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

REPLY BRIEF OF APPELLANT

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I. The judgment should be reversed and rendered.

This Court should reverse and render on the dispositive defense of limitations alone. Limitations began to run when Lofton discovered or should have discovered his injury by 1996 and certainly by 1998. Miss. Code Ann. § 15-1-49(2). Lofton's medical records show he complained about his lung injury the only way he knew to describe it (smothering, shortness of breath, chest discomfort) to his doctors who documented his injury as fibrosis of his lungs. Unable to deny his injury, Lofton contends he was not diagnosed with the disease asbestosis until 2003. His contention ignores the plain language of Miss. Code Ann. § 15-1-49(2) which does not require diagnosis.

A. Lofton's claims are time barred.

Lofton argues his claim did not accrue until he was diagnosed with the "disease" asbestosis in 2003. But Lofton ignores his documented lung injury in 1995-96 (upon which his 2003 diagnosis was based), and he misstates the law on three counts when he asserts that "[i]n 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 (Miss. 1990)]." *Lofton Brief* at 6.[1]

First, the plain language of Miss. Code Ann §15-1-49(2) does not require a medical diagnosis of injury or disease. Instead, it states an action accrues when a plaintiff (1) has discovered or (2) by reasonable diligence should have discovered the injury or disease. Second, no Mississippi case interprets the statute to require a medical diagnosis to commence the running of the statute of limitations. Third, *Owens-Illinois* does not hold there must be an asbestosis

[1] Lofton also argues, without citation to authority, that because CPChem denied he had asbestosis, it cannot contend he discovered his lung injury in 1995-1998. *Lofton Brief* at 6. That argument is misleading. CPChem challenged causation; it did not deny Lofton's lung injury. Tr. 242:23-27. That CPChem disputes the *cause* of his lung injury is immaterial to the fact Lofton discovered or should have discovered his lung injury (fibrosis) by 1998 at the latest.

diagnosis before the statute of limitations begins to run where the claimant alleges injury from exposure to asbestos. *See* Sec. I.A.2, *infra*.

1. Lofton discovered, or reasonably should have discovered, his injury by 1996.

The lung injury that caused Lofton's claims to accrue are those documented in his 1995-96 chest x-rays and CT scan: "interstitial stranding at the lung bases," "generalized... fibrosis," "pleural and parenchymal changes," and "interstitial pulmonary fibrosis and linear scarring." The injury was discovered when, from June 1995 to November 1996, Lofton repeatedly sought treatment complaining of lung related symptoms, including that he "wakes up smothering" and suffers from shortness of breath. *CP Brief* at 12-13. At that time, Lofton's lung injury ceased to be latent.

Lofton's actions demonstrate he discovered his lung injury by 1996, and certainly no later than 1998, by which time he had lost 31 pounds, suffered from weak spells, and continued to complain of shortness of breath, chest discomfort and fatigue. *Id.* Disease-free, uninjured persons do not repeatedly wake up smothering and seek medical treatment over a 3-year period complaining of shortness of breath. Lofton submitted to a series of chest x-rays and a CT scan in 1995-96 that conclusively documented his lung injury. His actions in seeking medical treatment reveal Lofton's actual knowledge of his injury, if not disease.[2]

In *Powe v. Byrd,* 892 So.2d 223 (Miss. 2004) this Court held the plaintiff who sought medical treatment on multiple occasions over two years for gastritis and hemorrhoids knew or reasonably should have known about his injuries, such that the applicable statute of limitations expired, although he was later diagnosed with colon cancer. *Id.* at 227-228. The holding in

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[2] The discovery rule calls for an objective, not subjective, inquiry. *Illinois Central Railroad Company v. McDaniel*, 951 So.2d 523, 534 (Miss. 2006). However, Lofton's own actions are relevant to the inquiry of what a reasonable diligent person knew or should have known about his injury. *Angle v. Koppers*, 42 So.3d 1, 6 (Miss. 2010) (citing *PPG Architectural Finishes, Inc. v. Lowery*, 909 So.2d 47 (Miss. 2005)).

Powe is particularly relevant to a claimant like Lofton, who repeatedly sought medical attention related to his fibrotic lung injuries and was later diagnosed with asbestosis. See *PPG Architectural Finishes, Inc. v. Lowery*, 909 So.2d 47, 51 (Miss. 2005).

Even assuming Lofton did not discover his lung injury by 1996, his cause of action accrued when he should have discovered his injury. Common sense dictates a reasonably diligent person who sought and received medical treatment multiple times in 1995-96, with the symptoms and documented medical findings discussed above, should have discovered the lung injury, if not the disease. More telling, however, is that Lofton's medical treatment for his lung injury did not end in 1996. By 1998 he was still seeking medical treatment complaining of "weak spells," "shortness of breath[,] chest discomfort" and fatigue. If not by 1995-96, when his chest x-rays and CT scan all demonstrate lung injury, then by 1998 Lofton undoubtedly knew, or should have known, of his lung injury through the exercise of reasonable diligence.

Lofton's argument that he was not told he had the disease asbestosis until 2003 is unavailing. Beginning in 1995, he had documented lung injury upon which his 2003 diagnosis was based. *See CP Brief* at 13-14. The law does not allow Lofton to be willfully ignorant of that injury; it requires reasonable diligence so that he may timely pursue his claim. His failure to inquire or investigate the serious symptoms and documented lung injury is no excuse. It is irrelevant that Lofton asserts his doctors did not disclose to him the results of his x-rays. A reasonable patient would have inquired.[3] To the contrary, Lofton admitted he knew he had serious symptoms, but he feared and did not want to know the potential diagnosis. (Lofton: "But I had experienced it I'm going to say a couple of years before that, but I didn't want to go to

[3] Although common experience tells us doctors, as a matter of course, disclose x-ray findings to their patients, CPChem submits a reasonable patient suffering Lofton's symptoms would have at least asked: "What's wrong with my lungs?" or "Why do I have trouble breathing?" or "Why do I wake up smothering?" or "What do my chest x-rays show?" Had Lofton done so, his physicians would have told him—"Your x-rays show fibrosis and scarring in your lungs."

the doctor. I know a lot of people that's had illnesses that they didn't want to be told what it was. You scared of it." Tr. 308:25-28). The law does not permit Lofton to delay accrual by ignoring a documented injury because he fears the diagnosis.

Similarly, Lofton argues that before he was diagnosed no one told him what causes fibrosis in the lungs. But, understanding causation is irrelevant to accrual. A claim accrues under §15-1-49 upon the claimant's discovery of the injury, not upon discovery of the injury's cause. *Lincoln Electric v. McLemore*, 54 So.3d 833, 836 (Miss. 2010) (citing *Koppers*, 42 So.3d at 5). Lofton, however, actually understood causation, which further demonstrates his knowledge of his injury. *Id.* at 838 ("While the notice of this causal relationship generally is irrelevant to the accrual of the cause of action, it shows McLemore's knowledge of his injury at that time"). Lofton admitted he knew the viscosifier products with which he worked for thirty years in the 1960s, 1970s, and 1980s were asbestos. RE 3, 372:3-19. He further admitted that during the 1980s he knew that asbestos was dangerous and that exposure to asbestos could cause him serious injury. RE 3, 306:15-307:1; 307:10-15; 373:15-29.

2. Lofton misstates controlling law.

To support his argument, Lofton misinterprets and misstates the holdings in *Owens-Illinois, Koppers,* and *Lincoln Electric*. *Lofton Brief* at 6-9.

Owens-Illinois does not hold there must be a diagnosis of asbestosis before the statute of limitations begins to run. In *Owens-Illinois,* the Court held the discovery rule codified in §15-1-49(2) means the "cause of action accrues and the limitations period begins to run when the plaintiff can reasonably be held to have knowledge of the injury or disease." *Owens-Illinois*, 573 So.2d at 709 (emphasis added). Significantly, in *Owens-Illinois* there was no contemporaneous x-ray evidence of lung injury when the plaintiff Edwards began experiencing shortness of breath. *Id.* at 705. In fact, the opposite is true. Three years after first experiencing shortness of breath,

and three years before he was diagnosed with asbestosis, "Edwards had x-rays taken; a radiologist found "no abnormalities in the chest" and "no evidence to indicate asbestosis." *Id.* Accordingly, the Court determined Edwards could not reasonably be held to have knowledge of the injury or disease before his diagnosis. *Id.* at 709. Lofton, on the other hand, had irrefutable x-ray evidence of lung injury and disease in 1995 and 1996—at least seven years before his 2003 diagnosis. His fibrotic lung injury, and its date of discovery, was confirmed by his own experts at trial. *CP Brief* at 14.

In *Koppers*, the plaintiff filed suit in 2006, claiming that exposure to chemicals released by the defendants in 1980 caused her to suffer numerous injuries: headaches in 1984, a DNC (1990), a hysterectomy (1994), ovarian cysts (1999), skin rashes and ovaries removed (2000), lumpectomy and infiltrating ductal carcinoma (2001). 42 So.3d at 3. The trial court held the plaintiff's cause of action accrued "when she had knowledge of her [1984] headaches" and the other injuries. *Id.* This Court affirmed the trial court's decision to dismiss the case and held the diagnosis date of the last injury was the latest date the plaintiff's cause of action could have accrued. *Id.* at 7 ("We find that Angle's cause of action accrued at the latest in 2001, the date she was last diagnosed with an injury . . . .") (emphasis added). However, this Court did not decide when the plaintiff's cause of action initially accrued—such decision was unnecessary because the plaintiff filed her complaint more than five years after her last injury.

In *Lincoln Electric*, the plaintiff welder argued, like Lofton, that his cause of action did not accrue until he was diagnosed with a disease. He filed suit in 2005. However, "McLemore had difficulty using his left hand in December 2001," and, like Lofton, "prior to his [2005] diagnosis, McLemore visited physicians in an effort to identify his condition." 54 So.3d at 838, 836. Consequently, the Court held his claim accrued "no later than" when he "knew (or should have known) . . . that he had an injury." *Id.* at 836 (emphasis added). Contrary to Lofton's

misinterpretation, the *Lincoln Electric* Court did not decide *when* the cause of action accrued, but instead determined the latest possible date, which was outside the limitations period. *Id.* at 838.

The application of the statute of limitations is a matter of law. *Powe*, 892 So.2d at 227. Here, Lofton's claims are barred as a matter of law because they accrued in 1996 or, at the latest in 1998—six to eight years before he filed suit in 2004. *CP Brief* at 11-14. His 2003 diagnosis is immaterial because his own actions and medical history demonstrate he discovered, or reasonably should have discovered, his lung injury by 1996 (and certainly no later than 1998). Lofton's admissions that he knew the viscosifiers were asbestos and could cause him serious injury are a vivid backdrop against which to assess what a reasonably diligent man would discover, or should discover, from 1995-1998 while he (1) repeatedly sought and underwent medical treatment for fatigue, smothering, and shortness of breath and (2) his concurrent medical records document lung injury ("interstitial pulmonary fibrosis and linear scarring").

B. CPChem proved its inherent characteristic defense.

Lofton fails to cite a single fact or authority that denies CPChem this defense. Instead, he rebuts nonexistent issues, misconstrues case law, and asserts argument relevant only to the warnings claim he lost at trial.

First, he incorrectly asserts CPChem has argued all asbestos lawsuits are prohibited and that asbestos is a natural mineral incapable of design. *Lofton Brief* at 11-12. CPChem did not argue either as grounds for reversal, so neither is relevant. He then argues Flosal was "designed by CPChem," another issue neither raised by CPChem nor relevant. *Id.* at 13.

Next, he argues *Godoy* stands for the proposition that defective design claims may be based on the presence of "characteristic" ingredients, but in so doing, he misconstrues the holding. *Godoy* held quite clearly that a claim for defective design can not be maintained where the alleged design defect is the presence of a characteristic ingredient of the product. *Godoy v.*

E.I. DuPont de Nemours & Co., 768 N.W.2d 674, 685 (Wisc. 2009); *CP Brief* at 17.[4]

Lofton then argues the design defect in Flosal is not the presence of asbestos, but that in ordinary use Flosal produced breathable asbestos fibers. *Lofton Brief* at 13. This distinction is immaterial. Lofton's expert admitted removing asbestos from Flosal would leave only an empty bag, which answers the question whether eliminating asbestos (and its alleged production of breathable asbestos fibers) would compromise Flosal's usefulness and desirability. Miss. Code Ann. §11-1-63(b). *CP Brief* at 15-16.

Lofton next argues that asbestos is not a generic aspect of viscosifiers. *Lofton Brief* at 14. But a plain reading of the MPLA reveals the inquiry focuses on "*the* product" claimed to be defectively designed, not the "type" of product. *The* product at issue was Flosal. Flosal was a *type* of viscosifier. As Lofton's expert explained, there were many different "types" of viscosifiers in use at that time. Tr. 890:27-892:2. Whether other types of viscosifiers did or did not contain asbestos or produce breathable asbestos fibers is not relevant to whether Flosal's usefulness or desirability would be compromised by eliminating asbestos fibers. As explained in CPChem's Brief, asbestos, which according to Lofton produced breathable fibers when used, was the inherent generic characteristic of Flosal. *CP Brief* at 15-16. An ingredient can not be more inherent and generic to "the product" than if its removal results in no product at all.

Finally, Lofton argues the average person was not aware of the dangers posed by asbestos

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[4] The "latex glove" case Lofton references, yet fails to cite, is *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727 (Wisc. 2001), in which a medical worker sued a latex glove manufacturer after she suffered an allergic reaction. The Court cited the Restatement (Second) of Torts §402A cmt. J (1965) which provides a manufacturer can, in some circumstances, prevent a product from being rendered unreasonably dangerous by issuing appropriate warnings or directions for use. *Id.* at 754. The Court then explained that based on this comment in the Restatement, where a "product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, the product, absent warning or directions, is unreasonably dangerous." *Id.* (emphasis added). The Court's focus was not on whether the presence of latex or cornstarch was a characteristic ingredient, but instead whether the product included a sufficient warning. *Id.* Since the jury found against Lofton on his warnings claim, *Green* is irrelevant and otherwise does not support Lofton's misplaced argument.

products. *Lofton Brief* at 14. In considering this point, it is important to note the statutory phrase "which is recognized by the ordinary person with the ordinary knowledge common to the community" modifies the term "inherent characteristic." Miss. Code Ann. §11-1-63(b). Because Flosal was a specialty-use product sold to drilling mud companies and used by well operators and drilling contractors, the "ordinary person" standard is properly limited to that "community" of persons in the oilfield industry. Tr. 354-361; R. 2530. Those operators and drilling contractors were notified by a printed warning on Flosal's packaging about the dangerous nature of the inherent characteristic (asbestos fibers) of the product. *See CP Brief* at 11, n.3 (Flosal's warning language). The warning notified the community of persons in the oilfield (1) the product contains asbestos fibers and (2) inhaling/breathing asbestos dust may cause serious bodily injury. Lofton's product design expert agreed: he testified Flosal's warning put drilling contractors, like those that employed Lofton, on notice to provide their employees with dust masks and respirators. Tr. 987:4-21.

Further, Lofton's own experts testified the average person was very much aware by 1963 of the dangers of asbestos. *CP Brief* at 16; Tr. 567:7-11 (Dr. Brody: the "world" was aware asbestos was toxic by 1963); Tr. 700:23-706:14 (Dr. Holstein: same). So even if, in this case, the "ordinary person" and the "community" considered under the MPLA is expanded beyond the confines of the oilfield, it is undisputed the ordinary person with ordinary knowledge was aware of the toxic nature of asbestos in Flosal at the time Lofton worked with it. *See CP Brief* at 15-18.

C. Lofton did not meet his burden of proof under the MPLA.

Lofton argues he met his statutory burden of proof under the MPLA because he put on evidence that (1) Flosal injured him and (2) there were non-asbestos viscosifier products available while Flosal was on the market. *Lofton Brief* at 14-18. His evidence falls far short of his statutory burden.

1. Lofton did not prove Flosal failed to function as expected.

As explained in CPChem's Brief, the law recognizes there are products whose use involves a risk of harm. That risk alone does not make the product defective, but may trigger a manufacturer's duty to warn.[5] *CP Brief* at 18-19; *Cooper v. General Motors Corp.*, 702 So.2d 428, 442 (Miss. 1997) (Mississippi law does not require manufacturer to design a "crashworthy, accident-proof or foolproof vehicle" or to "incorporate into his product every innovation which ... might have rendered the product more safe").

Lofton argues Flosal was defectively designed because when he misused it (he never used respiratory protection) it injured him. But Mississippi has squarely rejected the "use + injury" syllogism as a theory of liability in a products liability action. *Cather v. Catheter Technology Corp.*, 753 F. Supp. 634, 638-39 (S.D. Miss. 1991) ("Mere proof of damage following use of a product is not sufficient to establish liability"). To prevail on a design defect claim under the MPLA, a claimant must prove each and every statutory element of the claim. Lofton did not. *CP Brief* 18-20.

Lofton asserts the failure to function as expected requirement is to be viewed solely from the vantage point of the user. *Lofton Brief* at 15. Most of his cited authority is inapposite.[6] Only

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[5] *See* Restatement (Second) of Torts § 401 cmt k. ("There is no legal duty not to sell a chattel which involves a risk of harm"); Restatement (Second) of Torts § 402(A) cmts, h. & i. (manufacturers have an obligation to warn consumers about the dangers of their products) and cmt j. ("Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous").

[6] For example, *Smith v. Mack Trucks, Inc.*, 819 So.2d 1258 (Miss. 2002) was not governed by the substantive provisions of the MPLA (due to its date of filing) and the issue was whether a jury instruction on the inherent characteristic defense—not failure to function as expected—was proper. *Id.* at 1261-62. *Williams v. Bennett* did not address user expectations but instead affirmed summary judgment in favor of the defendant because there was no proof the defendant knew or should have known of the danger that caused the injury; nor was there proof of a feasible design alternative that could have, to a reasonable probability, prevented the harm. 921 So.2d 1269, 1274-77 (Miss. 2006). In *Wolf v. Stanley Works*, 757 So.2d 316, 321-22 (Miss. Ct. App. 2006) the Court affirmed summary judgment in favor of the defendant door manufacturer and ruled, *without deciding from whose perspective* the failure to function as expected

Austin v. Will-Burt Co., 361 F.3d 862, 873 (5th Cir. 2004) suggests the failure to function as expected requirement invokes the "consumer expectations test." Assuming that to be the case, the user to be considered is an objectively reasonable user. *Wolf*, 757 So.2d at 321-22 ("reasonable person" would not expect the allegedly defective door would never need maintenance); *Toney v. Kawasaki Heavy Indus.*, 975 F.2d 162, 168 (5th Cir. 1992) ("Mississippi Supreme Court has adopted an objective test of 'consumer expectations' for claims under Section 402A. The test is the objective measure of the expectations of the generic 'consumer' who has 'ordinary knowledge common to the community'").

Before looking at Flosal's functionality from the objectively reasonable consumer's viewpoint, it is important to note that *Austin* did not, as Lofton asserts, hold the crane mast functioned as expected "only because the plaintiff/user unequivocally had been made aware of the risk of electrocution when using the mast." *Lofton Brief* at 15. Instead, the *Austin* court held the crane mast functioned as expected for its intended purpose, even though it was misused and became entangled in power lines leading to a man's electrocution. There was no design defect because (1) there was no evidence that when the crane left the manufacturer's control, telescoping masts were insulated so as not to conduct electricity or that such masts were equipped with a proximity warning device, and (2) there was evidence the danger of electrocution was well recognized. *Austin*, 361 F.3d at 874.

The holding supports CPChem's position: (1) when Flosal left CPChem's control, no other asbestos viscosifier was formulated so as not to generate breathable fibers during use, and

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requirement is viewed, that regardless of whether the court examined the expectations of the user or the owner of the property, it was impossible to conclude a reasonable person would expect the allegedly defective door would never need maintenance. Finally, Lofton cites to and mischaracterizes dicta from *Guy v. Crown Equip. Corp.*, 394 F.3d 320 (5th Cir. 2004), wherein failure to function was not an issue on appeal and the court noted only that the district court below had denied summary judgment on that issue because "plaintiffs *perhaps* have made that element of proof" (emphasis in original) by arguing the forklift failed to function without injuring its operator. *Id.* at 330 n.*

(2) the dangers of breathing asbestos were well known at the time, not only to the community of oilfield users via warnings on the Flosal packaging but, also to the "world." *See* p. 8, *supra.* Just as a reasonable user of a crane would expect to be electrocuted if the crane were misused and became entangled in power lines, a reasonable consumer or user of Flosal—being aware of the dangers of asbestos by 1963 and having been specifically informed by Flosal's package warnings (1) that the product contained asbestos, (2) to use adequate protective devices to prevent inhalation, (3) to avoid creating dust, and (4) that inhalation/breathing asbestos may cause serious bodily injury (*see CP Brief* at 11 n.3)—would expect it to cause lung injury if it were misused for prolonged periods of time without adequate respiratory protection. This is exactly what Lofton argues happened to him.

No case holds that a dangerous product failed to function as expected because the plaintiff was injured while misusing the product. The MPLA and this Court's case law make clear the failure to function element of proof is in addition to, and separate from, proof of injury—even for dangerous or hazardous products.[7] *Williams v. Bennett*, 921 So.2d 1269, 1274 (Miss. 2006) (outlining the "additional statutory requisites codified in section (f) of the products liability statute") (emphasis added). *See Austin v. Will-Burt Co.*, 361 F.3d 862, 874-75 (5th Cir. 2004) ("Because there is no evidence that the mast 'failed to function as expected,' recovery against Will-Burt for design defect is precluded by section 11-1-63(f)(ii)"). Flosal functioned as expected for its intended purpose. *CP Brief* at 18-19.

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[7] "An ordinary revolver functions as expected if, when loaded and off-safety, the trigger is normally pulled and a bullet is expelled, and this is no less so because, quite unintentionally, someone is struck by the bullet. So also with a cigarette lighter normally ignited and applied to flammable material, notwithstanding that a tragic fire results, or an intact hatchet which strikes a hand placed or left on the target wood." *Austin*, 361 F.3d at 874.

2. Lofton did not prove a feasible design alternative that would have to a reasonable probability prevented the harm without impairing the utility, usefulness, practicality or desirability of the product to users or consumers.

The MPLA states plainly the claimant must prove a feasible design alternative to "*the* product." Miss. Code Ann. §11-1-63(f)(ii); *CP Brief* at 20-21. Again, Lofton overlooks this plain language and attempts to avoid it by arguing that entirely different types of products (non-asbestos viscosifiers) are alternative designs of Flosal. Tr. 892:1-2 ("before the 1960s these other types of viscosifiers were being used") (emphasis added). *Lofton Brief* at 17-18.

Like the plaintiffs in *Williams* and *Brass Eagle*, however, Lofton never explains how the product at issue could be alternatively designed in a manner that would prevent the harm and not adversely affect that specific product's utility, usefulness, practicality or desirability. *Williams*, 921 So.2d 1269, 1275 (Miss. 2006) (granting summary judgment to defendant; "the mere mention of a design alternative by an expert comes well-short of lending evidentiary guidance to a court"); *Clark v. Brass Eagle, Inc.*, 866 So.2d 456 (Miss. 2004).

In *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997), the court observed that an "alternative design is by definition a different method of configuring the product." (Emphasis added). The feature that drove customer demand for and acceptance of Flosal was asbestos—the sole constituent that made it a useful, desirable product to its users and consumers. *CP Brief* at 18; Tr. 891:2-3 (asbestos was an "excellent viscosifier"). Lofton presented no evidence or empirical data to demonstrate how Flosal could be reengineered or redesigned to eliminate the production of breathable asbestos fibers during ordinary use. Nor did he did provide any empirical evidence the non-asbestos products provided the same utility, usefulness, practicality or desirability as Flosal to its users and consumers, who were accustomed to and desired the functionality and utility provided by asbestos. *See Watkins*, 121 F.3d at 991-93 (excluding expert testimony on feasible alternative design for lack of empirical support; "proper

methodology for proposing alternative designs includes more than just conceptualizing possibilities").

D. Lofton failed to prove frequency, regularity and proximity of exposure to Flosal.

Lofton may be correct that the law does not require him to recall "the exact number of bags of asbestos mixed on an exact day at an exact minute 45 years ago," *Lofton Brief* at 22, but Mississippi law, even forty-five years after Lofton allegedly worked with a product, does require him to identify a specific product and to provide information about how frequently and with what regularity he used it. Lofton's record citations at pages 19-22 of his brief do not satisfy that fundamental test. Miss. Code Ann. §11-1-63; *Monsanto v. Hall*, 912 So.2d 134, 137 (Miss. 2005); *Gorman-Rupp Company v. Hall*, 908 So.2d 749, 757 (Miss. 2005).[8]

Lofton's assertion that "[a]fter mixing CPChem's products, [he] looked like a snowman ..." critically misstates the evidence. *Lofton Brief* at 20-21. The transcript at 275:23-24 reveals the question to which Lofton responded with his "snowman" metaphor was: "And let's talk about drilling mud. Tell the jury and the Court about drilling mud and how it's used." Tr. 274:3-5. Neither the question nor Lofton's long answer at Tr. 274:6-276:24 mentions Flosal or any specific drilling mud product. Instead, Lofton describes how all mud additives were delivered in bags that had to be cut open and dumped into the hopper and all were dusty.

Lofton's testimony overall is deficient because it concerned "asbestos drilling mud additives" in general, not Flosal or other specific CPChem products. *CP Brief* at 22. Transcript citations on which Lofton mistakenly relies to support his claim of specific product exposure reveal the many times he did not identify Flosal, or any specific drilling mud additive. For example, his testimony addresses unspecified "asbestos drilling mud additives" for David New

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[8] That CPChem sold the product from 1964 to 1984, under different labels, and touted its versatility is irrelevant to proving Lofton's requisite exposure. Similarly, that Lofton worked on 250 different drilling rigs, for many different operators, in seven different states and offshore, and mixed drilling mud in poorly ventilated spaces does not satisfy the standard. *See CP Brief* at 21-23.

Drilling and Reading & Bates in 1967 (Tr. 328:13-20), but he never testified that he Flosal during this employment.[9]

The typical flaw in his testimony is highlighted by the following:

> Q: Do you recall using asbestos drilling mud additives?
> A: Yes, sir. Because we had a lot of problems down there.
> Q: Do you recall which brand you used?
> A: I really couldn't because I know we had a lot of whole problems and I know we used a bunch of it.

Tr. 334:28-335:6. (Emphasis added.)

Even when Lofton mentioned Flosal or Visquik by name, his testimony is deficient. For example, he testified at Tr. 277:1-21 that in 1964 he used Flosal. Asked if he used a "lot of it," he answered he didn't know what he used: "Used a lot of it. Back then when I first started, I don't know what it was, but we had to mix high viscosity mud." Tr. 277:9-11 (emphasis added). Later, asked "when you used flosal, when you began using it in 1964, did it cause dust?," his response did not address Flosal in particular. Instead, he testified: "All the muds out there that you use out there cause dust. There's no way --." Tr. 278:28-29.

Where he recalled Flosal or Visquick, he failed to describe the frequency and regularity of his use. For example, when he worked for Four States Drilling from 1964 to 1967, he gave no information as to any frequency or regularity of using Flosal. Tr. 327:12. He recalled using Flosal in 1965 or 1966 on "one hole" for Penrod Drilling. Tr. 327:16-26. Obviously, one use is neither frequent nor regular.[10]

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[9] Similarly, he never testified he used Flosal at Justiss Oil in 1967, 1970, 1974, 1979, 1980, 1983 (Tr.328:21-26); Rowan Companies in 1967 (Tr. 329:7-11); T.L. Drilling in 1968 (Tr. 329:12-28); Big Chief Drilling in 1967 (Tr. 330:12-20); Exeter Drilling in 1972 and 1974 (Tr. 330:21-331:4); and Tesoro Drilling in 1980 (Tr. 334:19-335:6).

[10] The same deficiency appears in his testimony about Sharp Drilling Offshore (Tr. 330:6-11), Dual Drilling (Tr. 331:7-13), Two R Drilling (Tr. 331:24-28), Munro Drilling (Tr. 331:29-332:1-5), Chesley Pruet (Tr. 332:6-10), Rapid Drilling (Tr. 333:20-27), and Marion Drilling (Tr. 334:8-18). Nowhere does he even discuss frequency and regularity of use. In a few instances he offered only a vague generality as to his use of a particular product. For instance, for Noble Drilling in 1975 (Tr. 332-25-333:1-9) (used

E. The MPLA subsumes Lofton's negligence claim. If not, Lofton failed to prove negligent infliction of emotional distress.

1. Lofton's NIED claim is grounded in, or derivative of, his MPLA claim.

The MPLA provides the exclusive theories of liability to recover damages for injuries caused by a defective product. That does not mean the MPLA abrogates or subsumes all claims against product manufacturers or suppliers. Instead, the MPLA subsumes or abrogates claims grounded in, or derivative of, the four statutory product defect theories set out in Miss. Code Ann. §11-1-63(a)(1): (1) manufacturing defect, (2) design defect, (3) inadequate warning and (4) breach of express warranty—regardless of the label of the claim.[11] Accordingly, a negligent or intentional tort claim grounded in, or derivative of, one of the MPLA's four enumerated theories should be held barred or subsumed by the MPLA.

This Court has not squarely ruled on this issue. CPChem submits this construction of the MPLA promotes its purposes and is consistent with legislative intent and this Court's prior decisions in this area, which hold in a variety of circumstances that the MPLA does not bar claims which are not grounded in, or derivative of, one of the four MPLA theories. For

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Flosal "one time"), Exeter Service Company (Tr. 333:10-19) ("I used some visquick"), and Ratcliff Drilling in 1979 (Tr. 333:28-224:1-7) ("We used some visquick . . . .") (emphasis added).

[11] Because the MPLA governs "any action for damages caused by a product except for commercial damage to the product itself," Miss. Code Ann. § 11-1-63 (emphasis added), at least one commentator has suggested the legislature may have intended complete abrogation of common law claims for injuries caused by products. *See* Phillip L. McIntosh, *Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part I,* 16 MISS. C.L. REV. 393, 394 (1996):

> the overall structure of the Act creates the impression the legislature intended to create exclusive causes of action for injuries caused by products and to replace common law, except as to defenses, and where resort to common law is necessary to supply definitions of terms not otherwise defined in the Act. The Act's language appears to occupy the field, relying on the common law to provide definitions and defenses in addition to those enumerated in the Act.

See also, Dodson v. GMC, 1997 Miss. App. LEXIS 969, *15 (Miss. Ct. App., Aug. 12, 1997). CPChem does not suggest the MPLA completely abrogates or subsumes all non-MPLA claims, but only those claims grounded in, or derivative of, one of the four enumerated MPLA product defect theories set out in 11-1-63(1)(i)(1)-(4).

example, in *Bennett v. Madakasira*, 821 So.2d 794, 808 (Miss. 2002), the Court held the MPLA did not bar a claim for breach of implied warranty against a product manufacturer under the UCC (a non-MPLA claim). Likewise, in *R. J. Reynolds Tobacco Co. v. King*, 921 So.2d 268, 272 (Miss. 2005), the Court confirmed the limited scope of the MPLA's inherent characteristic defense and held it does not bar non-MPLA claims[12] in actions against manufacturers of cigarettes. Both holdings are consistent with CPChem's position. Most recently, in *Watson Quality Ford, Inc. v. Casanova*, 999 So.2d 830, 833-34 (Miss. 2008), the Court properly declined to hold the MPLA was "the exclusive remedy for malfunctioning automobiles," and held the MPLA did not bar a negligent repair claim against the seller of a car. The negligent repair claim did not arise from the manufacture, design, or marketing of the vehicle, so it was not grounded in, or derivative of, any of the four MPLA theories. Lofton, and the federal district court cases he cites, appear to misunderstand this Court's treatment of non-MPLA claims in the context of product liability cases.

Unlike the surviving claims in *Bennett, King,* and *Watson Quality Ford,* Lofton's NIED claim is indisputably grounded in, and derivative of, three of the four enumerated MPLA theories of liability. He alleges injury caused by use of a product that was defective in manufacture, defective in design and which failed to contain adequate warnings. R. 185-186. He asserts no fact or theory of liability that is not otherwise grounded in, or derivative of, his MPLA theories of liability. Stated otherwise, "but for" Lofton's use of a product he alleges was defectively manufactured, defectively designed and marketed with inadequate warnings, Lofton would have

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[12] Specifically, the *King* Court rejected RJR's argument that "the MPLA's inherent characteristic defense bars 'any action for damages caused by' manufactured commercial cigarettes regardless of how the plaintiff labels the causes of action in the complaint," and affirmed, on interlocutory appeal, the trial court's denial of RJR's motion for judgment as to King's fraudulent misrepresentation, conspiracy to defraud, negligent misrepresentation, deceptive advertising, and wrongful death claims. *See* 921 So.2d at 270. It is readily apparent these surviving theories of liability are not grounded in, or derivative of, the four MPLA theories of liability. Each can stand alone separate and apart from a product liability action.

suffered no injury and consequently, no emotional distress. Accordingly, it is consistent with legislative intent and this Court's prior rulings to hold that the MPLA subsumes Lofton's NIED claim.[13]

Courts in Louisiana, Connecticut, Kentucky, Washington, and New Jersey have all interpreted the original language of their products liability statutes to prohibit bringing common law negligence claims against product manufacturers/suppliers when those claims are grounded in, or derivative of, the enumerated product liability theories in their respective statutes.[14] Likewise, the state legislatures of both Ohio and Indiana rejected their state courts' conclusion that common law negligence claims against product manufacturers/suppliers survived the enactment of their respective products liability statutes.[15] When amending its statute to "abrogate

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[13] This Court's holding in a pre-MPLA case is instructive. *Estate of Hunter v. General Motors Corp.*, 729 So.2d 1264 (Miss. 1999) was a pre-MPLA claim governed by the products liability risk-utility test, adopted in *Sperry-New Holland v. Prestage*, 617 So.2d 248 (Miss. 1993), for determining whether a product contains a design defect. In *Estate of Hunter*, this Court held that a separate jury instruction on negligence was not required in addition to the products liability risk-utility instruction, because risk-utility analysis necessarily included a determination of negligence. *Id.* at 1277-78. That holding is functionally equivalent to holding that the negligence claim was subsumed by the then-governing products liability law. Similarly, the MPLA codifies risk-utility analysis for design defect at Miss. Code Ann. § 11-1-63(a)(ii) and that risk-utility analysis necessarily includes a determination of negligence.

[14] *See Jefferson v. Lead Indus. Ass'n*, 930 F. Supp. 241, 244-45 (E.D. La. 1996) (common law negligence, failure to warn, breach of express and implied warranties, and fraud claims against product manufacturer based on alleged defective design, manufacture and failure to warn abrogated by product liability act); *Mt. W. Helicopter, LLC v. Kaman Aerospace Corp.*, 310 F. Supp. 2d 459, 463-64 (D. Conn. 2004) (common law strict liability, negligence, breach of warranty and misrepresentation claims against product manufacturer based on alleged defective design and manufacture subsumed by product liability act); *Monsanto Co. v. Reed*, 950 S.W.2d 811, 814 (Ky. 1997) (common law negligence claim against product manufacturer based on alleged failure to warn subsumed by product liability act); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1066-67 (Wash. 1993) (common law negligence claim against product manufacturer based on alleged failure to warn subsumed by product liability act); *Oquendo v. Bettcher Indus., Inc.*, 939 F. Supp. 357, 361 (D.N.J. 1996) (common law negligence claim against product manufacturer based on alleged defective manufacture and design subsumed by product liability act).

[15] *See Miller v. Alza Corp.*, 759 F. Supp. 2d 929, 943 (D. Ohio 2010) (noting that the Ohio Products Liability Act abrogates common law negligence, negligent misrepresentation, and warranty claims against a product manufacturer); *Ryan v. Phillip Morris USA, Inc.*, 2006 U.S. Dist LEXIS 9077, *5-*10 (N.D. Ind. Feb. 22, 2006) (observing that after the 1995 Amendments to the Indiana Products Liability Act, the IPLA applied to all products liability cases—including the plaintiff's negligence and fraud claims.)

all common law products liability causes of action," the Ohio legislature specified the amendment was only intended to clarify its original intent, which the Ohio Supreme Court had misconstrued when it allowed a claim of common law negligent design against a product manufacturer. OHIO REV. CODE ANN. § 2307.71(B) (Lexis 2011); S.B. 80, 150th Leg. (Ohio 2004); *Carrel v. Allied Prods. Corp.*, 677 N.E.2d 795, 799-800 (Ohio 1997). The Indiana legislature amended its statute twice—first to allow the survival of negligence claims, then to pointedly reverse course and restore the products liability statute to its role as the exclusive remedy in products-based cases. IND. CODE ANN. § 33-1-1.5-1 (2011); Pub. L. No. 278-1995, § 1. *Progressive Ins. Co. v. GMC*, 749 N.E.2d 484, 487 n.2 (Ind. 2001).

Likewise, Professor Weems cautioned that allowing common law negligence claims against a product manufacturer for injuries caused by a product would render the MPLA irrelevant. "[A] plaintiff who is unable to demonstrate a feasible design alternative or to meet one of the other MPLA requirements would be able to circumvent the statute by simply proceeding under . . . a common law negligence theory."[16] That is precisely what happened here. Lofton asserted a common law negligence claim that cannot stand alone and apart from the statutory MPLA theories of liability. The MPLA's scope should not be so narrowly construed as to allow such a claim to survive; otherwise, circumvention of the MPLA's evidentiary requirements makes its enactment nothing more than "a mere academic exercise." *Id.*

The MPLA's plain language and this Court's prior rulings support CPChem's position that the MPLA provided Lofton his exclusive claim against CPChem, because Lofton alleges no fact or claim that is not grounded in, or derivative of, the enumerated MPLA theories of liability. Accordingly, the Court should hold that Lofton's NIED claim is subsumed by the MPLA. To hold otherwise renders the MPLA irrelevant.

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[16] Weems, Robert A. & Weems, Robert M., Ch. 15: Products Liability, § 15:3 *In General-MPLA*, MISSISSIPPI LAW ON TORTS (2d. ed. 2008).

2. Lofton did not prove his NIED claim.

Alternatively, this Court should reverse and render because Lofton failed to prove mental or emotional injury to support his NIED claim. Lofton does not contest that his NIED testimony is contained in only two transcript pages. Lofton's testimony is exactly the kind of generalizations of mere worry and emotional upset that this Court has held are not legally sufficient. *Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736, 744 (Miss. 1999). Whether an emotional distress claim sounds in tort, contract, or under the MPLA, the same quantum and quality of evidence to support an award is required. *Adams*, 744 So.2d at 743-744; *Morris Newspaper Corporation d/b/a WXXV-TV v. Allen*, 932 So.2d 810 (Miss. Ct. App. 2006).

The same standard of proof applies to emotional distress resulting from fear of future disease. The *Pickering* case, to which Lofton cites, does not hold that a plaintiff claiming a fear of future disease need not prove his emotional distress. This Court has "never allowed or affirmed a claim of emotional distress based solely on a fear of contracting a disease or illness in the future, however reasonable." *Paz v. Brush Engineered Materials, Inc.*, 949 So.2d 1, 5 (Miss. 2007) (citing *Ferguson*, 662 So.2d at 658). Lofton's fear of a future disease, without more, is legally inadequate. He must also prove his emotional injury. For example, Lofton did not, as did the plaintiff in *Pickering*, testify that he did not socialize, go out in public as much, or was subject to the snickering of others because of his alleged exposure to Flosal. *Pickering,* 749 So.2d at 98. Lofton failed to offer any such testimony, and no other witness did either.

Further, Lofton's proof does not satisfy the twin tests of *Pickering* to sustain a claim for fear of cancer. First, as discussed above, he did not prove the frequency, regularity and proximity of his alleged exposure to asbestos from Flosal, as opposed to all asbestos drilling mud additives. Lofton's medical experts cannot fill that gap because they have no first-hand proof of his exposure to Flosal. Second, his experts demonstrate his alleged fear of cancer is

unreasonable. Lofton has never been diagnosed with cancer. Tr. 573:24-29. Although his experts testified that exposure to asbestos generally increases his risk of getting cancer, they agree that Lofton, as a matter of medical probability, will not get cancer. Tr. 752:28-753:8 (Dr. Holstein); Tr. 832:5-9 (Dr. Stogner); Tr. 576:1-8 (Dr. Brody); Tr. 600:3-16 (Dr. Katz) ("The chances are he [Lofton] will not get cancer.")

II. Alternatively, the case should be remanded for a new trial.

If not rendered in favor of CPChem, this case should be remanded. *See CP Brief* at 25-47. Discrete arguments raised by Lofton in opposition to remand are addressed below.

A. The circuit court erred by denying a transfer of venue.

Lofton contends that venue is fair because CPChem obtained a prior defense verdict in Jones County. *Lofton Brief* at 29. Prevailing in one trial does not mean Jones County is a fair and unbiased venue, only that CPChem prevailed despite the tainted venue. Lofton contends bias in the jury pool was cured by the summons of an additional 100 persons. Given the depth and breadth of bias in Jones County, calling more people cures nothing—it simply highlights the need to change venue.

Lofton is wrong, again, when he asserts so many asbestos drilling mud cases are pending in Jones County, in part, because "defendants agreed to venue." *Lofton Brief* at 29-30. To the contrary, CPChem has not waived objections to venue.[17] Instead, CPChem has moved for change of venue in each case tried in Jones County, and the same trial judge has denied every motion.

CPChem demonstrated the high volume of past and pending asbestos lawsuits in Jones County, the negative advertising and mail solicitation by Lofton's counsel, and significant community connections with asbestos litigation and litigants. *CP Brief* at 27-30 *See Janssen*

[17] When the Special Master ordered severance and transfer of the original plaintiffs' cases, he stated "neither party has waived any rights or objections they may have with respect to these issues." R. 165.

Pharmaceutica, Inc. v. Bailey, 878 So.2d 31, 50-53 (Miss. 2004). Lofton does not dispute that 21,617 Masonite claimants have filed asbestos lawsuits in Jones County since 1997 nor that his own counsel have 458 asbestos drilling mud lawsuits against CPChem in Jones County. His argument that these extraordinary numbers do not reveal whether all plaintiffs are "local" Jones County residents or directly connected to Lofton misses the fundamental point that this high volume of asbestos cases creates a patent and latent bias throughout the venue. *CP Brief* at 28. Likewise, Lofton does not dispute the depth of bias shown in the jury questionnaires. He argues, without any explanation, that voir dire cures such extensive bias. To the contrary, the trial court abused its discretion during voir dire and jury selection, thereby intensifying the pre-existing bias, not curing it. *CP Brief* at 30-34.

Finally, Lofton contends he has no special or significant standing in the community. *Lofton Brief* at 31. *Bailey* makes clear, however, the focus of the inquiry is on Jones County's community connections with asbestos drilling-mud litigants generally, not Lofton's individual connections or standing. *Bailey*, 873 So.2d at 55.

B. The circuit court should have excluded the testimony of Lofton's industrial hygienist under *Daubert*, *McLemore*, and Rule 702.

Lofton does not refute that Cohen's testimony has no nexus to Lofton's alleged exposure to Flosal. For example, Cohen's opinion that the "the level of asbestos exposure [on drilling rigs] was substantial" is based upon his reading of 2-page memo referencing use of a product CPChem did not sell and on a well on which Lofton did not work. Ex. 2002, 144:15-20.

Lofton's contention that Cohen testified only to "general causation" does not eliminate *Daubert's* requirement that only *reliable* expert testimony be admitted. From a document containing no empirical data whatsoever, Cohen opines use of a UCC product[18] generated "no less than . . . 20 fibers per cc based on minimum lighting conditions." Ex. 2002, 147:14-16. His

[18] UCC was a trial defendant in *Smith* where Cohen testified live, but not in *Lofton*.

opinion is pure speculation, but even if it were not, his opinion has no nexus to any CPChem product. Further, there is no evidence of any methodology, much less a scientific methodology, supporting his opinion; or that his opinion was subjected to peer review, has an error rate, or is generally accepted in the scientific community. Cohen's non-existent methodology cannot be tested for reliability.[19] Cohen's failure to follow a scientific method in formulating his opinion is likely explained by his suspect credentials. *CPBrief at* 34-40. For these and all other reasons discussed in CPChem's Brief, allowing Cohen's testimony from the *Smith* trial to be read in *Lofton* is grounds for a new trial.

C. The circuit court erred when it admitted Exhibit 950 and allowed Lofton's counsel to improperly testify.

Lofton is incorrect when he (1) states Ex. 950 was admitted prior to trial and (2) argues he was entitled to use Ex. 950 to cross examine Dr. Ross "with documents that corroborated Mr. Lofton's work history and occupational exposure to asbestos." *Lofton Brief* at 40. Exhibit 950 was not admitted prior to trial,[20] nor even during Lofton's case in chief. Tr. 1015-1017. More importantly, no record in Ex. 950A-M corroborates or even mentions the use of Flosal (or any other CPChem product) at any well where Lofton actually worked. *CP Brief* at 40. Lofton does not refute this. Consequently, it is disingenuous to assert Ex. 950 corroborates Lofton's work history or his exposure to Flosal or that it impeaches Dr. Ross' testimony.

Because it did not corroborate Lofton's alleged use of Flosal, Ex. 950 was irrelevant under M.R.E. 401 and should not have been admitted, especially on cross-examination of the

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[19] While the NIOSH fiber counting procedure and EPA's methodology for analyzing asbestos in bulk samples may relate to Cohen's criticism of CPChem's dust studies, those procedures in no way support Cohen's speculative airborne fiber count opinion teased from his reading of Ex. 65 (UCC document by E.J. Kleber about Super Vibestos, a UCC product).

[20] On the first day of trial, Lofton's counsel read into the record the list of pre-admitted exhibits—Ex. 950 is not on that list. Tr. 222-23. Before trial, the Special Master ruled only that Ex. 950 was an authentic business record of Baker Hughes, expressly ruling "that further objections will be reserved pending the introduction or use of those records at trial." R. 10716, p. 25.

final defense witness before the case was submitted to the jury. It is improper to introduce irrelevant evidence on cross-examination under the guise of impeachment. *Tippit v. Hunter*, 205 So.2d 267, 273 (Miss. 1967). Even if Ex. 950 was relevant, the critical evidentiary gap—that Ex. 950 does not show use of Flosal on any well where Lofton worked—makes Ex. 950 more prejudicial than probative such that it should have been excluded under M.R.E. 403.

It was further error to admit Ex. 950 on cross-examination of Dr. Ross because Lofton was obligated to present all evidence relevant to his claims during his case-in-chief, not through cross-examination. *Dungan v. Presley*, 765 So.2d 592, 595 (Miss. Ct. App. 2000); *Crawford v. Meridian*, 186 So.2d 250, 253 (Miss. 1966); *Hosford v. State,* 525 So.2d 789, 791 (Miss. 1988).

The scope of questioning and evidence adduced on cross-examination must be relevant to the expert's opinion or area of expertise, more probative than prejudicial, and otherwise admissible. *See, e.g., Cervantes v. Rijlaarsdam*, 190 Ariz. 396, 400 (Ariz. App. 1997) (court properly denied cross-examination of expert where defendants were "attempting to introduce substantive evidence under the guise of impeachment" and "those facts were not relevant to that expert's area of expertise or opinions."). It was an abuse of discretion and reversible error to allow Lofton's counsel, under the pretense of cross-examining Dr. Ross, to testify from Ex. 950 about the amounts of Flosal used on wells where Lofton never worked. *CP Brief* at 40-43.

D. The jury failed to properly allocate liability.

Lofton's waiver argument is meritless. CPChem created a thorough evidentiary record and the trial court instructed the jury, and the special verdict form provided for, allocation of fault. R. 10322-10323 (jury instruction D-7); R. 10350-10355 (special verdict form). In its motion for new trial and memorandum in support, CPChem argued that a variety of grounds supported its motion, including that the verdict was against the overwhelming weight of the evidence. That was sufficient to preserve the issue for appeal, especially when the trial court

allowed CPChem only five minutes to argue its case for a new trial.[21] *Colson v. Sims*, 220 So.2d 345, 347 & n.1 (Miss. 1969); *Kiddy v. Lipscomb*, 628 So.2d 1355, 1359 (Miss. 1993).

The jury's failure to allocate liability to any party other than CPChem demonstrates its bias, passion, and prejudice against CPChem and was against the overwhelming weight of the evidence. CPChem demonstrated Lofton's employers, as well as drilling mud service companies and operators, were negligent for failing to provide Lofton statutorily required ventilation and respiratory protection. *CP Brief* at 43-44. Lofton does not refute that evidence nor that CPChem proved the negligence of those parties by a preponderance of the evidence.

Further, it bears repeating: the jury's allocation of liability is inherently illogical because it could only allocate all liability to CPChem if it simultaneously (1) believed Lofton's testimony, scant as it was, about using Flosal, but (2) disbelieved his concurrent testimony regarding his contemporaneous use of asbestos viscosifiers sold and manufactured by co-defendants Montello and UCC.[22] *Id.* at 44-46. In *Coho Res., Inc. v. Chapman*, this Court reversed and remanded a jury's verdict as against the overwhelming weight of the evidence because the jury ascribed 100% damages to the defendant in the face of uncontradicted evidence the plaintiff bore some fault. 913 So.2d 899, 912 (Miss. 2005).

III. Should the Court decide not to reverse and render or to remand this case, remittitur of the verdict is warranted.

Lofton does not refute that an award based on "a dollar a breath ... each breath, every time" for 20 years is inflammatory and warrants reversal or remittitur. Allowing such a "unit of

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[21] At the hearing on its motion for JNOV and for new trial, the trial court gave CPChem only five minutes to argue its case for a new trial. *See* Tr. 1351:2-6; 1355:18-1356:8. Therefore, counsel for CPChem adopted all the arguments and objections that were in the record and those that were made in its motion for new trial. *Id.* at 1355:18-1356:8. Mississippi law only requires that the movant assert that the verdict was against the overwhelming weight of the evidence, which CPChem did repeatedly.

[22] Even Lofton's expert Cohen based his "substantial exposure" opinion on evidence of UCC's product, not CPChem's. *See* p. 22, *supra.*

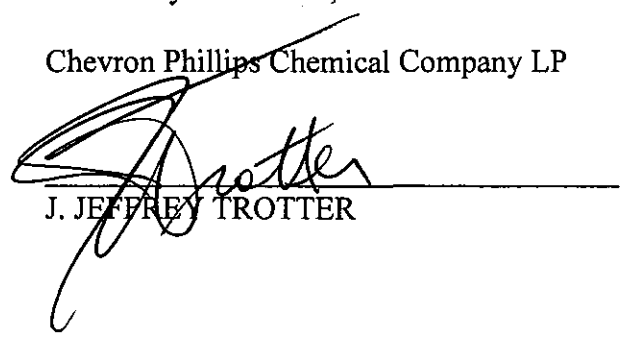
time" damages argument is reversible error where, as here, it leads to an excessive verdict. *Westbrook v. General Tire and Rubber Co.*, 754 F.2d 1233, 1239-1240 (5th Cir. 1985). The $15 million dollar non-economic damage award is 75 times greater than stipulated economic damages, is excessive and is not supported by the evidence. *CP Brief* at 46-47. If the Court decides to remit the verdict, CPChem recommends the non-economic damages be reduced to zero, but in no event, to no more than $1,000,000 (5 times economic damages).

CONCLUSION

For these reasons, CPChem asks the Court to reverse and render judgment in favor of CPChem. Otherwise, CPChem asks the Court to reverse and remand for a new trial. Alternatively, CPChem submits the Court should remit the non-economic damages to zero, but in no event, to no more than one million dollars ($1,000,000).

Respectfully submitted, this the 12th day of October, 2011.

Chevron Phillips Chemical Company LP



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CERTIFICATE OF SERVICE

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I certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above Brief of the Appellant to the following:

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This the 12th day of October, 2011.

J. Jeffrey Trotter