THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Jean Hoefer Toal, Chief Justice of the Supreme Court of South Carolina (Retired),
Acting as Circuit Court Judge

Appellate Case No. 2019-001600
Case No. 2015-CP-04-01607

Rita Joyce Glenn, individually and as personal representative of the Estate of Tommy Harold Glenn, deceased,..... Respondents,

vs.

3M Company, f/k/a Minnesota Mining and Manufacturing Co.; Air & Liquid Systems Corporation, Individually and as Successor-In-Interest to Buffalo Pumps; Airgas USA, LLC; Aurora Pump; BW/IP Inc., a Subsidiary of Flowserve Corporation; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor By Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Products, lnc., f/k/a Carolina Gasket and Rubber Company, Inc.; Carboline Company; Crane Co. d/b/a Crane Chempharrna & Energy d/b/a Aloyco, n/k/a Crane Energy Flow Solutions; Crosby Valve, lnc.; Dana Companies, LLC; Daniel International Corporation; Fisher Controls International, LLC.; Flowserve Corporation, Individually and as Successor in Interest to Anchor/Darling Valve Company; Flowserve Corporation, Individually and as Successor to Byron Jackson Pump Company; Fluor Daniel, lnc., f/k/a Daniel Construction Company, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; Goodyear Tire & Rubber; Goulds Pumps, Inc.; Grinnell LLC, f/k/a Grinnell Corp, f/k/a ITT Grinnell Corp., Individually and as Successor to Kennedy Valve Manufacturing Co., Inc.; 1-Iajoca Corporation; Imo Industries, Inc., Individually and as Successor-in-Interest to De Laval Turbine, Inc.; Ingersoll Rand Company; ITT Corporation; John Crane, LLC; Linde LLC, a Delaware Limited Liability Company, formerly known as the BOC Group, Inc. and/or Airco, Inc.; MP Supply, Inc. f/k/a Mill Power Supply; Metropolitan Life Insurance Company, a wholly-owned subsidiary of MetLife, Inc.; Sepco Corporation; The J.R. Clarkson Company Solely as a Successor by Merger to Anderson Greenwood & Co., f/k/a Kunkle Valve Company, Inc.; The Sherwin-Williams Company; Trane U.S. Inc., f/k/a American Standard, Inc.; United Conveyor Corporation; United Seal & Rubber Company, Inc.; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; Velan Valve Corporation;

Viking Pump, Inc.; and Weir Valves & Controls USA, Inc., Individually and as Successor in interest to Atwood & Morrill Co., Inc. .....Defendants,

Of which Fisher Controls International LLC is the .....Appellant.

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STATEMENT OF ISSUES

1. Did the circuit court abuse its discretion in finding that the jury's verdict for the Glenns on their negligence and breach of warranty claims, but not on their strict liability claim, was consistent under South Carolina law?

2. Did the circuit court abuse its discretion in admitting the medical causation testimony from the Glenns' expert witnesses as relevant and reliable?

3. Did the circuit court abuse its discretion in declining to instruct the jury on the sophisticated intermediary defense, intervening cause, or punitive damages as related to Plaintiff's breach of warranty claim?

4. Did the circuit court abuse its discretion in rejecting Fisher's proposed special verdict form apportioning fault to settled parties and in rejecting Fisher's setoff calculation?

5. Did the circuit court abuse its discretion in sanctioning Fisher for its discovery misconduct?

STATEMENT OF FACTS[1]

I. Tommy Glenn was exposed to asbestos from Fisher valves.

Tommy Glenn died of malignant pleural mesothelioma caused by asbestos exposure. (R. p. 1310, line 6-p. 1313, line 2; R. p. 1316, lines 15-20). Beginning in 1970, Tommy was exposed to asbestos as an instrument technician at Duke's nuclear power plants. (R. p. 767, line 1-p. 768, line 23; R. p. 784, lines 20-24; R. p. 1071, line 4-p. 1072, line 22; R. p. 1074, lines 1-19; R. p. 1183, line 8-p. 1187, line 10; R. p. 7462).

There were "tons" of Fisher control valves at Duke's Oconee Nuclear Power Station. (R. p. 815, line 24-p. 816, line 21; R. p. 1197, lines 4-11). Part of Tommy's job was to install instrumentation and tubing on Fisher valves. (R. p. 816, lines 17-24). When connecting tubing to the instrumentation, there was a flange connection that required Tommy to cut and install a gasket. (R. p. 790, line 9-p. 792, line 5). In addition, part of Tommy's job involved scraping off the internal bonnet gaskets from Fisher valves. (R. p. 823, line 7-p. 825, line 15).

Most Fisher valves at Duke were connected to the pipe with a flanged connection that utilized gaskets to prevent leaking. (R. p. 778, line 22-p.779, line 12; R. p. 1191, lines 8-15). Because of the heat, asbestos gaskets were used. (R. p. 1196, lines 2-21). Tommy was exposed to dust from the removal of asbestos gaskets. (R. p. 780, line 4-p.783, line 20; R. p. 1075, line 2-p. 1076, line 8; R. p. 1193, line 5-p. 1194, line 22). He was also exposed to asbestos packing on Fisher valves. (R. p. 785, line 19-p. 788, line 24; R. p. 1078, line 17-p. 1079, line 14). Tommy was routinely present when maintenance workers changed gaskets and packing on Fisher valves. (R. p. 825, lines 16-21; R. p. 1074, line 8-p. 1076, line 8; R. p. 1078, lines 7-16). This was

[1] Decedent Thomas Harold Glenn went by "Tommy" Glenn. For clarity, Tommy Glenn will be referred to by his first name given that his wife, Rita Glenn, shares the same last name and is the plaintiff in this case. No disrespect is intended.

particularly true during plant shutdowns, when the instrumentation crew worked 12-hour days next to other workers that were removing asbestos gaskets and packing. (R. p. 792, line 16-p. 796, line 5; R. p. 1074, line 9-p. 1077, line 3; R. p. 7188). He was also present when thermal insulation was removed from Fisher valves. (R. p. 820, line 7-p. 821, line 11; R. p. 1077, line 5-p. 1078, line 16).

The instrument technicians frequently consulted the Fisher manuals. (R. p. 833, line 25-p. 834, line 7; R. p. 1079, line 19-p. 1080, line 14). The manuals were very detailed about what gaskets needed to be used on Fisher valves and flanges. (R. p. 1192, line 17-p. 1193, line 4). There were no warnings about asbestos hazards in the Fisher manuals. (R. p. 834, lines 8-12; R. p. 1080, lines 10-14; R. p. 1197, lines 12-18).

It is undisputed that Fisher sold asbestos gaskets and packing for decades. (R. p. 522, line 16-p. 523, line 5; R. p. 738, lines 13-16). Fisher sold valves to Duke that contained asbestos gaskets and packing. (R. p. 710, lines 7-18). Fisher also sold asbestos replacement gaskets and packing to Duke. (R. p. 575, line 23-p. 576, line 4l; R. p. 575, line 23-p. 576, line 3). The gaskets Fisher sold to Duke contained 80 to 85% asbestos. (R. p. 551, line 12-p. 552, line 9; R. pp. 3395-96).

Records show that Fisher sold a lot of valves to Duke. (R. p. 573, line 22-p. 575, line 14; R. pp. 3404-3795; R. pp. 3993-7171). There were 161 Fisher valves at Oconee alone. (R. p. 710, lines 7-12). Those valves ranged in size from one-inch in diameter to a 16-inch diameter that is more than six feet tall. (R. p. 536, line 9-p. 539, line 11; R. pp. 3404-3765). Records show that Fisher had sales to Duke amounting to hundreds of thousands of dollars, if not millions of dollars. (R. p. 531, lines 10-15). Fisher sold valves with flanged connections to Duke. (R. p. 540, line 24-p. 541, line 4).

Fisher had a material specification for asbestos gaskets. (R. p. 551, line 20-p. 552, line 9; R. pp. 3395-98). Tommy's co-worker, Dale Jolly, recalled that the manuals for Fisher and valves specified the type of gaskets that must be used. (R. p. 1079, line 19-p. 1080, line 9). Fisher knew that asbestos gaskets and packing are components that wear out and anticipated that these components would need to be replaced periodically. (R. p. 572, lines 19-24). Fisher also knew that its valves would be insulated. (R. p. 573, lines 6-21; R. p. 678, lines 7-10).

Fisher designed its valves with flanged connections. The majority of valves at Oconee Nuclear Power Station had flanged connections. (R. p. 778, line 22-p. 779, line 12). Fisher knew and intended that flanged connections were used with gaskets and knew asbestos gaskets would be used. (R. p. 729, line 4-p. 730, line 23; R. p. 3832). It was obvious to Fisher that gaskets would be used on the flanged connections of its valves. (R. p. 1331, lines 3-8). Fisher's handbook provided that flange gaskets made of asbestos were an option. (R. p. 729, line 4-p. 730, line 7).

OSHA regulations required Fisher to place warning labels on asbestos products as of 1972. (R. p. 1391, line 20-p. 1392, line 4). Fisher acknowledges that it could have warned in several places: on the side of the valve, in its maintenance and instruction manuals, its Control Valve Handbook, or through its company representatives. (R. p. 614, line 21-p. 616, line 11). Yet Fisher never warned about the hazards of asbestos exposure associated with asbestos gaskets. (R. p. 576, lines 8-24; R. p. 614, lines 18-20; R. p. 837, lines 6-10). Sometimes Fisher did not even inform Duke that these materials contained asbestos. For example, Fisher's internal newsletter noted that "[p]acking materials listed in new publications using the word 'composition' contain asbestos," but it did not inform Duke of this fact. (R. p. 638, line 7-p. 641, line 15; R. p. 3841). There were also situations where parts numbers for asbestos gaskets were used although the

description of the part did not state that the gasket contained asbestos. (R. p. 740, line 5-p. 748, line 15; R. pp. 7189-94).

Fisher had information from the gasket manufacturers that when asbestos gaskets are "abraded" or subject to "mechanical actions," asbestos fibers can be released and a hazard is created. (R. p. 1392, line 5-p. 1393, line 14; R. p. 7440-53). Fisher specifically had information that manipulation of asbestos gaskets can cause asbestosis, lung cancer, and mesothelioma. (R. p. 1393, lines 8-14; R. p. 7457; R. p. 7460). Yet Fisher represented that the asbestos gaskets it was selling did not release asbestos fibers and did not cause harm. (R. p. 546, line 24-p. 548, line 6; R. p. 624, line 5-p. 625, line 5).

Tommy Glenn and his co-workers did not know that it was dangerous to work with asbestos gaskets and packing. (R. p. 834, lines 8-12; R. p. 836, line 7-p. 837, line 10). Duke was also unaware that asbestos gaskets were hazardous, and thus was not warning its employees. (R. p. 7181). Duke thought that asbestos gaskets were not friable because Fisher had provided documentation to Duke claiming that the asbestos in gaskets is encapsulated and is not released during use. (R. p. 546, line 24-p. 548, line 22; R. p. 624, line 5-p. 625, line 5; R. p. 7181). Even at trial, Fisher continued to insist that asbestos gaskets were encapsulated and did not pose a risk of harm. (R. p. 616, line 16-p. 617, line 9).

In 1980, however, Fisher tested chrysotile and crocidolite gaskets and measured asbestos levels up to .48 fibers per cubic centimeter of air (fibers/cc). (R. p. 560, line 24-p. 562, line 17; R. p. 3881). A Fisher document acknowledges that there was an "exposure problem identified with the initial testing." (R. p. 566, lines 15-21; R. p. 3888).

Plaintiff's expert Dr. Arthur Frank established that the dangers of asbestos exposure became known in industry around the turn of the century. (R. p. 1270, line 17-p. 1271, line 13;

R. p. 1348, line 7-p. 1349, line 3). By 1955, it was established that occupational asbestos exposure could cause lung cancer. (R. p. 1350, line 17-p. 1351, line 3). By 1960, it was known that asbestos exposure could cause mesothelioma. (R. p. 1351, lines 4-13). It has been known at least since the 1930s that asbestos diseases are preventable. (R. p. 1352, lines 12-16). A summary of the available historical literature about asbestos hazards is contained in a NIOSH document from 1976. (R. p. 609, line 17-p. 613, line 21; R. pp. 3921-27).

In 1942, Dr. Hueper reported that bystanders were at risk of disease when nearby workers were working with asbestos products in a manner that produced dust. (R. p. 1396, lines 2-19). This same publication identified gaskets and products as asbestos products that were of concern, even if workers were exposed as bystanders and on an incidental basis. (R. p. 1396, line 24-p. 1397, line 4).

Early on, Fisher had direct knowledge about the hazards of asbestos exposure. Fisher was a government contractor. (R. p. 589, lines 2-21). In the 1950s, the U.S. Department of Labor established workplace safety regulations for government contractors, called the Walsh-Healey Act, that required employers to take steps to control asbestos exposure levels below a certain threshold. (R. pp. 3871-74). As a government contractor, Fisher was required to comply with the Walsh-Healey Act.

Even though Fisher was supposed to behave with the knowledge of an expert, Fisher did not even think about discontinuing its sales of asbestos-containing gaskets and packing until its customers demanded it and manufacturers stopped making these products. (R. p. 522, line 21-p. 523, line 20). Fisher denies that it discontinued its asbestos sales for safety reasons. (R. p. 524, lines 4-18). Documents show, however, that it decided to eliminate asbestos "as a result of the increasing safety and liability concerns of our customers and suppliers, many of whom have

already eliminated asbestos from their products." (R. p. 3402). Even when Fisher eliminated asbestos gaskets and packing in 1987, it continued to sell its stock of these asbestos materials and still failed to warn about the hazards. (R. p. 637, lines 2-13).

Fisher contends that its knowledge of asbestos hazards began in the mid-1970s. (R. p. 528, lines 3-12). Even if the jury accepted that as true, Fisher continued to sell asbestos-containing materials to Duke for more than a decade after it had actual knowledge of the danger. Fisher sold asbestos gaskets and packing until at least December 1, 1987, when it undertook an "asbestos elimination program." (R. p. 711, lines 10-12; R. p. 3366).

II. The qualifications and opinions of the Glenns' causation experts.

A. Dr. Arthur Frank

Dr. Frank is a board-certified physician who specializes in occupational and preventive medicine. (R. p. 1255, line 18-p. 1256, line 19; R. p. 1258, lines 22-25; R. p. 7195; R. pp. 7411-12). He earned his medical degree from Mount Sinai School of Medicine in New York in 1972, where he studied with Dr. Irving Selikoff, a world-renowned expert in the field of asbestos and asbestos-related disease. (R. p. 1254, line 12-p. 1255, line 11; R. p. 1257, lines 21-23). He then became a commissioned officer in the U.S. Public Health Service, serving active duty for two years at the National Cancer Institute in the lung cancer branch studying asbestos diseases. (R. p. 1258, lines 1-16). In 1977, he obtained his Ph.D. in biomedical sciences based on his study of the effects of asbestos on respiratory tissue. (R. p. 1254, lines 16-22; R. p. 7411). He has held professorships at medical schools and schools of public health ever since. (R. p. 1259, lines 2-22; R. pp. 7412-13). Since 2002 he has been at Drexel University as a professor of public health and a professor of medicine in the pulmonary division of the college of medicine, and since 2011 he has also been a professor of engineering in the college of engineering. (R. p. 1254, lines 1-8; R.

p. 1259, line 23-p. 1260, line 19; R. p. 7195; R. pp. 7412-13). The circuit court recognized Dr. Frank as an expert in occupational and preventive medicine. (R. p. 1272, lines 6-12).

For almost fifty years, Dr. Frank has devoted his career to the study and prevention of asbestos-related diseases, including through participation in epidemiologic studies of asbestos-exposed populations, teaching asbestos medicine to medical students and doctors, and testifying as an expert witness in cases like this one. (R. p. 1255, line 18-p. 1257, line 17; R. p. 7195). Dr. Frank frequently consults with state, federal, and international agencies on occupational and environmental health issues, as well as medical schools and public health organizations all over the world. (R. p. 1260, lines 15-19; R. p. 1264, lines 2-5; R. pp. 7415-24). He has authored more than 220 publications, about half of which pertain to asbestos-related topics. (R. p. 1261, lines 2-17; R. pp. 7525-39). He has received many awards, including one in 2016 from a prestigious international organization that recognized his global work seeking to improve occupational safety and health related to asbestos. (R. p. 7195; R. p. 7412).

Dr. Frank is very familiar with asbestos exposures in the workplace, having reviewed thousands of articles on asbestos-related topics, including many that measured exposure levels from working with asbestos products. (R. p. 1266, line 1-p. 1268, line 1; R. p. 1270, lines 1-16). He has also interviewed many workers with asbestos-related diseases who have described what conditions were like when working with asbestos products. (R. p. 1269, lines 2-8).

Dr. Frank explained that even at the current permissible exposure limit (PEL) of .1 fiber/cc, the government has determined that not all mesothelioma will be prevented. (R. p. 1288, line 10-p. 1290, line 20). Epidemiological studies have established that exposures at the lowest levels increase the risk of mesothelioma. (R. p. 1290, line 23-p. 1291, line 17; R. p. 7208). It is

well-documented that bystanders working in the same environment with asbestos products can get mesothelioma. (R. p. 1298, line 22-p. 1300, line 18).

A risk assessment by the National Academy of Sciences found that at an environmental exposure level of .0004 fibers/cc there would be an average of nine mesotheliomas. (R. p. 1288, line 10-p. 1290, line 15). At exposure levels of .002, approximately one magnitude greater, six times as many people would die of mesothelioma. (R. p. 1289, line 11-p. 1290, line 20). One of 3 cancer deaths in the occupational setting in the U.S. is attributed to asbestos exposure. (R. p. 1318, lines 16-19). OSHA has published that it is "aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure." (R. p. 1319, lines 3-6).

Dr. Frank testified that asbestos fibers do not stay "encapsulated" or locked into the gasket during their normal course of use. (R. p. 1368, lines 7-11). Dr. Frank testified that "the basic rule is this: If you can see dust and you know that it contains asbestos, it's very likely that that dust is exceeding allowable levels." (R. p. 1306, lines 13-16). Industrial hygiene studies have measured asbestos exposure levels ranging from 2.1 to 31 fibers/cc from the removal of gaskets. (R. p. 1333, line 25-p. 1335, line 21). These studies have found that removal of asbestos gaskets can exceed OSHA's excursion limits for maximum, short-term asbestos exposures. (R. p. 1335, lines 18-21). Tommy's asbestos exposures from Fisher valves, even as a bystander, were many orders of magnitude above background levels. (R. p. 1338, line 3-p. 1339, line 8).The average background level of asbestos in urban areas has been measured as .00001 fibers/cc. (R. p. 1294, line 17-p. 1295, line 14).

Mesothelioma is caused by a person's cumulative asbestos exposure. (R. p. 1297, line 11-p. 1298, line 21). The more exposure a person has, the greater the risk of getting the disease. (R.

p. 1296, line 22-p. 1297, line 19). When there are exposures to multiple products, all the exposures contribute to the cumulative dose. (R. p. 1303, line 14-p. 1304, line 24).

For his opinions in this case, Dr. Frank reviewed Tommy's work history and medical records, and some case documents. (R. p. 1273, lines 5-7; R. p. 1346, lines 1-18; R. p. 1358, lines 10-14). Dr. Frank testified that Tommy's repeated exposures to asbestos from Fisher valves was a substantial cause of his disease. (R. p. 1336, line 10-p. 1337, line 14). He further opined that even if this was Tommy's only asbestos exposure, his opinion is that "exposure to Fisher valves in the manner described here was the source of [Tommy's] exposure to asbestos that caused [his] mesothelioma." (R. p. 1337, lines 22-24).

B. Dr. Arnold Brody

Dr. Arnold Brody is a cell biologist and an experimental pathologist. (R. p. 356, line 16-p. 357, line 5; R. p. 3796). He has a doctorate in cell biology and has spent his career conducting laboratory research to learn how asbestos causes disease. (R. p. 356, line 21-p. 357, line 9; R. p. 359, line 5-p. 361, line 1; R. p. 3796). Early in his career, Dr. Brody worked with Dr. Chris Wagner, the pathologist who first published about mesothelioma as an asbestos-related disease in 1960 (R. p. 359, line 5-p. 360, line 9). For fifteen years, Dr. Brody was head of pulmonary pathology at the National Institute of Environmental Health Sciences, which is part of the National Institutes of Health (R. p. 362, line 10-p. 363, line 2). He was a professor in the pathology department at Tulane University Medical School for many years, where he remains a professor emeritus. (R. p. 356, lines 16-19; R. p. 363, lines 3-21; R. p. 3796). Dr. Brody's research has always been funded by competitive grants from the National Institutes of Health, which only awards such research grants to about 10-15% of the scientists who apply. (R. p. 364, line 10-p. 365, line 6). Since 1981, his research findings have been published in more than 100

peer-reviewed, published articles about asbestos and lung disease. (R. p. 366, line 13-p. 369, line 10; R. pp. 3807-23). He regularly teaches and lectures on asbestos and disease. (R. p. 363, lines 3-16; R. p. 366, lines 1-12; R. pp. 3797-3806). The circuit court found him to be an expert in the field of cell biology and experimental pathology as it relates to asbestos and the diseases it causes. (R. p. 372, lines 10-13).

Dr. Brody offered testimony, supported by a slide presentation, to explain how asbestos fibers cause cancer after they are inhaled into the body. (R. p. 373, line 4-p. 419, line 22; R. pp. 7463-7505). Dr. Brody testified that every disease has a target cell and for mesothelioma that is the mesothelial cells that run along the outside of the lung. (R. p. 357, lines 1-2; R. p. 377, lines 5-18). He explained to the jury how asbestos fibers get into the lungs, make their way past the body's defense systems and to the target cells, and then transform those mesothelial cells into cancer cells by causing genetic errors. (R. p. 378, line 1-p. 379, line 7; R. p. 381, line 7-p. 419, line 22). Every time a person is exposed to asbestos, some portion of those fibers reach the target cell. (R. p. 416, line 17-p. 417, line 5). Genetic errors increase each time the damaged cells are hit with asbestos fibers, and it is the accumulation of genetic errors that eventually causes a tumor to develop. (R. p. 417, line 15-p. 419, line 22).

Dr. Brody testified that substantial exposures, meaning exposures greater than background levels that occur for an extended period of time, contribute to the cumulative dose of asbestos that causes mesothelioma. (R. p. 431, lines 15-24; R. p. 489, line 25-p. 491, line 6). In looking at asbestos disease causation in persons with mesothelioma, Dr. Brody utilizes the Helsinki Criteria, a consensus document among international scientists about the criteria used to attribute mesothelioma to asbestos exposure. (R. p. 491, line 16-p. 492, line 10).

III. Trial and post-trial proceedings

A jury trial was held against Fisher and two other defendants over nine days in January 2019. The jury considered the Glenns' claims of negligence, strict products liability, and breach of implied warranty. (R. p. 2353; R. pp. 3234-35). The parties stipulated that Tommy's reasonable and necessary medical expenses for the treatment of his mesothelioma were $479,911.72. (R. p. 2343). The jury returned a verdict in favor of the Glenns and against Fisher on the negligence and breach of warranty claims, awarding $1,000,000 in survival damages to Tommy Glenn's estate, $1,000,000 in wrongful death damages, and $1,000,000 to Rita Glenn for loss of consortium. (R. p. 3236). The jury also made a finding, by clear and convincing evidence, that Fisher's conduct was willful, wanton, or reckless. (R. p. 3236). In the second phase of trial, the jury unanimously awarded punitive damages in the amount of $2,125,000. (R. p. 3237).

After trial, Fisher moved for judgment notwithstanding the verdict (JNOV) and a new trial. Those motions were denied. (R. p. 13). Fisher also moved for a setoff for Plaintiffs' pre-trial settlements, which was granted. (R. p. 13). Plaintiffs' settlements with other parties totaled $2,805,000. (R. p. 49). By order dated October 26, 2017, the circuit court had approved the apportionment of those settlements 90% to the wrongful death claim and 10% to the survival claim. (R. p. 50). Applying that apportionment to set off the verdict, the circuit court granted a setoff as follows:

> The setoff for wrongful death is 90% of the aggregate settlements of $2,805,000, amounting to $2,524,500, which exceeds the jury's award of $1,000,000 for wrongful death. The wrongful death award is entirely eclipsed by the pre-trial settlements and Fisher owes zero for wrongful death damages.
>
> The setoff for survival is 10% of the aggregate settlements of $2,805,000, amounting to $208,000. Given the jury's award of $1,000,000 for survival damages, Fisher owes $720,000 for survival damages.

> There is no setoff for loss of consortium, as that claim was not settled pre-trial by any defendants. Fisher is responsible for the jury's $1,000,000 loss of consortium award.
>
> Fisher's total setoff is $1,280,000 and it remains responsible for $1,720,000 of the compensatory damages awarded by the jury, plus punitive damages.

(R. pp. 50-51).

Judgment was entered against Fisher for $3,845,000, plus costs and interest. (R. p. 51). The circuit court also granted Plaintiffs' motion for sanctions against Fisher for its discovery misconduct regarding Dr. Oury's destructive tissue digestion study and unauthorized deposition, to the detriment of Plaintiffs. (R. pp. 58-60)

ARGUMENT

I. The circuit court did not abuse its discretion in finding the jury's verdict to be consistent in accordance with South Carolina law.

Whether to grant a new trial is a matter within the discretion of the trial judge, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law. *Vinson v. Hartley*, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996). While a new trial should be granted if the verdict is irreconcilably inconsistent, "'[i]t is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found.'" *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 49–50, 691 S.E.2d 135, 149 (2010) (quoting *Rhodes v. Winn–Dixie Greenville, Inc.*, 249 S.C. 526, 530, 155 S.E.2d 308, 310 (1967)).

The circuit court rejected Fisher's contention that the verdict is inconsistent, finding that its argument was foreclosed by the holding in *Bragg v. Hi-Range, Inc.*, 319 S.C. 531, 538, 462 S.E.2d 321, 325 (Ct. App. 1996). (R. p. 39; R. p. 2422, line 14-p. 2423, line 3). *Bragg* held that directing a verdict on a strict liability claim is not inconsistent with a jury verdict on a negligence claim in a product liability case. *Id.*

In *Bragg*, the court granted directed verdict on a strict liability cause of action on a number of grounds, including that the plaintiff had failed to introduce evidence that the defendant's product was defective or unreasonably dangerous in design. 319 S.C. at 538. The jury then found the defendant liable under a negligence theory. On appeal, the defendant contended that it was inconsistent to grant directed verdict on strict liability but not negligence given the similarity of the claims. *Id.* The court of appeal disagreed, finding that "[a]lthough substantial similarities in analysis exist between strict liability for the sale of defective products and negligence principles of liability, especially in design and inadequate warning cases, differences do exist." *Id.* "**Strict liability and negligence are not mutually exclusive theories of recovery; that is, an injury may give rise to claims that can be established under either principles of strict liability or negligence, and failure to prove one theory does not preclude proving the other.**" *Id.* (emphasis added).

While there are some overlapping elements between these causes of action, in strict liability the focus is on the product whereas in negligence the focus is on the conduct of the manufacturer or seller. *Id.* at 539. "Therefore, it is possible under certain circumstances for a supplier of products to be held liable under a negligence theory even though the supplier is not strictly liable." *Id.* at 541. "Consequently, a directed verdict on the strict liability claim in the present case was not, as a matter of law, logically inconsistent with allowing the negligence claim to be submitted to the jury." *Id.*; *see also Donze v. Gen. Motors, LLC*, 420 S.C. 8, 19, 800 S.E.2d 479, 485 (2017) (reaffirming that that negligence, strict liability, and breach of warranty are distinct causes of action).

Bragg controls this question and establishes that there is no logical inconsistency in the jury's verdict that Fisher was negligent but not strictly liable. Fisher instead relies on *Branham v.*

Ford Motor Company, 390 S.C. 203, 701 S.E.2d 5 (2010). *Branham* holds that "[w]here one claim is dismissed and a question arises as to the continuing viability of the companion claim, the critical inquiry is to ascertain the basis for the dismissal. If one claim is dismissed and the basis of the dismissal rests on a common element shared by the companion claim, the companion claim must also be dismissed." *Id.* at 211-12. It is only when the strict liability claim is dismissed due to the absence of an element shared by the companion negligence claim that the negligence claim should also be dismissed. *Id.* at 212.

Fisher has failed to show any inconsistency under *Branham*. The circuit court found that "Fisher has not shown that the jury's finding on strict liability was due to the absence of an element shared by the companion negligence claim in this case." (R. p. 40). Fisher asks this Court to speculate that is so because there are some overlapping elements, but provides no principled basis on which to make this determination. This Court should decline to "speculate what was in the jurors' minds" in reaching their verdict. *Stoneledge at Lake Keowee Owners Ass'n, Inc. v. Cincinnati Ins. Co.*, No. 8:14-CV-01906-BHH, 2018 WL 4689135, at *24 (D.S.C. Sept. 28, 2018).

In *Bragg*, the court explained that there could reasonably be a finding of negligence and not strict liability when "the jury instructions given rendered negligence the broader theory of recovery." 319 S.C. at 540. It discussed a Minnesota case in which an electric company lineman was severely burned when his clothing caught on fire. *Id.* (discussing *Bigham v. J.C. Penney Co.*, 268 N.W.2d 892 (Minn. 1978)). The Minnesota Supreme Court found that negligence was a broader theory of recovery because "while the failure to warn of the flammable characteristics of the clothing was negligent as to the plaintiff, those characteristics did not necessarily render the

clothing 'defective and unreasonably dangerous' toward an ordinary consumer not exposed to unusual fire hazards." *Id.* at 541 (quoting *Bigham*, 268 N.W.2d at 897).

Similarly, here negligence was charged as a broader theory of recovery than strict liability. While the same three elements were required for each, the negligence cause of action specified that "[a] manufacturer who incorporates a defective component part into its finished product and places the finished product in the stream of commerce is liable for injuries caused by defects in the component part." (R. p. 2363, lines 17-21). Further, a defendant is liable for an allegedly defective product that it did "design, recommend, specify, require, manufacture, sell or place in the stream of commerce." (R. p. 2363, lines 23-25). This is much broader than the strict liability instruction that the plaintiff must show that "the product was defective and unreasonably dangerous when placed in the stream of commerce." (R. p. 2353, line 24-p. 2354, line 9). This difference was important in this case because much of the evidence involved Fisher's specification of asbestos materials on its valves, some of which were added to the valves post-sale per Fisher's design and requirements.

In this case, the jury was very careful in its consideration of the specific wording of the instructions, questioning the circuit court about the meaning of its strict liability instructions. The court's instruction No. 13 provided the three elements of strict liability, and the jury wanted to know if that was an umbrella charge that also guided their consideration of product defect under instructions No. 14 (reasonable alternative design), No. 15 (strict liability—design defect), and No. 16 (strict liability—failure to warn). (R. p. 2353, line 13-p. 2357, line 25; R. p. 2389, line 17-p. 2390, line 15).

In determining that the jury's verdict could be reconciled, the circuit court noted that "[t]he jury's questions about the strict liability instructions indicated division regarding whether

to find for Plaintiff or Fisher on this claim." (R. p. 40). Further, "[t]heir unanimous verdict on all three claims, finding in favor of Plaintiff on two and in favor of Fisher on one, was the jury's prerogative." (R. p. 40).

As the circuit court determined, Fisher has not met its burden of showing any inconsistency in the jury's verdict. The court did not abuse its discretion in so ruling, particularly given the nuances in the instructions that allowed a finding of product defect under negligence for defective component parts and for defective parts that Fisher "recommend[ed], specif[ied], [or] require[d]." (R. p. 2363, lines 22-25). Plaintiff's causes of action remained distinct, and the jury's different findings on strict liability and negligence reflect no inconsistency.

II. The circuit court did not abuse its discretion in admitting the testimony of the Glenns' causation experts.

The circuit court did not abuse its discretion in admitting the causation opinions of Dr. Frank and Dr. Brody. Contrary to Defendants' mischaracterization, these experts do not hold the opinion that "any exposure" or "every exposure" or "every asbestos fiber" causes mesothelioma generally or caused Tommy Glenn's mesothelioma. They instead testified that Tommy's mesothelioma was caused by his cumulative asbestos exposure and that given the specific facts of his exposure to visible asbestos dust from Fisher valves regularly for many years, these exposures were a substantial factor in causing Tommy's disease. Based on the record, Judge Toal rejected Fisher's arguments, finding the testimony of Dr. Frank and Dr. Brody to be reliable, admissible, and sufficient to meet the *Henderson* causation standard.[2]

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[2] Dr. Brody only offered general causation testimony. As the federal multi-district (MDL) litigation court has observed in admitting Dr. Brody's testimony, "the purpose of Dr. Brody's testimony [is] to assist the jury in understanding the relationship between exposure to asbestos fibers and disease processes generally . . . ." *Larson v. Bondex Int'l*, No. 09-69123, 2010 WL 4676563, at *4 (E.D. Penn. Nov. 15, 2010).

A. Standard of Review

"The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citing *Mizell v. Glover,* 351 S.C. 392, 570 S.E.2d 176 (2002); *State v. Caldwell,* 283 S.C. 350, 322 S.E.2d 662 (1984)). "A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support, or "when the ruling is manifestly arbitrary, unreasonable, or unfair." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

South Carolina Rule of Evidence 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." SCRE 702. Courts evaluating the admissibility of scientific expert evidence "must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508 (1999). Once the trial court has made the threshold determination that these requirements are met, the jury may give the expert's testimony such weight as it deems appropriate. *Id.* at 20-21.

B. Dr. Frank and Dr. Brody have a reliable scientific basis for their opinions.

Contrary to Fisher's assertions, Plaintiff's experts' opinions regarding the cumulative nature of asbestos diseases and the lack of any safe threshold of exposure are not "unreliable," but are generally accepted medical facts. Judge Toal found that "the expert opinion testimony of

Dr. Frank and Dr. Brody regarding the cumulative nature of asbestos diseases and the lack of any safe threshold has ample support in the scientific evidence and that Plaintiff's experts were entitled to rely on these basic medical facts in reaching their opinions in this case." (R. pp. 28-29). Further, the "experts' reliance on these basic medical facts is not the equivalent of the opinion that 'each and every exposure' was a substantial factor in causing the decedent's disease." (R. p. 29).

The circuit court relied on this distinction as recently explained by the Pennsylvania Supreme Court in an opinion upholding the admissibility of Dr. Frank's causation opinions. (R. p. 29, citing *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1045-46 (Pa. 2016)). In *Rost*, the court found Dr. Frank's testimony to be entirely compatible with the substantial factor causation standard:

> We must agree with the Rosts that Ford has confused or conflated the "irrefutable scientific fact" that every exposure cumulatively contributes to the total dose (which in turn increases the likelihood of disease), with the legal question under Pennsylvania law as to whether particular exposures to asbestos are "substantial factors" in causing the disease. It was certainly not this Court's intention, in either Gregg or Betz, to preclude expert witnesses from informing juries about certain fundamental scientific facts necessary to a clear understanding of the causation process for mesothelioma, even if those facts do not themselves establish legal (substantial factor) causation.

151 A.3d at 1045-46.

The circuit court also relied on the Eleventh Circuit's recent decision in *Bobo v. Tennessee Valley Auth.,* 855 F.3d 1294 (11th Cir. Apr. 26, 2017). (R. p. 29). There, the court noted that expert testimony that "there is no evidence that there is a threshold level of exposure below which there is zero risk of mesothelioma," and that "all 'significant' exposures to asbestos 'contribute to cause mesothelioma,'" is not the same thing as saying that each and every exposure is causative. *Id.* The expert's causation opinion was admissible because it was

based on the exposure facts in the case and was supported by scientific literature, including the Helsinki Criteria. *Id.*

Dr. Frank has explained that he does "not believe that exposure to a ***single*** asbestos fiber or a *single breath* of air containing asbestos fibers has ever caused a mesothelioma or any other asbestos related cancer or any non-malignant asbestos disease." (R. p. 7405). It is important to recognize that "an 'exposure' is never a single fiber . . . when someone breathes visible dust from an asbestos product, there may be millions or billions of asbestos fibers present." (R. p. 7406). Even one day of exposure at the current OSHA limit results in the inhalation of hundreds of thousands of fibers. (R. p. 7405).

The circuit court concluded that Dr. Frank does not hold the opinion that "each and every exposure" is a substantial factor in causing disease. (R. p. 30). The federal asbestos MDL agrees and has found that Dr. Frank does not hold the "any exposure" opinion, which differs substantively from the "cumulative exposure" opinion. *Mortimer v. A.O. Smith Corp.*, 2015 WL 12533103, at *8 (E.D. Pa. Oct. 23, 2015). The Pennsylvania Supreme Court similarly held that, contrary to Fisher's mischaracterization, Dr. Frank does not hold the opinion that "each and every breath" of asbestos is a substantial factor. *Rost*, 151 A.3d at 1045-46.

The circuit court has previously found Dr. Brody's causation opinions to be reliable and helpful to the trier of fact. *Garvin v. Agco Corp.*, No. 2012-CP-40-6675, 2014 WL 86284338, at *11 (S.C. Ct. Comm. Pleas Dec. 10, 2014). The court rejected the defendant's contention that Dr. Brody holds the opinion that every asbestos exposure contributes to cause disease, noting that "[t]he trial record does not contain any such testimony from any of Plaintiffs' experts." *Id.*

Fisher relies on the Southern District of South Carolina's opinion in *Haskins v. 3M Co.*, No. 2:15-cv-02086, No. 3:15-cv-02123, 2017 WL 3118017 (D.S.C. July 21, 2017). There,

Judge Norton excluded the testimony of the plaintiff's expert, Dr. Carlos Bedrossian, on the grounds that it was inconsistent with the substantial factor causation standard. *Id.* at *6. While he did not question the underlying scientific foundation for the expert's opinions, he held that the opinion was inconsistent with the legal requirements for demonstrating causation because the expert did not determine that the plaintiff's exposure to the defendant's product had a substantial impact on the plaintiff's total cumulative exposure. *Id.* at *7. He concluded that the expert's opinion that every occupational exposure contributes to cause mesothelioma "is sound science [but] is inconsistent with the law." *Id.* at *6.

The serious flaws in the *Haskins* opinion were outlined in a note in the Harvard Law Review. *Tort Law—Expert Testimony in Asbestos Litigation—District of South Carolina Holds the Every Exposure Theory Insufficient to Demonstrate Specific Causation Even if Legal Conclusions Are Scientifically Sound*, 131 Har. L. Rev. 658 (Dec. 2017). The author explained that "although the court wrapped its conclusions in substantial factor language, it applied the but-for causation standard for specific causality" by requiring a showing that exposure to the defendant's product must be quantified and shown either to reach a threshold sufficient to independently cause the disease or to be comparatively significant in the context of the other exposures. *Id.* at 662. In doing so, "[t]he *Haskins* interpretation of 'substantial factor' merely rehashed the traditional tort standard and added potentially insurmountable hurdles in a field where the courts have consistently determined that those standards are inappropriate." *Id.* at 664. Moreover, "[i]n failing to ground his interpretation of the legal standard in the scientific realities of mesothelioma, Judge Norton overly narrowed the amount of admissible scientific evidence that can demonstrate specific causation." *Id.* at 665. "Requiring evidence on the dose threshold or quantification of exposure pushes against the legal community's virtual agreement

that asbestos diseases do not respect traditional tort rules." *Id.* The court should have instead used the science to guide his interpretation of the legal standards, which would respect the appropriate balance between the standard of proof and the limits of science. *Id.*

It is not proper to evaluate the experts' medical opinions with reference to only one narrow part of the basis for the opinion. As the circuit court found, "in reaching their [general] causation opinions, Dr. Frank and Dr. Brody relied on their many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including animal studies, epidemiology, and other scientific literature, the dose-response relationship, and the science regarding the low levels of exposure that can cause mesothelioma." (R. p. 32). Fisher's attack on their opinions as "unreliable" has absolutely no merit.

Further, Dr. Frank's specific causation opinions were found to be "grounded in the exposure evidence presented at trial." (R. p. 32). He testified that "[t]o link asbestos to a mesothelioma, you have to have exposure, you have to have the right latency . . . and you have to have the proper diagnosis." (R. p. 1303, lines 5-9). There was no doubt that Tommy had mesothelioma. (R. p. 1303, lines 9-10). Dr. Frank's specific opinion was properly based on industrial hygiene studies measuring exposure levels from the removal of asbestos gaskets and packing as hundreds of thousands to millions of times higher than background levels. (R. p. 1294, line 10-p.1295, line 14; R. p. 1332, line 1-p. 1336, line 1; R. p. 1338, lines 1-17). He found Tommy's exposures to asbestos from Fisher valves to be a substantial factor based on the exposure facts showing that he had regular and proximate exposures to the removal of asbestos gaskets and packing from Fisher valves over many years, that the gaskets contained 85% asbestos, and were removed in a manner that created dust. (R. p. 1336, line 10-p. 1337, line 14).

The circuit court found this to be a reliable basis for his opinions under South Carolina Rule of Evidence 702. (R. p. 33).

Finally, it is worth noting that the expert testimony of Dr. Frank and Dr. Brody has been consistently admitted by other courts as reliable and helpful to the trier of fact. With regard to Dr. Frank, his testimony was accepted in the following published cases: *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975, 980 (4th Cir. 1987); *Waite v. AII Acquisition Corp.*, 194 F. Supp. 3d 1298, 1312-14 (S.D. Fla. 2016); *In re Asbestos Prod. Liab. Litig. (Breedlove)*, No. 09-CV-75120, 2011 WL 499993, at *2 (E.D. Pa. Feb. 10, 2011), *Rost*, 151 A.3d at 1045-47; *Lovelace v. B & R Auto Serv., Inc.*, 798 S.E.2d 439, 440 (N.C. App.), *review denied*, 804 S.E.2d 538 (N.C. 2017); *Smith v. Illinois Cent. R. Co.*, 37 N.E.3d 445, 452-53 (Ill. App. 2015); *In re Estate of Lilienthal*, No. 4-14-0280, 2015 WL 1234216, at *1 (Ill. App. Mar. 17, 2015); *Tyson v. H.K. Porter Co.*, 216 N.C. App. 184, 716 S.E.2d 441 (2011); *Shepard v. Grand Trunk W. R.R. Inc.*, No. 92711, 2010 WL 1712316, at *8 (Ohio App. Apr. 29, 2010); *In re Asbestos Litig.*, 911 A.2d 1176, 1193-94, 1205-06 (Del. Super. Ct. 2006).

In addition to the *Garvin* case, Dr. Brody's testimony has similarly been admitted in the following cases: *Rabovsky v. Air & Liquid Sys. Corp.*, No. CIV.A. 10-3202, 2012 WL 876752, at *3 (E.D. Pa. Mar. 13, 2012); *In re Asbestos Prod. Liab. Litig. (No. VI)*, No. 10-CV-03202, 2012 WL 252919, at *1 (E.D. Pa. Jan. 25, 2012); *In re Asbestos Products Liab. Litig. (No. VI) (Larson)*, No. 09-69123, 2010 WL 4676563, at *3-4 (E.D. Penn. Nov. 15, 2010); *Rost*, 151 A.3d at 1038, 1045; *Startley v. Welco Mfg. Co.*, 78 N.E.3d 639, 642, 647 (Ill. App. 2017); *Hennegan v. Cooper/T. Smith Stevedoring Co.*, 837 So. 2d 96, 105-06, 110 (La. Ct. App. 2002).

The circuit court did not abuse its discretion in reaching the same conclusion as to the admissibility of these experts' testimony in this case.

C. Dr. Frank based his specific causation opinion on the exposure evidence in this case.

Dr. Frank's specific causation opinion is firmly grounded in the exposure evidence presented at trial. A documented history of occupational exposure to asbestos is sufficient to attribute mesothelioma to asbestos. (R. p. 1284, lines 15-24; R. p. 1303, lines 1-10). Dr. Frank explained that "[t]o link asbestos to a mesothelioma, you have to have exposure, you have to have the right latency . . . and you have to have the proper diagnosis." (R. p. 1303, lines 5-8). Dr. Frank has reviewed Tommy's medical records, (R. p. 1273, lines 5-7), and determined that "[t]here's no question in this case that Mr. Glenn had a mesothelioma." (R. p. 1303, lines 9-10).

In terms of Tommy's exposures, industrial hygiene studies have measured asbestos exposure levels ranging from 2.1 to 31 fibers/cc from the removal of gaskets. (R. p. 1335, lines 7-17). These studies have found that removal of asbestos gaskets can exceed OSHA's excursion limits for maximum, short-term asbestos exposures. (R. p. 1335, lines 18-21).

Tommy's exposures were many orders of magnitude above background levels. The level of asbestos in the ambient air in urban areas is .00001 f/cc, and in rural areas it's .000001 f/cc. (R. p. 1294, line 10-p. 1295, line 14). Tommy's exposures from the removal of asbestos gaskets were hundreds of thousands to millions of times higher than that. (R. p. 1338, line 1-p. 1339, line 8).

In stating his causation opinion, Dr. Frank relied on a summary of the exposure facts proven to the jury:

> Q. As it relates to Fisher, a defendant in this case, I want you to assume that they made valves, that in terms of the frequency of exposure to those valves, there has been testimony that it was regular or routine, specifically during 60-day outages that happened throughout the year.

In terms of proximity, I want you to presume it's close. And in terms of close, the jury heard the picture that we already looked at together, three to four feet apart, from elbow to elbow, to ten feet.

With me?

A. That's close.

Q. Okay. In terms of duration, we're not talking weeks or months but years.

In terms of asbestos content, the jury has heard it goes from 25 percent to 85 percent but that, in Fisher's material specifications, we're looking at the higher end.

And in terms of work practice, that they used scrapers. . . a wire brush and a grinder.

Even if no one had published a study on this, I want to ask you the following question: With the frequency, proximity, and duration I've asked you to assume and the work practices I've identified with an 85 percent asbestos product, is that something, based on your medical expertise, that is a substantial and significant cause of the development of mesothelioma if the work happened in the right latency period?

A. Yes.

(R. p. 1336, line 10-p. 1337, line 14). If this had been Tommy's only asbestos exposure, it would have been sufficient to cause his mesothelioma. (R. p. 1337, lines 18-25).

Such exposures cannot be considered "low dose" exposures:

Q. And if you have an exposure that's repeated tens of thousands of times above background, not just for months but years, does it make sense to call that low dose?

A. No.

(R. p. 1323, lines 11-15).

Dr. Frank testified that even at the lowest levels of asbestos exposure that have been studied, there is still an increased risk of mesothelioma. (R. p. 1288, line 10-p. 1291, line 23; R. p. 1298, lines 16-21). For example:

Q. Are there also epidemiological studies where they're studying population where they rate different levels of exposures, and even at the lowest level, they're finding too much mesothelioma?

A. Oh, absolutely. My affidavit that I guess is now Exhibit 76, Page 14, I have reviewed some of these studies. And while there is an allowable level still in the United States, which is designed supposedly to protect people for a 40-year work career -- 50 weeks a year, eight hours a day, 40 years supposed to protect you -- if you work at that level for one year, you have a four times increased risk of getting a mesothelioma at the legally allowable level.

(R. p. 1290, line 23-p. 1291, line 10).

Dr. Frank's causation opinions are based on the record of Tommy's repeated exposures to asbestos from Fisher valves during his years at Duke, as well as the scientific literature and other evidence mentioned above. This is a reliable scientific basis for his opinions. Fisher has failed to show otherwise. The circuit court did not abuse its discretion in finding that Dr. Frank's specific causation testimony is supported by the scientific literature as well as the facts of this case, and that his testimony was relevant and helpful to the jury.

III. The circuit court did not abuse its discretion in declining to instruct the jury on the sophisticated intermediary defense, intervening cause, or punitive damages.

An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). A trial court must charge the current and correct law. *In re Estate of Pallister*, 363 S.C. 437, 451, 611 S.E.2d 250, 258 (2005). The reviewing court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial. *Hennes v. Shaw*, 397 S.C. 391, 402, 725 S.E.2d 501, 507 (Ct. App. 2012). "A trial court's refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal." *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005).

A. Fisher was not entitled to an instruction on the sophisticated intermediary defense or intervening cause.

As an initial matter, Fisher asks this Court to follow California law, not South Carolina law, regarding the sophisticated intermediary defense. The South Carolina Supreme Court has observed that the sophisticated intermediary defense has not been adopted in South Carolina. *See Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 226, 781 S.E.2d 548, 557 (2015), *reh'g denied* (Feb. 12, 2016). The Court explained that no South Carolina court has adopted this defense, and that it was not necessary to do so for the Court to reach its decision in *Lawing*:

> In arguing that the court of appeals erred in affirming the trial court's decision to charge the jury on the sophisticated user defense, the Lawings contend that the sophisticated user defense is not the law of South Carolina. **We agree that prior to the court of appeals' opinion in this case, neither this Court, nor the court of appeals, had explicitly adopted the defense However, we need not formally adopt the doctrine at this time** because . . . the facts of this case do not implicate the sophisticated user defense.

Id. (emphasis added).

The circuit court did not rule out the availability of the sophisticated intermediary defense in South Carolina, but found that Fisher failed to show that it is applicable under the facts of this case. (R. p. 17). Under *Lawing*, "[a] product manufacturer cannot raise the sophisticated intermediary defense without first showing that it placed a warning label on its products." (R. p. 16). In *Lawing*, the Court held that "[t]he sophisticated user doctrine is typically applied as a defense to relieve the supplier of liability for failure to warn where it is difficult or even impossible for the supplier to meet its duty to warn the end user of the dangers associated with the use of a product, and the supplier therefore relies on the intermediary or employer to warn the end user." *Id.* at 226. The Court determined that "[u]nder the specific factual circumstances in this case, the proper focus is the *labeling* on the sodium bromate shipped to [the purchaser], not

the *use* of sodium bromate in [the] plant." *Id.* at 227. The purchaser's "knowledge of the dangers of sodium bromate does not affect the suppliers' duty to properly label sodium bromate as a hazardous and flammable product, because the knowledge of sodium bromate's inherent qualities are useless to a person who comes into contact with the chemical but cannot identify it." *Id.* "The fact that a sophisticated user of a particular product ultimately receives the product does not permit the supplier to decide whether or not to adequately label the dangerous product as such." *Id.* at 228. Because the product supplier had not placed a visible warning label on the pallets of sodium bromate, it was error to charge the jury with the sophisticated user defense. *Id.*

The situation in this case is similar in that Duke may have known that asbestos was hazardous, but neither Duke nor Tommy knew that friable asbestos was released from Defendant's asbestos gaskets and packing because those products contained no warning to that effect. Fisher took the position that the asbestos was encapsulated in these products, and has not shown that Duke knew any differently. Duke's knowledge was thus not useful to Tommy because of the inadequacy of Fisher's labeling.

Fisher failed to meet the elements of the sophisticated intermediary defense in this case. Even under the California authority it cites, this is an affirmative defense for which Fisher has the burden of proof. *Webb v. Special Elec. Co.*, 370 P.3d 1022, 1034 (Cal. 2016). Under *Webb* its burden is high: "Because the sophisticated intermediary doctrine is an affirmative defense, **the supplier bears the burden of proving that it adequately warned the intermediary, or knew the intermediary was aware or should have been aware of the specific hazard, and reasonably relied on the intermediary to transmit warnings**." *Id.* (emphasis added).

Fisher has not shown that it warned Duke. Unlike in *Lawing*, where a warning was given, here the evidence establishes that Fisher provided no warnings to Duke whatsoever. (R. p. 576,

lines 8-13). This circuit court noted at the directed verdict stage that "the fundamental [holding] of *Lawing v. Univar* is that sophisticated intermediary doesn't come into play unless the products are properly labeled to the intermediary, so all this reliance on the sophisticated intermediary and sophisticated user will fall simply on that basis alone." (R. p. 1641, lines 4-10).

Fisher also failed to show that it knew Duke was aware or should have been aware of the danger from asbestos gaskets. Again, the evidence shows the opposite: Duke distinguished asbestos gaskets as non-hazardous because it was thought they did not release asbestos fibers when disturbed. (R. p. 7181). And Fisher certainly has not shown that it was relying on Duke to inform its employees of those hazards. They introduced no evidence to this effect. This total lack of evidence supporting the sophisticated intermediary defense is why the circuit court declined to charge the jury with this defense. (R. p. 1759, line 14-p. 1768, line 24). Fisher has failed to show that the sophisticated intermediary defense relieved it of its duty to warn. The circuit court did not abuse its discretion in finding that Fisher had failed to meet the requirements of this defense.

Fisher's intervening cause argument is likewise without merit. Neither Duke's actions nor Tommy's actions were an intervening cause. With regard to Duke, Fisher argues that Duke should have protected Tommy and that this failure was an intervening cause.

First, "it is no defense that a similar duty rested upon another person." *Matthews v. Porter*, 239 S.C. 620, 631, 124 S.E.2d 321, 327 (1962). Even if Duke had breached a duty to warn or protect Tommy, that does not excuse Fisher's own wrongful conduct. Duke's conduct does not relieve Fisher of its duty to warn.

More importantly, "[f]or an intervening act to break the causal link and insulate the tortfeasor from further liability, the intervening act must be unforeseeable." *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 463 S.E.2d 636, 640 (Ct. App. 1995). "If the intervening acts are (1)

set in motion by the original wrongful act and (2) are the normal and foreseeable result of the original act, the final result, as well as every intermediate cause, is considered in law to be the proximate result of the first wrongful cause." *Wallace v. Owens-Illinois, Inc.*, 300 S.C. 518, 521, 389 S.E.2d 155, 157 (Ct. App. 1989).

Here, the circuit court found that "[t]he jury could have reasonably determined that Duke's conduct was entirely foreseeable." (R. p. 35). Duke didn't warn about gaskets because Fisher misled Duke about the safety of asbestos gaskets, as outlined in the Statement of Facts. Fisher could hardly expect Duke to warn about the dangers of asbestos gaskets when it portrayed the asbestos as "encapsulated" and safe, which it continued to do in front of the jury in this case. It was Fisher's own original wrongful act that set in motion any blameworthy conduct of Duke.

With regard to Tommy's own actions, "an intervening act does not break the chain of causation if it is a normal response to the situation created by the original wrongful act." *Wallace v. Owens-Illinois, Inc.*, 300 S.C. 518, 522, 389 S.E.2d 155, 157 (Ct. App. 1989). Tommy is, of course, not at fault for not protecting himself against a danger he did not know about because of Fisher's failure to inform him of the hazards of working with its valves. Tommy continued to perform his work as he always had, without protective measures, which is an entirely "normal response" to Fisher's failure to warn. The circuit court properly found that "[t]he evidence does not support a finding that Tommy's own conduct was an intervening cause of his disease." (R. p. 36). Fisher has failed to show an abuse of discretion in this determination.

B. Fisher was not entitled to a jury instruction regarding the unavailability of punitive damages for a breach of warranty claim.

There were no errors in the circuit court's punitive damages instructions. The circuit court did not abuse its discretion in declining to instruct the jury that punitive damages could not

be based on a finding in Plaintiff's favor on her breach of warranty claim. As the circuit court found, "Fisher presents no authority in support of its contention that the jury should be instructed that punitive damages are not available in a breach of warranty case." (R. p. 45). The case Fisher relies on, *Rhodes v. McDonald*, 345 S.C. 500, 548 S.E.2d 220 (Ct. App. 2001), did not hold that juries should be instructed regarding the causes of action that give rise to a claim for punitive damages.

Moreover, any possible error in the circuit court's decision was harmless. The jury found that Fisher was negligent and that it had engaged in conduct that was willful, wanton, or reckless. (R. p. 3234; R. p. 3236). This is indisputably the proper standard for imposition of punitive damages. *Clark v. Cantrell*, 339 S.C. 369, 381, 529 S.E.2d 528, 534 (2000). Given this clearly proper basis for the jury's punitive damages award, the circuit court concluded that "the jury did not base punitive damages on its breach of warranty finding." (R. p. 45). There was no abuse of discretion in this determination that the jury's punitive damages award was based on its negligence finding.

IV. The circuit court did not abuse its discretion in denying Fisher's request to apportion fault to parties not at trial or in rejecting Fisher's setoff calculation.

"The determination as to whether special verdict forms should be submitted to the jury is within the sound discretion of the trial judge." *Gamble v. Stevenson*, 305 S.C. 104, 107, 406 S.E.2d 350, 352 (1991). A circuit court's setoff for pre-trial settlements is likewise reviewed for an abuse of discretion. *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 115, 498 S.E.2d 395, 407 (Ct. App. 1998).

A. The circuit court properly refused Fisher's request to allow the jury to apportion fault to non-parties and settled parties.

The trial court did not abuse its discretion in declining to submit Fisher's proposed special verdict form to the jury. Section 15-38-15 does not give the Fisher the right to place non-parties or settled parties on the verdict form. First and most importantly, defendants found to have acted with willful and wanton conduct may not allocate fault to other parties. There are a number of additional reasons the statute precludes apportionment, as set forth below.

1. Section 15-38-15(F) precludes apportionment when there is a finding of willful or wanton conduct.

Section 15-38-15 provides that "[t]his section does not apply to a defendant whose conduct is determined to be wilful, wanton, reckless . . . ." S.C. Code Ann. § 15-38-15(F). This provision is dispositive of this issue, as the jury found that Fisher's conduct was willful, wanton, or reckless. (R. p. 3236).

2. Section 15-38-15 limits allocation of fault to "defendants."

The circuit court properly allowed allocation of fault only to those defendants present at trial, based on the statutory language. The language of §15-38-15 repeatedly uses the term "defendants" when discussing the apportionment scheme:

> In an action to recover damages resulting from personal injury. . . if indivisible damages are determined to be proximately caused by more than one ***defendant***, joint and several liability does not apply to any ***defendant*** who conduct is determined to be less than fifty percent of the total fault for the indivisible damages as compared with the total of: (1) the fault of all the ***defendants***; and (ii) the fault (comparative negligence), if any, of the plaintiff. A ***defendant*** whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact. See §15-38-15(A), (emphasis added).
>
> Apportionment of percentages of fault among ***defendants*** is to be determined as specified in subsection (c). See §15-38-15(B), (emphasis added).

> The jury...shall... upon a motion by at least one ***defendant***, where there is a verdict...against two or more ***defendants*** for the same indivisible injury...specify in a separate verdict...the percentage of liability...that is attributable to each ***defendant***. In determining the percentage attributable to each ***defendant***, any fault of the plaintiff...will be included so that the total of the percentages of fault attributed to the plaintiff and to the ***defendants*** must be one hundred percent. See §15-38-15(C)(3), (emphasis added).
>
> A ***defendant*** shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party. §15-38-15(D), (emphasis added).
>
> Notwithstanding the application of this section, setoff from any settlement received from any potential tortfeasor prior to the verdict shall be applied in proportion to each ***defendant's*** percentage of liability as determined pursuant to subsection (c).

§15-38-15(E) (emphasis added).

The South Carolina Legislature specifically chose the term *defendant* and not "nonparty," "released party," or some other term. Giving the term its plain and ordinary meaning, a defendant is the party against whom relief or recovery is sought in an action or suit. *Black's Law Dictionary* 5th Ed. Suggesting nonparties can be placed on the verdict form to be included in the apportionment scheme would contravene the terms of the statute.

A statute's words must be construed in context and in light of the intended purpose of the statute in a manner, which harmonizes with its subject matter and accords with its general purpose. *In re Manigo*, 398 S.C. 149, 729 S.E.32 (2012). The purpose of §15-38-15 was to end joint and several liability for defendants with less than fifty percent fault. The prevailing notion was, for example, a ten percent at fault defendant should not be responsible for one hundred percent of the plaintiff's damages. By limiting only defendants to the verdict form the statutory purpose is maintained. Defendants are free to argue they have no fault or less than fifty percent

of the fault. The successful defendant will enjoy the protection offered by the statute and avoid joint and several liability.

The circuit court found that this interpretation is mandated by the Supreme Court of South Carolina's recent decision in *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017), the companion case to *Machin v. Carus Corp.*, 419 S.C. 527, 799 S.E.2d 468 (2017). (R. pp. 40-41). In *Smith*, the Supreme Court examined section 15-38-15 and its subparts in relation to an entity's presence on the verdict and a jury's apportionment of fault. In *Smith*, the plaintiff was involved in a motor vehicle accident. 419 S.C. at 552. On the morning of the accident, Mr. Tiffany, while driving the commercial vehicle owned by Brown Trucking, experienced vehicle failure. *Id.* He parked his vehicle along the shoulder of the highway adjacent to a gas station exit. *Id.* Mr. Mizell, stating that Mr. Tiffany's vehicle blocked his view of oncoming traffic as he attempted to exit the gas station, eased his vehicle forward to get a better view. *Id.* When he did so, his vehicle collided with Mr. Smith's vehicle.

Prior to filing suit, Mr. Mizzell's liability carrier tendered the limits of his liability policy to Smith. *Id.* at 553. In exchange, Mr. Smith signed a covenant not to execute in favor of Mizell. *Id.* Smith later sued Brown Trucking and Mr. Tiffany, alleging that his injuries were the result of Tiffany's negligent positioning of his commercial vehicle, obstructing the view of vehicles attempting to exit the gas station. *Id.* In their answer, the defendants alleged that Mizzell was a necessary and indispensable party and that they were entitled to a determination of Mizzell's proportion of fault. *Id.* The trial court rejected defendants' claims and refused to include Mizezell on the verdict form for purposes of allocation. *Id.* Defendants appealed.

While acknowledging the holding in *Machin* that fault cannot be apportioned to an immune nonparty (such as the employer from *Machin*), the Court examined the legislature's use

of "defendant" and its directive that only "defendants" be listed on the verdict form. As to the settled party, the Supreme Court stated:

> Mizzell is not subject to liability for any part of Smith's claims based on the covenant not to execute he obtained from Smith. The covenant not to execute included language protecting Mizzell from any further liability to Smith in excess of the agreed-upon settlement amount. Even though, by its terms, a covenant not to execute discharges the settling tortfeasor's liability only as to the plaintiff, in section 15-38-50 the legislature expanded the scope of a settling tortfeasor's immunity to include protection from liability to nonsettling tortfeasors. Specifically, section 15-38-50 provides that "[w]hen a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury ... *it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.*" (emphasis added). Thus, by the terms of the covenant not to execute, Mizzell has no additional liability to Smith, and Mizzell is also immune from any liability to non-settling alleged tortfeasors Tiffany, Brown Trucking, and Brown Logistics by virtue of section 15-38-50.

Id. at 561 (emphasis in original). The Court affirmed the trial court's ruling to not permit Mizzell to be added to the verdict form.

This same standard applies to this matter. As discussed above, the statutes do not require that all potentially liable entities be added to the verdict form. The requirement is that "defendants" be on the verdict form. The settled entities which Fisher seeks to include on the verdict form here are simply entities who were potentially liable for Plaintiff's injuries. However, as Mr. Mizzell from the *Smith* matter, those entities have no additional liability to Plaintiff and cannot be apportioned liability at trial.

Finally, a standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning. *Jennings v. Jennings*, 736 S.E.2d 242 (S.C. Sup. Ct. 2012). In Section 15-38-15(C)(3) the percentages of fault of the plaintiff, if any, and that of the defendants must add up to one hundred percent. If the term defendant in that section of the statute was to include a non-party potential tortfeasor, then

the language allowing for set off found in §15-38-15(E) would be unintelligible. This section allows a defendant to reduce his share of the verdict found against him by his proportional share of a set off from a prior settling tortfeasor. It makes no sense to speak of set off for a non-party thrust on a verdict form who has no obligation to pay money as a result of a verdict.

Given the words used in the statute, the circuit court did not err in interpreting the provision to prevent non-parties and settled parties from being entered on the verdict form.

3. South Carolina legislative history supports the circuit court's interpretation of Section 15-38-15.

The legislative history of §15-38-15 is extensively discussed in the 2007 law review article, Shaw, *Limited Joint and Several Applicability Under Section 15-38-15: Application of the rule and the special problem posed by nonparty fault*, 58 S.C.L.Rev. 627 (2007). For example, the article states:

> The December 8, 2004 version of House Bill 3008 proposed the following language: "in assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged injury...regardless of whether the person was, or could have been, named as a party to the suit." The proposed section continued by providing how the defendant was to assert the nonparty defense, which included a notice requirement and an extra statement of the basis for believing the non-party was at fault. A later version of House Bill 3008, which more closely resembled the adopted section 15-38-15 instructed the jury to consider in its fault allocation process the fault of those parties who had previously settled or been released. In the end, the legislature declined to adopt either of these versions; instead it chose an approach to fault allocation that not only failed to mention non-parties, but provided specific instructions that the jury consider only the fault of the plaintiff and the defendants. The implication is that the legislature deliberately determined that the jury should not consider any potential fault of the non-parties.

Before settling on the language that would ultimately become §15-38-15, the South Carolina legislature considered language that specifically permitted non-party fault allocation. The legislature's adoption of the statute's current text instead of the proposed language outlined

above demonstrates that non-party fault allocation was both considered and rejected. Legislative history is relevant and was used by the South Carolina Supreme Court in *Michau v. Georgtown County, Self-Insured Employer*, 396 S.C. 589, 594 n.4, 723 S.E.2d 805 (2012), to interpret the meaning of a statute.

4. Subsection (D) does not support putting non-parties on the verdict form.

According to §15-38-15(D), "[a] defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages." This section speaks of a *right retained.* In other words, a right enjoyed before passage of this statute is still available to the defendant. That right was not the ability to place non-parties on the verdict form. There is no question that prior to the enactment of §15-38-15, a jury was not permitted to allocate fault between defendants let alone between defendants and non-parties. *See Rourk v. Selvey*, 252 S.C. 25, 164 S.E.2d 909 (1968); *S.C. Ins. Co. v. James C. Greene & Co.,* 290 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986).[3] The retained right contained in §15-38-15(D) is of course, the age old right of a defendant to invoke the intervening and/or superseding negligence of released parties or non-parties as a defense. The statute provides the defendant the right to argue the "empty chair" defense. Placing the empty chair on the verdict form is altogether a different matter. The aforementioned law review article supports this reading of the statute:

> The introductory phrasing of subsection (D) also supports the reading the legislature did not intend for a jury to allocate fault to nonparties and perhaps explains its inclusion in the statutory scheme. Subsection (D) begins with the language, "[a] defendant shall retain the right to assert." This language suggests that the subsection (D) is not intended to change the law with respect to the defendant's ability to argue nonparty fault. Further, prior to the adoption of section 15-38-15, a jury was not permitted to allocate fault between defendants or between defendants and nonparties. This reading of subsection (D) provides insight into the legislature's decision to include subsection (D). One concern is

[3]The South Carolina Torts Claim Act, §15-78-100(C), does allow for special verdict apportioning fault between the governmental entity and other private named party defendants.

> that a court would interpret the new statute to eliminate a defense previously available to defendants, caused the plaintiff's injury. Subsection (D) serves as a safeguard against such interpretation.

Shaw, *supra*, at 634.

§15-38-15(D) preserves the right of the Defendants to argue their own nonliability and any nonparty contributing fault. Moreover, any defendant found to be less than fifty percent at fault receives the protection and purpose of the statute, freedom from joint and several liability. Additionally, any defendant against whom a verdict is rendered is eligible for set off from any previously settled tortfeasors. This is the statutory scheme created by the legislature. It provides no room for non-parties on the verdict form.

5. Placing non-parties on the verdict form would undermine the substantial right of a plaintiff to choose her defendants.

By insisting on non-parties be placed on the verdict form, Fisher would undermine the plaintiff's substantial right to choose whom she wishes to sue. Placement on the verdict form enshrines a non-party with a status by the court akin to that of a defendant. The court, not just the defense lawyers, are asking the jury to determine liability of the defendants in relation to non-parties. As a result, a plaintiff has lost control of the substantial right to choose her defendant. The right of the plaintiff to choose her defendant is a substantial right. *Neeltec Enterprises, Inc. v. Long*, 397 S.C. 563, 725 S.E.2d 926 (2012).

In *Chester v. South Carolina Department of Public Safety*, 388 S.C. 343, 698 S.E.2d 559 (2010) the Supreme Court upheld the substantial right of a plaintiff to choose his own defendant where the trial court required the plaintiff to add party defendants pursuant to the apportionment statute under the South Carolina Tort Claims Act, §15-78-100(c). The case arose out of a multiple vehicle wreck on Interstate 95 resulting in many potential defendants. The plaintiff sued several governmental entities ("TCA defendants"). These defendants prevailed upon the trial

judge to require the plaintiff to join other alleged tortfeasors as defendants. Since some of these tortfeasors had previously settled with the plaintiff, the court dismissed the action. The TCA defendants wanted their alleged liability to be apportioned with that of other tortfeasors. The TCA defendants relied on §15-78-100(c):

> In all actions brought to this chapter when an alleged joint tortfeasor is named as a party defendant in addition to the governmental entity, the trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined.

The Supreme Court reversed, holding "It is well-settled that a plaintiff has the sole right to determine which co-tortfeasors(s) she will sue." *Chester*, 388 S.C. at 345. The Court found a ruling that the TCA defendants could compel a plaintiff to join other alleged tortfeasors as defendants would overturn the above firmly entrenched common law principle. *Id.*

What drove the Court's decision was the fact the TCA defendants were not without a remedy. They were still eligible for apportionment among the various defendants originally sued by the plaintiff, and they were entitled to equitable set off against any prior settlements. Similarly, in the case at bar, Fisher is eligible for a setoff, as well.

6. Placing non-parties on the verdict form would undermine the truth-seeking function of the Court.

States that permit non-party fault allocation install safeguards to protect against procedural abuses associated with accused parties who are not represented at trial. Examples of safeguards other states have required include requirements that a defendant affirmatively plead a non-party defense. It requires the defendant to notify the plaintiff by providing the nonparty's identity and location to notify the nonparty that he is being blamed for the plaintiff's injuries and to allow the nonparty the opportunity to appear and defend himself. Procedural safeguards are necessary to protect the integrity of the truth seeking function of the court. South Carolina Code §15-38-15

neither expressly provides for the allocation of fault to non-parties nor does it provide procedural safeguards to prevent the use of nonparty defendants to unfairly impact the fault allocation verdict.

7. Placing non-parties on the verdict form would discourage settlement and prevent Plaintiff from recovering her full damages.

Fisher's argument that non-parties should be placed on the verdict form would discourage settlement with any defendant prior to verdict. A plaintiff would have no incentive to settle with a particular defendant if that defendant would remain on the verdict form. Again, it is one thing to settle and anticipate an empty chair defense. In that scenario, the parties must argue whether the settled defendant was the sole proximate cause of injury. It is altogether different to settle but have the settled party on the verdict form as part of the apportionment scheme. In this latter scenario, the parties must argue the allocation of fault, if any, to be allocated to the settled defendant, who is essentially unrepresented at trial. Plaintiff's counsel cannot be expected to "defend" the unrepresented, settled defendant at trial. Given these trial dynamics, there is a probability the jury will find fault with the unrepresented, settled defendant in amounts larger than if he was represented by counsel. With the likelihood of a "lambs to the slaughter" scenario, counsel will be discouraged from engaging in settlement. Such a result flies in the face of the South Carolina strong public policy of favoring the settlement of disputes. *Chester*, 388 S.C. at 346, 698 S.E.2d at 560; *Poston v. Barnes*, 294 S.C. 261, 363 S.E.2d 888 (1987).

Second, if settled parties are placed on the verdict form, settlement will be discouraged because the remaining defendants will claim setoff for any proceeds paid prior to verdict. *See* §15-38-15(E). The combined effect of apportionment of the settled defendant's fault plus set off for prior settlement proceeds will prevent a plaintiff from recovering the full amount of his

damages. Therefore, placing a settled defendant on the verdict form denies the plaintiff his full damages as determined by the jury. Such a result discourages settlement.

8. Fisher's constitutional argument fails.

This Court should reject Fisher's contention that the circuit court's application of South Carolina Code §15-38-15 violated South Carolina's constitutional guarantees of due process, equal protection, and the right to a jury trial. Fisher's equal protection and due process argument completely ignores that because no suspect class or fundamental rights are involved, the statute is reviewed under the rational basis standard. *Worsley Companies, Inc. v. S.C. Dep't of Health & Envtl. Control*, 351 S.C. 97, 104, 567 S.E.2d 907, 911 (Ct. App. 2002). Under this standard, this Court will give "only minimal scrutiny to the challenged statute[] . . . ." *Lee v. S.C. Dep't of Nat. Res.*, 339 S.C. 463, 466–67, 530 S.E.2d 112, 113 (2000). "A legislative enactment will be sustained against constitutional attack if there is 'any reasonable hypothesis' to support it." *Id.* (quoting *D.W. Flowe & Sons, Inc. v. Christopher Constr. Co.*, 326 S.C. 17, 23, 482 S.E.2d 558, 562 (1997)).

It is abundantly clear that the legislature had a rational basis for limiting apportionment of fault to defendants at trial. As set forth above, there are numerous public policy reasons for this rule, including the achievement of a fair apportionment of damages among joint tortfeasors, encouraging settlement, and permitting a plaintiff to choose her defendants. Fisher's ability to blame other parties was preserved in §15-38-15(D), which permits invocation of the intervening and/or superseding negligence of released parties or non-parties as a defense. Fisher was also entitled to seek (and did receive) a setoff for Plaintiff's settlements with other defendants. The legislature has thus struck a balance between the rights of plaintiffs to recover from those defendants remaining at trial and the rights of defendants to place the blame on settled parties.

Finally, while the right to a jury trial is a fundamental right, *Lane v. Gilbert Const. Co.*, 383 S.C. 590, 600, 681 S.E.2d 879, 884 (2009), Fisher has failed to show that this right is abridged by Section 15-38-15. Fisher's defenses were fully considered by the jury in this case. Fisher had the opportunity to convince the jury that settled parties were responsible for Tommy's injuries, but the jury rejected that argument. Fisher's true complaint is not that a jury did not decide all relevant issues, but that it does not like the jury's liability determination in this case. Fisher's constitutional rights were not violated by the circuit court's application of Section 15-38-15 or the jury's verdict.

B. Fisher received a proper setoff for Plaintiff's pre-trial settlements.

Fisher's setoff argument ignores that the pre-trial settlements were not for the exact same causes of action that were tried to verdict against Fisher. While the jury returned a verdict against Fisher that evenly divided damages among Plaintiff's causes of action for survival, wrongful death, and loss of consortium,[4] the circuit court approved a settlement distribution of 90% to the wrongful death claim and 10% to the survival claim.[5] Fisher may only receive a credit for the amount paid by another defendant who settles for the same cause of action. And there is no credit, of course, for the punitive damages award of $2,125,000.[6]

Fisher is not entitled to setoff as a matter of law. In *Ellis v. Oliver*, 335 S.C. 106, 112-13, 515 S.E.2d 268, 271-72 (Ct. App. 1999), the Court of Appeals held that "when a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law." *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). However, when the settlement involves compensation for an injury different

[4] R. p. 3236.
[5] R. pp. 1-2.
[6] R. p. 3237.

from the one tried to verdict, there is no setoff as a matter of law. *Hawkins*, 330 S.C. at 114-15, 498 S.E.2d at 407. Further, when the settlement "is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between" the claims. *Smith*, 397 S.C. at 473, 724 S.E.2d at 191.

The settlement amount is relevant to this issue because Defendants are only entitled to "credit for the amount paid by another defendant **who settles for the same cause of action**." *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012) (emphasis added). The Court of Appeals later acknowledged the conflict created by the *Ellis* holding. In reference to the requirement that the trial court determine the allocation of the settlement funds when the settlement includes payment for claims tried to verdict and claims that were not, the *Smith* court stated:

> This is what the circuit court did in *Rutland v. S.C. Dep't of Transp.*, 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010), cert. granted, (Oct. 19, 2011).[7] This court affirmed the *Rutland* trial court's determination that the settlement that the settlement was not properly allocated between the different claims of wrongful death and survival because there was no evidence of conscious pain and suffering. 390 S.C. at 85–86, 700 S.E.2d at 455. In this respect, *Rutland* conflicts with *Ellis*. In *Ellis,* the court of appeals stated that wrongful death and survival are the same claim for the same injury. 335 S.C. at 112–13, 515 S.E.2d at 272. The conflict between *Rutland* and *Ellis* is resolved by reference to *Bennett v. Spartanburg Railway, Gas & Electric Co.*, 97 S.C. 27, 81 S.E. 189 (1914), in which the supreme court held that wrongful death and survival actions are different claims for different injuries. 97 S.C. at 29–30, 81 S.E. at 189–90. The court stated: "Necessarily, therefore, there must be separate verdicts and separate judgments, and hence there should be separate actions." 97 S.C. at 31, 81 S.E. at 190.

[7] The Court of Appeals' holding was appealed to the Supreme Court of South Carolina in *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 734 S.E.2d 142 (2012). On this issue, the Supreme Court affirmed the trial court's equitable reallocation of the settlement received by the plaintiff.

Smith, 397 S.C. at 481 n.1, 724 S.E.2d at 195 n.1.

Here, the jury returned a verdict against Fisher and awarded damages on three causes of actions: survival, wrongful death, and loss of consortium. The jury awarded $3,000,000 in compensatory damages against Fisher, $1,000,000 for each cause of action. On the other hand, the settlements received by Plaintiff included compensation only for wrongful death and survival, and the division was very different from that made by the jury. As the circuit court approved, 90% of the settlement proceeds were allocated to wrongful death and 10% to survival. As such, Fisher's entitlement to a setoff does not arise as a matter of law, but is determined in relation to the allocation of settlement proceeds already made.

Plaintiffs have substantial discretion to apportion settlement proceeds between different causes of action, and reallocation is not warranted simply to benefit a nonsettling defendant. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015). In *Riley*, the Supreme Court held that the court of appeals had erred in reapportioning settlement proceeds between the survival and wrongful death claims based on its view that the apportionment was not proportionately reasonable. *Id.* In reversing on that issue, the Supreme Court explained that settlement terms are not meant to benefit nonsettling parties:

> A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

Id. (quoting *Lard v. AM/FM Ohio, Inc.*, 901 N.E.2d 1006, 1019 (Ill. App. 2009)).

Riley recognized that "[s]ettling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify appellate reapportionment for the sole purpose of benefitting [the nonsettling defendant.]" *Id.* Even though the plaintiff had allocated most of the settlement proceeds to her survival claim, and the verdict against the defendant was only on the wrongful death claim, the Court upheld the plaintiff's allocation as reasonable and determined that the defendant was only entitled to set off the amount apportioned to the wrongful death claim. *Id.* at 197-98.

Here, Plaintiff's apportionment of 90% to wrongful death was entirely reasonable given Tommy Glenn's relatively young age of 69 and that his family is deprived of his companionship for the remainder of his life expectancy of 14 years. (R. p. 2375, line 21-p. 2376, line 9). There has been no contention that this allocation is unreasonable or that it should be altered, other than Fisher's unsupported contention that Plaintiff should have been forced to allocate some percentage of her settlement proceeds to the loss of consortium claim.

Under settled precedent, there can be no doubt that Fisher may only receive a setoff for the portion of the damages actually settled by other defendants. Fisher may only receive a setoff for that portion of the wrongful death, survival, and loss of consortium damages already settled by other defendants. As the circuit court calculated, Fisher may only receive a setoff of $1,280,000 and remains responsible for $1,720,000 of the compensatory damages awarded by the jury, plus punitive damages.

Contrary to Fisher's contention, there has been no double recovery. Fisher not only disregards that wrongful death claims compensate for different injuries than survival or personal injury claims, but also that wrongful death claims are separate and distinct from loss of consortium claims. *See Burroughs v. Worsham*, 352 S.C. 382, 406, 574 S.E.2d 215, 227 (Ct.

App. 2002). Wrongful death claims seek to recover the damages sustained by the beneficiaries as a result of the death, and those beneficiaries include the decedent's spouse and children. *Id.*; *Self v. Goodrich*, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989). The general elements of damages recoverable in a wrongful death action are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and loss of the decedent's experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries. *Self*, 300 S.C. at 351, 387 S.E.2d at 714. Only a spouse may recover for loss of consortium, which "includes afforded services provided by the other spouse: Love, companionship, affection, society, sexual relations, comfort, solace, and guidance" as well as "the value of those services of her spouse which were lost including the loss of her spouse's society and companionship in her home and for any expenses for the care and treatment to her spouse and for any medical expenses reasonably incurred." (R. p. 2374, line 19-p. 2375, line 2). These damages do not encompass the mental shock and suffering, wounded feelings, and grief and sorrow that the spouse and children may recover for wrongful death. In addition, there could not possibly a "double recovery" for Tommy Glenn's own damages, as his pain and suffering is not an element recoverable under wrongful death.

Fisher received the full setoff that it was entitled to in this case. Its arguments are contrary to South Carolina law permitting plaintiffs to allocate settlement proceeds as they see fit, and the allocation did not result in a double recovery in this case.

V. The circuit court did not abuse its discretion in sanctioning Fisher for its discovery misconduct.

It was within the circuit court's discretion to exclude Fisher's tissue digestion study and related expert testimony given Fisher's abuse of the discovery process. *Rickerson v. Karl*, 412

S.C. 215, 219, 770 S.E.2d 767, 770 (Ct. App. 2015). ("The decision of whether to impose sanctions is generally entrusted to the sound discretion of the trial court."). "Under Rule 37(b)(2)(C), SCRCP, when a party fails to comply with a discovery order, the trial court has the discretion to impose a sanction it deems just, including an order dismissing the action." *McNair v. Fairfield Cty.*, 379 S.C. 462, 465–66, 665 S.E.2d 830, 832 (Ct. App. 2008). Sanctions can range up to default or dismissal, and "[i]n determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Griffin Grading & Clearing, Inc. v. Tire Service Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999). Further, "[t]o encourage compliance with discovery procedures, trial courts can impose sanctions upon parties who violate the rules, including exclusion of witnesses whose identities have been withheld." *McGaha v. Mosley*, 283 S.C. 268, 277, 322 S.E.2d 461, 466 (Ct. App. 1984). "The burden is on the appealing party to show the trial court abused its discretion in imposing sanctions for failing to comply with a discovery order." *QZO, Inc. v. Moyer*, 358 S.C. 246, 256, 594 S.E.2d 541, 547 (Ct. App. 2004).

Here, the circuit court found that sanctions were warranted given Fisher's "pattern and practice of disregard for this state's long-standing Discovery and Scheduling Order, the case management order and established case deadlines, the South Carolina Rules of Civil Procedure, and orders from this Court." (R. p. 58). First, Fisher had a laboratory perform testing on Tommy's lung tissue that destroyed the tissue without an agreement between the parties, in violation of the standing order providing that such destructive testing may not been done absent an agreement or court order. (R. p. 120, line 12-p. 125, line 9; R. p. 171, line 3-p. 172, line 25). This is undisputed. Fisher now seeks to portray this as a "misunderstanding" because the parties

were attempting to reach an agreement at the time the test was performed. (Appellants' Br., at 43). This is disingenuous. Plaintiff's terms were that if testing was to be done, the tissue had to be equally divided so that Plaintiff's expert could perform his own tissue digestion study, and that the division would have to be done by an independent laboratory. (R. p. 123, lines 3-8). Fisher blew through both of those terms, hiring a biased laboratory that works only for defendants in litigation, RJ Lee Group, that destroyed virtually all of the tissue. (R. p. 122, line 7-p. 126, line 6; R. p. 127, lines 20-25). Fisher than gave the report from RJ Lee Group to its medical expert Dr. Oury, who changed his opinions in this case. (R. p. 130, lines 2-18).

Fisher then unilaterally noticed the deposition of its medical expert, Dr. Oury, for January 8, 2019, to testify about his new opinions, the day before the pre-trial hearing scheduled for January 9 and less than a week before trial set to begin on January 14. The circuit court granted Plaintiff's motion for protection from the January 8 deposition date for Dr. Oury, precluding it from going forward. (R. p. 55; R. p. 117, lines 10-15). Unbeknownst to Plaintiff or the circuit court, Fisher defied this order and took Oury's deposition anyway.

At the pre-trial hearing the next day, without knowing that Oury's deposition had been taken, Plaintiff's counsel set forth the extreme prejudice to Plaintiff from the timing of the tissue digestion study and Oury's new opinions. The tissue digestion study happened less than 30 days before trial (the report was dated December 18, 2018) even though the case had been on trial for two years. (R. p. 119, lines 13-18; R. p. 124, lines 15-20; R. p. 130, lines 9-18). As Plaintiff's counsel explained, the timing of this put Plaintiff at a serious disadvantage, as in less than a week before trial Plaintiff needed to depose Dr. Oury, depose the scientist from RJ Lee Group, and depose her own expert, Dr. Gordon, to respond to these two defense witnesses. (R. p. 130, line 9-p. 131, line 17).

Even without knowing that Oury's deposition had been taken in defiance of the circuit court's order, the court was "very troubled" by Fisher's conduct. (R. p. 171, lines 3-10). The court stated that "I can't get my head around the concept that the documents, as I have seen them, would represent an agreement sufficient to lead anybody to believe that it's okay to send tissues that are being released from Emory University to a defense expert to make the cuts. That bothers me." (R. p. 171, lines 5-10). Further, "I do not think the standing orders of this court have been honored" and that "it defies common sense to think that anyone on either side would agree to an expert for the other side to be the one to make divisions of material which before that had resided with the treating hospital, Emory." (R. p. 175, lines 11-18).

The circuit court therefore granted Plaintiff's motion to strike the tissue digestion study and to preclude any evidence or testimony regarding the tissue digestion study. (R. p. 175, line 14–p. 176, line 15). The unmistakable effect and intent of these orders was to preclude Dr. Oury's deposition. But it had already occurred in secret, without Plaintiff's counsel present.

At the close of trial, on January 23, Fisher attempted to present Oury's deposition to the Court as a "proffer." (R. p. 2145, line 22-p. 2149, line 15). This was the first time that Plaintiff's counsel and the circuit court learned that Fisher had taken Dr. Oury's deposition in contravention of the circuit court's rulings. The circuit court was shocked that Fisher was brazenly offering this deposition in violation of multiple court orders:

> This document is not simply some affidavit or sworn statement. It's a complete deposition with curriculum vitae; with excerpts from a book written by Dr. Oury, Pathology of Asbestos-Associated Diseases; and all the RJ Lee Group testing, digestion testing; and a report from Dr. Oury. All of that is contained herein.
>
> Interestingly, what is not contained herein is my order, which had been passed the previous day before this deposition was taken and received by counsel the previous day before this deposition was taken . . . .

> Discovery is ongoing and this material not only was done in violation of my order of January the 7th, but it contains vital information central to the big issue in this case . . . . The big issue turns around and there's no real issue he has mesothelioma, although Dr. Oury tries to cast some doubt on that.

(R. p. 2177, line 9–p. 2179, line 8). The circuit court ultimately determined that the formal statement given by Oury was in violation of the court's protective order, and that the additional opinions from Dr. Oury that were not provided to the court nor to Plaintiff in a timely manner would not be accepted as a proffer:

> The truth of the case is the defendants had nothing to do with Mr. Glenn's mesothelioma, and that opinion can only be defined if you get this expanded material that was not given to me, not given to the plaintiff at the time we talked about whether his tissue digestion studies would be allowed, which is what I ruled on, nor was it provided in ongoing discovery in the posture of having taken it at a time when they had been noticed and I had then said they were protected.
>
> So what we're talking about now is, to me, misleading the court and disobeying the ongoing obligation per not only discovery rules but the orders that govern asbestos cases which require this kind of information be turned over. It was not turned over.

(R. p. 2210, line 22–p. 2211, line 11).

Fisher's conduct reflected a disregard for the court's authority to control the discovery process, to control its docket, and to ensure that all of the relevant facts are presented to an unbiased jury. Both Plaintiff and the circuit court were surprised by the late and unauthorized tissue digestion study and Fisher's unilateral deposition of Oury. Exclusion of this evidence was within the circuit court's discretion.

CONCLUSION

For the reasons set forth herein and in Judge Toal's Post-Trial Order, Fisher has failed to demonstrate any grounds for reversal. The Glenns therefore ask this Court to affirm the circuit court's rulings in all respects.

CERTIFICATION

I certify that this Final Brief of Respondents complies with Rule 211(b), *South Carolina Appellate Court Rules*.

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Respectfully submitted,

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