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS WAS SUPPORTED BY THE EVIDENCE.

CPChem first claims that the MPLA "subsumes, abrogates, or makes redundant common law negligence claims grounded in product liability." (CPChem's Brief at 23). First, the cases CPChem cites discuss common law design defect, failure to warn, or strict liability claims, not claims for negligent infliction of emotional distress. *Jowers v. BOC Group, Inc.*, No. 1:08-CV-36, 2009 WL 995613 (S.D. Miss. Apr. 14, 2009); *see also Elliot v. Amadas Indus., Inc.*, (S.D. Miss. Mar. 1, 2011). Second, the Southern District of Mississippi has recently declined to follow *Jowers*, specifically holding that common law negligence claims may be brought alongside MPLA claims. *Riley v. Ford Motor Co.*, No. 2:09–CV–148–KS–MTP, 2011 WL 2516595, *2 (S.D. Miss. June 23, 2011); *see also Childs v. GMC*, 73 F.Supp.2d 669, 672 (N.D.Miss.1999) (MPLA was not intended to abrogate common-law theories of negligence). There is no basis for

CPChem's claim that Mr. Lofton's common law negligent infliction of emotional distress claim was abrogated by the MPLA.

CPChem next claims that the evidence of Mr. Lofton's emotional distress was not sufficient for a fear of cancer claim. "The Mississippi Supreme Court has indeed recognized fear of future disease as a basis for emotional distress claims." *Brooks v. Stone Architecture, P.A.*, 934 So.2d 350, 352 (Miss. App. 2006) (*citing Leaf River Forest Products, Inc. v. Ferguson,* 662 So.2d 648, 350 (Miss. 1995)). The requirements for a fear of future disease claim have been addressed by Mississippi Courts as recently as 2006. Courts consistently point out that emotional distress inflicted negligently or intentionally is compensable under Mississippi law and consistently follow that discussion with a statement clearly defining the distinct standard in fear of future illness tort cases.

> However, emotional distress based on the fear of future illness must await a manifestation of that illness or be supported by substantial exposure to the danger, and be supported by medical or scientific evidence so that there is a rational basis for the emotional fear.

Id.[12] There was overwhelming evidence that Mr. Lofton has a manifestation of an illness, asbestosis, from his exposure to Flosal. Additionally, Mr. Lofton's fear of future illness is supported by substantial exposure to the danger—here, asbestos—as detailed by his extensive use of and exposure to asbestos. *See supra*, section I(B)(4). Even assuming there has been no manifestation of illness, the courts have specifically held that a fear of future illness claim will go forward despite that.

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[12] It is important to note that *Brooks* was issued after *Morrison v. Means,* the breach of contract case heavily relied upon by CPChem; thus, *Brooks* is the controlling standard in a toxic tort fear of cancer case.

> Since the plaintiffs chose to bring their case before any manifestation of illness, in order to survive summary judgment, they were required to show that genuine issues of material fact existed regarding (1) substantial exposure to asbestos and (2) medical or scientific evidence supporting the reasonableness of their emotional fear.

Id. at 353; *see also South Central Regional Medical Center v. Pickering*, 749 So.2d 95 (Miss. 1999) (in a case where the court said it was applying the same standard as in a fear of cancer case, recovery was allowed for a claim for fear of getting AIDS, despite the fact that the appellee never got AIDS).[13] Mr. Lofton has certainly provided more than sufficient evidence to meet the elements of a negligent infliction of emotional distress for his fear of cancer claim. Mr. Lofton articulated regular exposure to asbestos over a 20-plus year time period, many times in an enclosed setting for many hours each day. As detailed above, Drs. Holstein and Stogner testified the exposure was sufficient to support the diagnosis of asbestosis. Drs. Brody, Katz, Holstein and Stogner articulated the medical and scientific basis for the significantly increased risk of getting cancer, mesothelioma, and severe breathing problems from progressive asbestosis. (Tr. 574:26-575:9 - Dr. Brody; (Tr. 621:11-20 - Dr. Katz); (Tr. 752:28-753:5 - Dr. Holstein); (Tr. 832:25-833:10 - Dr. Stogner). CPChem's statements to the contrary are disingenuous. Therefore, Mr. Lofton has met the burden required to prove his fear of cancer claim. The inquiry should stop there. However, out of an abundance of caution, Mr. Lofton will provide additional briefing.

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[13] In *Brooks*, contrary to the case now before this Court, the plaintiffs had no asbestosis diagnosis and no positive B-read. In fact, the *Brooks* plaintiffs brought their case just two months after their very brief (less than two months) exposure to asbestos at a school. The *Brooks* plaintiffs did not wait the ten to twenty-plus year latency period to see if the exposure to asbestos caused asbestosis. Whether or not the exposure to asbestos was substantial is a material question of fact. *Id.* Contrary to the case now before this court, summary judgment was granted in *Brooks*, because the opinion of the plaintiffs' expert, Dr. Lorino, that plaintiffs' "non-occupational exposure to asbestos provides a reasonable basis for their fear of contracting future disease," was found to be unreliable. This is because Dr. Lorino did not know how long the plaintiffs were exposed to asbestos, did not review the plaintiffs' medical records, did not know the plaintiffs' names, and was simply not familiar with the exposure that took place.

CPChem relies upon *Morris v. Means*, a breach of contract case, and cases citing it in its filing. 680 So.2d 803 (Miss. 1996). As a general matter, *Morris* is distinguishable from the fear of future disease claim in this toxic tort case. In addition, "the supreme court revisited the issue of emotional damages in contract cases" since *Morris*. *Morris Newspaper Corporation d/b/a WXXV-TV v. Allen*, 932 So.2d 810 (Miss. Ct. App. 2006). The court stated,

> We take this opportunity to clarify the burden for recovery of mental anguish and emotional distress in breach of contract actions. Plaintiffs may recover such damages without proof of a physical manifestation. Furthermore, expert testimony showing actual harm to prove mental injury is not always required. However, the plaintiff must show (1) that mental anguish was foreseeable consequence of the particular breach of contract, and (2) that he or she actually suffered mental anguish. Such generalizations as "it made me feel bad," or "it upset me" are not sufficient. A plaintiff must show specific suffering during a specific time frame. These requirements are not different from the requirements to establish physical pain and suffering.

Id. (quoting University of Southern Mississippi v. Williams, 891 So.2d 160 (Miss. 2004)). The court also states that, "where defendant's conduct is more egregious, the plaintiff's burden of establishing specific proof of suffering will decrease." *Id.*

Even if the standard in breach of contract cases does apply to the fear of cancer toxic tort claim in this case (and it does not), Mr. Lofton meets the burden. Mr. Lofton tearfully articulated his significant fear of cancer. Since the time when Dr. Stogner explained to Mr. Lofton the reality that he has a significantly increased risk of getting lung cancer, he has had a fear of cancer. Mr. Lofton constantly worries about this. (Tr. 316:15-317:19). This is especially true when Mr. Lofton is laying in bed at night thinking about it. (Tr. 316:15-317:19). He worries about who will care for his wife, who is on oxygen and cannot take care of herself. (Tr. 271:9-10; 316:15-317:19). For many years, he also had the constant worry of who would care for his mother in the nursing home. (Tr. 316:15-317:19). Mr. Lofton's stress and worry gets

worse, especially if he is isolated. (Tr. 316:15-317:19). Even when doing things like playing with his grandchildren, Mr. Lofton worries about getting cancer. (Tr. 316:15-317:19).

In *Pickering,* the Mississippi Supreme Court noted that it was applying the same standard to the fear of an HIV/AIDS case as would apply in "a fear of developing cancer case." *Pickering*, 749 So.2d at 99. The plaintiff in *Pickering* was anxious and afraid about the prospect of getting HIV/AIDS, did not socialize and go in public as much, and thought she was subject to snickering by others who she thought may have known about her exposure. *Id.* at 98. There is no indication she received medical care for her emotional distress, and the court never suggested it was necessary. *Id.* Mr. Lofton proved his fear of cancer claim.

II. CPCHEM RECEIVED A FAIR AND IMPARTIAL TRIAL; REMAND IS INAPPROPRIATE.

A. JONES COUNTY IS AN APPROPRIATE VENUE.

CPChem argues that venue was improper under Mississippi Code Annotated section 11-11-51, which provides that

> When either party to any civil action in the circuit court shall desire to change the venue, he shall present to the court, or the judge of the district, a petition setting forth under oath that he has good reason to believe, and does believe that, from the undue influence of the adverse party, prejudice existing in the public mind, or for some other sufficient cause to be stated in the petition, he cannot obtain a fair and impartial trial in the county where the action is pending, and that the application is made as soon as convenient after being advised of such undue influence, prejudice, or other cause, and not to delay the trial or to vex or harass the adverse party.

As the statute makes clear, a petition pursuant to section 11-11-51 cannot be made to "delay the trial or to vex or harass the adverse party."[14] Additionally, section 11-11-51 does not contemplate an "expansion" of the jury pool, but only a change of venue. Nevertheless, the trial court ordered that an extra 100 jurors be summoned for this case. CPChem cannot reasonably or justifiably argue that Jones County was tainted with bias or prejudice.

Just months prior to trying the instant case, the case of *Bob Martin v. Phillips 66, et al* was tried in Jones County. It was another asbestos drilling mud case in which the plaintiff sought recovery for asbestosis and fear of cancer. The defendants, including CPChem, obtained a defense verdict from that Jones County jury. Given the outcome in *Martin*, it is disingenuous to now claim CPChem cannot get a fair jury trial in this asbestos case in the same county only six months later.

Yet CPChem's entire argument is based upon the allegation that it cannot get an impartial jury in Jones County, Mississippi.[15] This allegation is without merit. The trial court summoned an extra 100 citizens to report for jury selection. This means the total number of jurors that were available for jury selection were in excess of the panel the parties had at the *Martin* trial. It can hardly be argued that there were not sufficient panel members from which to select a fair-minded jury of 12 with a handful of alternates.

As far as the number of asbestos drilling mud cases are concerned, cases are pending in Jones County because: 1) the plaintiff had exposure to asbestos drilling mud additives in Jones

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[14] Although Mr. Lofton filed his case in 2004, CPChem never requested a change in venue until it joined in Union Carbide Corporation's Motion to Transfer Venue filed March 9, 2010, only thirteen days prior to jury selection. (CR-8287; 9247).

[15] CPChem does not contest the fact that Jones County, Mississippi is a proper venue pursuant to Miss. Code Ann. § 11-11-3. Therefore, Mr. Lofton will not address those issues.

County, 2) the principal place of business in Mississippi for Baker Hughes and Oilfield Service & Supply, two of the defendants in the cases when originally filed, is Jones County, and 3) defendants agreed to venue. CPChem's implication otherwise is misleading. Just because these individuals have a case pending in Jones County does not mean they reside there. Instead, the vast majority of the plaintiffs who have filed asbestos drilling mud cases in Jones County are from other counties. There is no basis to claim they are going to somehow taint the jury pool.

Additionally, CPChem relies on *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31 (Miss. 2004), and argues that the following issues are relevant to a venue determination: 1) the substantial risk of prejudice and bias where there are multiple suits, such as mass tort actions, pending in a county against the defendant, 2) negative pre-trial publicity, and 3) community connections to asbestos generally and asbestos litigation in particular.

CPChem argues that 21,617 plaintiffs have filed asbestos lawsuits in Jones County, and that 458 of those lawsuits deal with drilling mud claims. However, as discussed above, CPChem offers absolutely no evidence of the portion of those plaintiffs who actually reside in Jones County or have connections with the community in Jones County sufficient to create bias or prejudice. *Cf. Bailey*, 878 So.2d at 51-53 (where 114 *local* litigants were an indicator of bias). CPChem also points to various responses to pre-trial jury questionnaires, which allegedly show certain percentages of the pool with either personal or familial ties to the oil and gas industry and asbestos litigation. Of course, any potential bias or prejudice among members of the venire is necessarily confronted in the voir dire process, and was done so in this case by both the trial court and counsel for both parties. CPChem also argues that Mr. Lofton's counsel's pre-trial mailers somehow tainted the jury pool.

A closer look at the *Bailey* case reveals its utter lack of similarity to the present case. In *Bailey*, the trial court originally granted the defendant's motion under section 11-11-51 with respect to Jefferson County and transferred the case to Claiborne County. 878 So.2d at 51. On appeal, the Supreme Court found that the trial court erred in transferring the case to Claiborne County, which was adjacent to Jefferson County, because of its proximity to Jefferson County. *Id.* at 52. In deciding to grant the motion to transfer venue from Jefferson County, the trial court considered the following factors in combination:

1) Prominent Jefferson County residents, such as the Mayor of Fayette, were plaintiffs *in the pending case*;

2) A variety of relationships between plaintiffs *in the pending case* and prominent Jefferson County public officials;

3) *Television advertising* by plaintiffs creating a negative impression in the community.

4) Between 1995 and 2000, 21,012 plaintiffs have sued in Jefferson County;

5) 760 lawsuits were filed in Jefferson County in 2000;

Id. at 51.

By way of comparison, CPChem does not and cannot allege that Mr. Lofton, the Appellee *in this case*—as is the proper inquiry—possesses any special or significant standing in the community that would warrant a change in venue, as was the case in *Bailey*. Finally, CPChem notes that alleged pretrial advertisements are issues to be considered by the court to justify a change in venue. However, no "pretrial publicity" existed in this case. The advertisements referred to were targeted mailers, not widespread television commercials as in *Bailey*. In fact, when asked during voir dire if any of the venire members had received one of the targeted mailers in question which were mailed in 2003-2004, each and every panel member

indicated that they had not. (Tr. 164:26-166:24). The facts present in *Bailey* provide affirmation that the trial court was correct to deny CPChem's motion to change venue.

B. THE COURT DID NOT ERR DURING THE VENIRE QUALIFICATION AND VOIR DIRE PROCESS.

CPChem argues that the trial court prevented it from fully questioning jurors concerning their own or a family member's asbestos claim. In fact, nothing could be further from the truth. The trial court's very first question posed to the panel was concerning asbestos claims or past dealings with asbestos claims by the potential jurors or their family members. (Tr. 77:1-28). This subject occupied the vast majority of voir dire, and detailed questions were made of individual jurors. (Tr. 77:1-88:16). CPChem's counsel also questioned individual jurors about their work around asbestos. (Tr. 169:12-170:25). The only time the trial court admonished CPChem on any subject matter in voir dire dealt with Mr. Caves' question concerning whether venire members had worked around asbestos. (Tr. 168:16-169:10). The trial court directed Mr. Caves to steer clear of issues that had already been covered by previous questions. In response, Mr. Caves stated that, "Well, *I wasn't going to get into the claims*, Judge, about it just if they had worked around it." (Tr. 168:25-27). (emphasis added). CPChem cannot now complain that it was somehow prejudiced during voir dire.

Additionally, CPChem points to three issues that it claims constitute "prejudice" during venire qualification and voir dire: 1) a statement by the Court to a potential juror who was excused; 2) the Court's statement that the jury must decide if CPChem did something wrong, and if so, what to do about it, and 3) Mr. Lofton's counsel's statement during voir dire that this case was one against ConocoPhillips alone. First, it should be noted that CPChem does not explain how any of these statements prejudiced the outcome of the trial, beyond the mere conclusory

statement that "prejudice" occurred. *See McCoy v. State*, 954 So.2d 479, 485 (Miss. App. 2007). This, of course, is because no such prejudice occurred.

With respect to the first issue, the panel member in question was asked about his direct contact with drilling mud, and was excused because the trial court feared he "might wind up with a claim." (Tr. 94:13-17). Nothing about this statement is prejudicial. That a potential juror might have a future *claim* based on his exposure to asbestos is not a surprising or inflammatory fact. As CPChem is well aware, there is a difference between a claim and judgment.

CPChem also complains about the trial court's statement that the jurors must "decide whether [CPChem] did something wrong, and if you decide that then you've got decide [sic] what you want to do about it, if you want to give them any money or not." CPChem does not and cannot point to any facts or evidence that tend to show that the jury ultimately disregarded the trial court's instructions based on this fleeting comment during voir dire. Additionally, CPChem offers no authority that the trial court's statement, while general, was in fact error.

Finally, CPChem complains about Mr. Lofton's counsel's statement during voir dire that this was "not a lawsuit against any Defendant except ConocoPhillips." Of course, this is a true statement; ConocoPhillips was the sole defendant in this case. CPChem seems to complain that this statement somehow impacted its ability to prove its affirmative defenses concerning allocation of fault to non-parties. Never mind that Mr. Lofton's counsel's statement was true—that is, Mr. Lofton sought recovery solely from ConocoPhillips—but additionally, CPChem offers no evidence that this statement in any way prejudiced the evidence or the jury's deliberations concerning its affirmative defenses.

CPChem next argues that the trial court erred in overruling several challenges for cause. "A juror who may be removed on a challenge for cause is one against whom a cause for

challenge exists that would likely affect his competency or impartiality at trial." *Gorman v. McMahon,* 792 So.2d 307, 316 (Miss. Ct. App. 2001) (quoting *Berry v. State,* 703 So.2d 269, 292 (Miss.1997)). The trial court sits in the best position to determine whether a juror should be excluded; thus, "[the] trial court has wide discretion in determining whether to excuse prospective jurors, including those challenged for cause." *Id.* at 317(25) (quoting *Poe v. State,* 739 So.2d 405, 409 (Miss. Ct. App. 1999)). CPChem complains that its challenges for cause with regard to the following jurors should have been granted: Juror Coleman, Juror Lewis, Juror Wyndham, Juror McKenzie, Juror Jenkins, Juror Allison, Juror Hosey, Juror Jones, Juror Woodard, Juror Newall. With respect to Juror Coleman, the record reflects that CPChem merely "believed" that his son might have had an asbestos case. (Tr. 201:29-202:6). There was no proof of this fact, and thus, the trial court was correct in overruling the motion to strike. Similarly, CPChem believed that Juror Lewis's son and husband were "possible" asbestos claimants; however, no proof was presented for this claim. (Tr. 203:5-19). Additionally, Mr. Lofton's counsel noted that Juror Lewis's questionnaire actually referenced a cousin with a claim, and not her son or husband. *Id.* Thus, the trial court did not err in overruling CPChem's motion to strike.

With respect to Juror Wyndham, CPChem objected because Ms. Wyndham's parents had been represented by Mr. Lofton's counsel, Mr. Robert Sullivan. (Tr. 197:19-24). However, when asked if this fact would prevent her from being a fair juror, Ms. Wyndham responded in the negative. (Tr. 89:9-26). With regard to Juror McKenzie, CPChem relied on an unsworn statement in a jury questionnaire and not on any statements she made during voir dire. (Tr. 204:11-205:12). CPChem objected to Juror Jenkins merely because of his work history at Masonite. As CPChem acknowledged, it had no claim information on Mr. Jenkins. (Tr. 205:19-

23. Similarly, Juror Allison's grandfather worked at Masonite (Tr. 197:1-7), Juror Hosey worked at Masonite (Tr. 198:12-22), Juror Jones's father worked at Masonite (Tr. 201:5-9), Juror Woodard worked for Masonite (Tr. 197:25-198:11), and Juror Newall worked for Howard Industries (Tr. 202:16-26). CPChem presented no evidence that any of these jurors had an asbestos claim or injury. Nor does CPChem argue that they stated anything other than that they could be fair and impartial jurors. Given this information, the trial court did not err in overruling CPChem's motions to strike.

C. THE TESTIMONY OF KENNETH COHEN WAS SUFFICIENT TO SATISFY *DAUBERT/MCLEMORE.*

CPChem argues that Dr. Cohen's testimony in the *Elsie Smith* trial cannot be used to prove specific causation in the instant case. However, Dr. Cohen did not offer any testimony with respect to Mr. Lofton's occupational exposure to asbestos. CPChem has ignored the fact that Dr. Cohen's testimony was offered only as support for general causation and a critique of CPChem's site-testing procedures.[16] Any argument to the contrary is misleading, and CPChem's objection to Dr. Cohen's "foundation" is baseless. Furthermore, CPChem's suggestion that the trial court "abdicated its gate-keeping responsibility" is simply not true. Significant briefing and hearing time before Special Master Robert Gholson was dedicated to Dr. Cohen's pending

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[16] CPChem also argues that Dr. Cohen's opinion is inapplicable to an asbestosis case, as compared to a cancer case. However, as explained above, Dr. Cohen's testimony in this case dealt with general causation as well as a critique of CPChem's site-testing procedures, which has no bearing on which asbestos-related disease is at issue. Additionally, Dr. Cohen testified as an industrial hygienist, not as a medical expert, and his testimony was limited to the opinion that, based on the evidence and documentation he reviewed, the level of asbestos exposure was substantial. (Px. 2002, 147:8-20). He also testified that, from an industrial hygiene perspective, there is a correlation between substantial and significant asbestos exposure and disease. (Px. 2002, 152:22-153:2). Clearly, this industrial hygiene opinion is relevant and reliable, whatever the asbestos-related disease the worker ends up developing. CPChem cites to its own expert's opinion to refute the opinion of Dr. Cohen; however, the existence of opposing expert opinions is certainly not a new phenomenon in litigation and should not be used to refute the opposing expert's qualifications or reliability. This role is delegated to the jury.

testimony, which resulted in the admission of his prior testimony related to general causation and his criticism of CPChem's site-testing procedures. (CR-2938; 3736; 3895; 5358; 9519; 9628; 9895; 9909; 10163; 10370).

CPChem also claims Dr. Cohen is not qualified to testify as an industrial hygienist, another assertion exhaustively argued before the Special Master. Dr. Cohen obtained his Bachelor of Science from San Diego State University. (Px. 2002, 26:6-14). He received his doctorate from California Western University in 1976. (*Id.*). He worked for over 30 years in the occupational safety and health area. (Px. 2002, 38:1-25, 39, 40:1-2). He was a registered professional engineer in the area of industrial safety in California for 25 years before retiring. (*Id.*). Finally, he was a registered environmental assessor—evaluating environmental sites for hazardous materials or hazardous exposures—in California for four to five years. In addition, he was an employee of Cal-OSHA. (Px. 2002, 42:23-43:21). He was a certified industrial hygienist—the highest level of attainment in the field of industrial hygiene—for 25 years before retiring. (Px. 2002, 39:23-25, 40:1-2. He was a certified Asbestos Hazard Emergency Response Act ("AHERA") asbestos inspector, a management planner, and inspector for asbestos in schools. (Px. 2002, 41:11-25, 42:1-4). Additionally, Dr. Cohen has taken numerous classes on asbestos and industrial hygiene to stay current on the topics. (Px. 2002, 41:5-25, 42:1-19, 43:22-25, 44:1-2). This is in addition to the individual lectures and articles he has given or authored on the same topics. (Px. 2002, 49:9-24). He is and has been a member of the American Academy of Industrial Hygiene, American Society of Safety Engineers, American College of Toxicology, and American Industrial Hygiene Association. (Px. 2002).

Despite this extensive background, CPChem attacks Dr. Cohen, alleging he lacks the qualifications to testify as an expert in industrial hygiene. CPChem emphasizes he failed out of

UCLA while it ignores that he later received a bachelor degree from San Diego State University. CPChem impugns Dr. Cohen's doctorate degree because the university no longer exists and he completed his degree without taking classes at the university and doing it in a period of nine months. This might be noteworthy but for the fact that he had obtained credit for coursework he had previously done in a masters program at San Diego State University and spent the nine months working on and presenting his dissertation. (Px. 2002, 31-32). Finally, CPChem tries to impute significance to the fact that Dr. Cohen took two credentialing exams multiple times before passing in an effort to discredit the reality that he passed the exams and has worked in the field for 30 years, teaching courses on the subject and obtaining licensing from a number of different organizations. Dr. Cohen was tendered as an industrial hygienist. He is certified as an industrial hygienist. His studies in the work of asbestos, AHERA, and his articles—just to name a few—qualify him to give an opinion.

Dr. Cohen's opinions also easily satisfy the reliability prong of the *Daubert/McLemore* standard. CPChem complains about Dr. Cohen's methodology for arriving at the opinion that "exposure to one fiber above ambient levels is 'substantial and significant.'" (CPChem's Brief at 36). CPChem continues to refer to Dr. Cohen's alleged "one fiber opinion" throughout its attack on his testimony; however, CPChem's argument does not accurately or reliably represent Dr. Cohen's testimony at trial. Dr. Cohen testified that, based on the documentary evidence he reviewed, being able to visibly see asbestos in the air signifies that the fiber count would be no less than 20 fibers/cc, based on minimum lighting conditions. (Px. 2002, 147:8-20). Dr. Cohen then testified that according to published industrial hygiene literature, this level of exposure is

substantial.[17] (Px. 2002, 147:19-20). Dr. Cohen also testified that CPChem's own dust studies undervalued the amount of asbestos workers were exposed to by measuring the exposure for only a small fraction of the workday and then extrapolating the values, as opposed to a continual monitoring of exposure levels over an eight-hour period.[18] (Px. 2002, 164-167, 169:1-15). Dr. Cohen based his opinion on the NIOSH-approved fiber counting procedures, as well as EPA methodology for analysis of asbestos in bulk samples.[19] (Px. 2002, 100:10-101:23).

On cross-examination, CPChem's counsel presented Dr. Cohen with a hypothetical situation concerning asbestos-insulated pipes in the courthouse. Dr. Cohen stated that exposure to asbestos above ambient in the hypothetical courthouse would be "substantial and significant." (Px. 2002, 199:18-200:4). Dr. Cohen also stated that, when compared to "an individual who is

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[17] Interestingly, CPChem quotes literature in its brief that states that "the threshold cumulative dose of asbestos necessary for clinical manifestations of asbestosis was between 25 and 200 fibers/ml-yrs (fibers/ml x number of years) of cumulative exposure," which is consistent with Dr. Cohen's opinion. (CPChem's Brief at 38).

[18] CPChem does not challenge this portion of Dr. Cohen's testimony.

[19] CPChem generally states that Dr. Cohen does not testify about whether his methodology has been tested, subjected to peer review, has an error rate, or whether it is generally accepted in the scientific community. CPChem also complains that Dr. Cohen did not "cite to any supporting scientific or epidemiological studies." (CPChem's Brief at 37). What is most interesting about these arguments is that, in making them, CPChem does not once cite to Dr. Cohen's actual testimony. Instead, CPChem cites to a portion of the argument section of their *Daubert* motion and two portions of the trial transcript in which CPChem's counsel addresses the trial judge. (CR-2959; 2980, 88; 2987; 117). In fact, the cite to CPChem's *Daubert* motion relies on a case, which states the following:

> It might not be surprising that in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may not have ever interested any scientist. . . . Therefore, the Court determined that it could "neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*" because "[t]oo much depends upon the particular circumstances of the particular case at issue."

Miss. Transp. Com'n v. McLemore, 863 So.2d 31, 37 (Miss. 2003) (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 151 (1999)). CPChem's generalized statements to this Court hold no water and are not rooted in the record. As stated above, Dr. Cohen applied a methodology that was clearly and unequivocally rooted in science and approved by the scientific community.

not sitting in the courtroom in your hypothetical asbestos-contaminated courtroom," an exposed individual would be at an elevated risk of suffering an asbestos-related disease. There is certainly nothing remarkable about this statement. *See Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1094 (5th Cir. 1973) (recognizing that "the effect of exposure to asbestos dust is cumulative, that is, each exposure may result in an additional and separate injury"). Dr. Cohen never testified or suggested that Mr. Lofton need only prove exposure to "one fiber of asbestos from Flosal," as CPChem would have this Court believe. Dr. Cohen's opinion is clearly based on his expertise with the measurement of asbestos fibers, as well as its limitations, and he is certainly competent to testify as such. (Px. 2002, 164-167, 169:1-15). Dr. Cohen's opinions, as well as the methodology he used to arrive at those opinions, easily pass muster under the *Daubert/McLemore* standard.[20]

D. THE TRIAL COURT DID NOT ERR IN ITS TREATMENT OF EXHIBIT 950.

CPChem next undertakes what can only be described as a written tirade against Mr. Lofton's use of Exhibit 950 in his cross-examination of CPChem's expert, Dr. Robert Ross.[21] Without making a single legal argument, CPChem merely sets forth the objections it made during trial with regard to Mr. Lofton's cross-examination of Dr. Ross, and obliquely states that Exhibit 950 should have been excluded on grounds of foundation, relevance, prejudice, speculation, and confusion of the jury. These objections are without merit.

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[20] CPChem cites to three California cases in which Dr. Cohen's testimony was excluded. However, Dr. Cohen's testimony in those cases has no bearing on his opinion in this case and is irrelevant to CPChem. Again, this is yet another fact CPChem could have used to attack Dr. Cohen's credibility, as opposed to being the basis of a *Daubert* challenge.

[21] Exhibit 950 contains records of wells drilled in Mississippi on which tons of Flosal was used. Dr. Ross was specifically asked about Exhibits 950-A through M (RE-16), which indicated that Mr. Lofton's employers had used Flosal.

Dr. Ross was called by CPChem as an expert witness. It follows, then, that Mr. Lofton was afforded the opportunity to cross-examine Dr. Ross concerning the basis of his conclusions. Additionally, the Mississippi Rules of Evidence are clear that cross-examination "shall not be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." MISS. R. EVID. 611(b). Moreover, leading questions are permitted on cross-examination. *Id.* at 611(c). And, of course, documentary evidence may also be used for impeachment purposes. The exhibit in question had been authenticated prior to trial and admitted as a business record. During direct examination, Dr. Ross offered his opinion and stated that he had formed this opinion *without* reviewing Mr. Lofton's work history. (Tr. 1069:27-1070:8; 1076:2-27). As pointed out to the jury, however, Dr. Ross authored a medical treatise that asserts that a doctor must obtain an occupational history of asbestos exposure before a diagnosis of an asbestos related disease can be made. (RE-17, Dx. ID Ross 2; Tr. 1069:27-1070:8, 1076:2-27, 1077:14-1078:28). On cross-examination, therefore, Mr. Lofton was without question entitled to present Dr. Ross with documents that corroborated Mr. Lofton's work history and occupational exposure to asbestos and ask whether the existence of those documents changed his expert opinion. CPChem's objections were unwarranted and were properly overruled by the trial court.

E. THE JURY'S VERDICT WAS NOT AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

CPChem argues that the jury's verdict is against the overwhelming weight of the evidence because the jury decided against allocation of fault to various other parties, including Mr. Lofton's employers and other third parties. First, CPChem has waived this argument. In its motion for new trial, CPChem simply and summarily stated that, "[f]or all the reasons,

authorities, and evidence set out in this memorandum and in the memorandum in support of JNOV, Defendant is entitled to a new trial because the jury's verdict was against the overwhelming weight of the evidence." (CR-10588). Nowhere in its motion for new trial or for judgment notwithstanding the verdict did CPChem argue that the jury's verdict was against the overwhelming weight of the evidence because of its failure to allocate fault among more than one party. (CR-10505-10530; 10575-10594). Similarly, CPChem failed to present this argument to the trial court during the hearing on its motions. (Tr. 1355:25-1361:21). CPChem also failed to raise this argument in its motion for directed verdict. (Tr. 1022:21-1035:29; 1227:2-22; 1284:7-1285:1). As such, this argument has been waived. *In re Englargement & Extension of Mun. Boundaries of City of Clinton*, 955 So.2d 307, 331 (Miss. 2007).

Nevertheless, out of an abundance of caution, Mr. Lofton will address this issue. An appellate court will not reverse a trial court's denial of a motion for a new trial absent an abuse of discretion. *Hyundai Motor America v. Applewhite*, 53 So.3d 749, 753 (Miss. 2011). The trial court's judgment in this case was entirely appropriate because it was based on the evidence. CPChem never argued or even suggested that the jury should allocate liability to any defendant, including third parties not present at trial.[22] Not in voir dire, opening statement or closing argument did CPChem suggest that the jury hold other parties accountable. In fact, CPChem elicited less than three pages of testimony from Mr. Lofton about his use of asbestos drilling mud additive products other than Flosal. (Tr. 367-368). CPChem now belatedly attempts to argue on appeal that Mr. Lofton's testimony somehow rises to the level of proof necessary to justify

[22] CPChem argues that they proved that Mr. Lofton's employers failed to protect him. It is interesting to note that the evidence they point to in support of this statement is Dr. Cohen's testimony, whom they claim to be unreliable and who was not offered as a specific causation witness. There was simply no evidence presented to prove an intervening cause, as CPChem belatedly argues to this Court. In actuality, the evidence at trial was contrary to CPChem's argument to this Court. (Tr. 987:14-988:13).

allocation of fault to other entities besides CPChem. But this argument is too little, too late. Of course, CPChem can point to no evidence from its own witnesses or experts that supports allocation of fault to any entities other than CPChem. This occurred simply because CPChem chose a different strategy: CPChem argued, and tried to prove, that Mr. Lofton did not have an asbestos-related disease; instead, argued CPChem, this "pulmonary cripple's" lung disease was caused by something else, either medications, rheumatoid arthritis, or bacterial infection. (Tr. 1110:3-16; 1135:20-1138:11; 1263:18-29). This is an argument the jury obviously rejected primarily because the evidence of Mr. Lofton's 20-year work history with Flosal was overwhelming. Neither the jury nor Mr. Lofton's treating doctor, Dr. Stogner, could ignore this evidence. The jury's verdict perfectly corresponds to the evidence and to CPChem's chosen trial strategy.

III. REMITTITUR IS INAPPROPRIATE IN THIS CASE.

Contrary to CPChem's assertion, "[t]he standard of review for trial court decisions regarding a remittitur is the abuse of discretion standard." *InTown Lessee Assoc., LLC v. Howard*, No. No. 2009–CA–01987–SCT, 2011 WL 2569287, at *12 (Miss. June 30, 2011). CPChem categorizes the jury's verdict in this case as the result of "bias, prejudice, or passion" based largely on the jury's award of $15,000,000 in non-economic damages and its "short deliberations." CPChem apparently does not credit the jury with the sense or acumen that our legal system affords them, because it gives no credence to the seven days of trial testimony that these jurors attentively and conscientiously observed. Nevertheless, as the case law makes clear, the amount of time the jury spends in deliberations has absolutely nothing to do with the legal standard applied by this Court under Mississippi Code Annotated section 11-1-55.

Instead, the question presented to a trial court is whether "the verdict is so excessive it shocks the conscience evidencing a bias, passion and prejudice on the part of the jury." *Estate of Jones v. Phillips ex rel. Phillips*, 992 So.2d 1131, 1150 (Miss. 2008). In other words, the "jury's award is not to be set aside unless it is entirely disproportionate to the injury sustained." *Id.* However, "[i]t is primarily the province of the jury [and, in a bench trial, the judge] to determine the amount of damages to be awarded and the award will normally not be 'set aside unless so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous.'" *Id.* CPChem presented no credible legal argument with respect to this legal standard. Instead, CPChem states simply that the jury's award of non-economic damages was "more than 75 times the amount of the stipulated economic damages."

Even if this fleeting comment constituted legal argument, it lacks legal merit. The cases on which CPChem relies are inapposite to the case at bar. *Entergy Mississippi, Inc. v. Bolden*, 854 So.2d 1051, 1058 (Miss. 2003) (relying on "scant testimony offered in support of damages for pain and suffering" to justify remittitur); *Stinger v. Crowson*, 797 So.2d 368 (Miss. App. 2001) (affirming trial court's award of remittitur when treating physician testified plaintiff should not experience any future pain); *Jackson Public Sch. Dist. v. Smith*, 875 So.2d 1100 (Miss. App. 2004) (reducing award when trial judge failed to make any findings concerning future impairment to plaintiff); *Wells Fargo Armored Serv. Corp. v. Turner*, 543 So.2d 154 (Miss. 1989) (reducing award when plaintiff's total impairment amounted to only 16%); *Rawson v. MidSouth Rail Corp.*, 738 So.2d 280 (Miss. 1989) (affirming remittitur after testimony was submitted that plaintiff stated he was pain free). In contrast to the cases cited by CPChem, Mr. Lofton presented testimony from every medical expert—*including* CPChem's expert, Dr. Ross—that Mr. Lofton was a "pulmonary cripple" who lived on an oxygen bottle and that his life

expectancy had been reduced because of his condition. (Tr. 322:23-323:3, 593:11-17; RE-2, Tr. 810:14-24; Tr. 1154:29-1155:3, 1214:3-11). Indeed, Dr. Stogner testified that Mr. Lofton "is at a high risk situation for rapid deterioration and smothering." (RE-2, Tr. 809:26-812:12). CPChem has presented no evidence—indeed, none exists—to support its request for remittitur.

CONCLUSION

For the reasons described above, Troy Lofton respectfully requests that this Court affirm the jury's verdict in favor of Mr. Lofton.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have caused to be hand-delivered the original and three copies of the Brief of Appellee and a condensed disk of same for filing to:

Ms. Kathy Gillis, Clerk
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I certify that I this day mailed by United States Mail, postage prepaid, a true and correct copy of the above Brief of Appellee to the following:

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This the 24th day of August, 2011.

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