THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-001600

Rita Joyce Glenn, individually and as personal representative of the Estate of Thomas Harold Glenn, deceased, ... Respondent,

v.

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, Inc., f/k/a Carolina Gasket and Rubber Company, Inc.; Carboline Company; Crane Co. d/b/a Crane Chempharma & Energy d/b/a Aloyco, n/k/a Crane Energy Flow Solutions; Crosby Valve, Inc,; 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, Inc., 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.; Hajoca 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.

Petition for Rehearing

Pursuant to 221(a) and 240 of the South Carolina Appellate Court Rules, Appellant Fisher Controls International LLC ("Fisher") respectfully requests rehearing regarding this Court's opinion issued April 5, 2023, affirming circuit court rulings in favor of Rita Joyce Glenn, individually, and as personal representative of the Estate of Thomas Harold Glenn. *See Glenn v. 3M Co. et al.* Op. No. 5975 (S.C. Ct. App. filed April 5, 2023) ("Opinion").

The Court overlooked or misapprehended several important points, discussed below. The Court should consequently grant rehearing and reverse the circuit court rulings based on the arguments herein. Fisher also incorporates into this petition all arguments raised by Fisher in its briefing and at oral argument and does not abandon such arguments.

Argument

I. This Court Overlooked Or Misapprehended Controlling South Carolina Inconsistent Verdict Jurisprudence.

In its Opinion, this Court affirmed the circuit court's order denying Fisher's motion for a new trial on the ground that the record reveals a way to reconcile the jury's verdict for Fisher on strict liability, but in favor of Plaintiff on negligence. This is error.

The evidence relative to the three common elements of the strict liability and negligence claims was the same. The jury could not have logically determined that the three common elements were present for the plaintiff's negligence verdict, but one or more were missing to support a defense verdict on the strict liability claim.

This Court determined that the addition of language included in the circuit court's negligence instruction, coupled with alleged evidence regarding "recommendations" of Fisher regarding asbestos-containing gaskets, supports logical reconciliation of the verdicts. The Court overlooked and misapprehended that Fisher did not "recommend" asbestos-containing gaskets, and thus there is no way this could be used, as a factual matter, as a basis for verdict reconciliation. *See* Record Vol. 8, p. 2276. Further, under the jury instructions, in order to find for plaintiff, the jury had to have found the products for which Fisher manufactured, distributed or sold to be "unreasonably dangerous," but the jury affirmatively found the products were not unreasonably dangerous when it determined Fisher was not liable for strict liability.

In addition, unlike the plaintiff in the *Bigham v. J.C. Penny*, 268 N.W.2d 892 (Minn. 1978) case cited in the Court of Appeals' opinion, the Plaintiff here was an ordinary user. Thus *Bigham*, which stands for a scenario where reconciliation of seemingly inconsistent verdicts could be possible due to the unique occupation of the injured plaintiff there, has no relevance here. Plaintiff's allegations of wrongdoing in this case were the same for both the negligence and strict liability theories, with the add-on that for negligence, Plaintiff asserted wrongful conduct of Fisher.

Further, Fisher cannot be liable for components it did not place into the stream of commerce, such as asbestos-containing flange gaskets and insulation that Duke purchased from

third parties and may have added to Fisher valves,[1] where Plaintiff did not claim alleged negligent conduct separate from the design, manufacture, or sale of an allegedly defective product. Regardless, even assuming *arguendo* Plaintiff claimed Fisher should be held negligent for "recommending" asbestos-containing gaskets, there was no evidence Fisher did this.

Even assuming that the addition of asbestos-containing components by Duke is a foreseeable material alteration to the Fisher valves, the jury's strict liability verdict is dispositive. *See Fleming v. Borden, Inc.*, 316 S.C. 452, 457, 450 S.E.2d 589, 592–93 (1994); *Kennedy v. Custom Ice Equip. Co.*, 271 S.C. 171, 176, 246 S.E.2d 176, 178 (1978) ("The test of whether a product is defective when sold is whether the product is unreasonably dangerous to the consumer or user *given the conditions and circumstances that will foreseeably attend the use of the product*." (emphasis added)). The verdict in favor of Fisher on the strict liability claim is necessarily a finding that Plaintiff failed to prove an element common to both claims—that Fisher products were unreasonably dangerous to the user.

For both strict liability and negligence, Plaintiff was required to prove Fisher's product was unreasonably dangerous to the user. *Branham v. Ford Motor Co.*, 390 S.C. 203, 210, 701 S.E.2d 5, 9 (2010). If the product is not unreasonably dangerous, then the level of care Fisher exercised with respect to a negligence claim is never analyzed. *Branham*, 390 S.C. at 210, 701 S.E.2d at 9 ("The fault-based element is of no moment where, as here, there is no showing in the first instance of a product in a defective condition unreasonably dangerous to the user."). Thus, the alleged

[1] *See Baughman v. Gen. Motors Corp.*, 780 F.2d 1131, 1132–33 (4th Cir. 1986) ("Where . . . the defendant manufacturer did not incorporate the defective component part into its finished product and did not place the defective component into the stream of commerce, the rationale for imposing liability is no longer present. The manufacturer has not had an opportunity to test, evaluate, and inspect the component; it has derived no benefit from its sale; and it has not represented to the public that the component part is its own."); *O'Neil v. Crane Co.*, 266 P.3d 987, 991, 1005 (Cal. 2012); *Simonetta v. Viad Corp.*, 197 P.3d 127, 133–34 (Wash. 2008).

"conduct"—the purported absence of due care—***is*** the additional fault element that need not be proven in a strict liability claim. It does not offer a separate or exclusive basis for liability. *See id.* at 212 n.5, 701 S.E.2d at 9 n.5 ("The converse of the situation before us is more easily understood, that is, where the negligence claim is dismissed and the strict liability survives, as questions of fact are presented as to elements common to both claims yet the plaintiff fails to present evidence of the absence of due care."). If a product is not unreasonably dangerous to the user—as the jury found by virtue of its verdict on the strict liability claim—Fisher cannot be liable for its alleged conduct in failing to warn, failing to test, or any other alleged negligent conduct.

At its core, this Court's analysis sits on a problematic foundation- an expansive reading of *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995). It appears that this Court acknowledged the Supreme Court's directive in *Branham v. Ford Motor Co*. that "[w]hen an element common to multiple claims is not established, all related claims must fail." *Opinion* at *18. In *Branham*, the circuit court dismissed a strict liability claim "on the ground that the [product at issue] was not as a matter of law in a defective condition unreasonably dangerous to the user at the time of manufacture." 390 S.C. at 210, 701 S.E.2d at 8. Although the plaintiff there also asserted a negligence claim based on a failure to test the product, the *Branham* Court held the finding that the product was not defective precluded any products liability negligence claim as a matter of law. *Id.* at 210, 701 S.E.2d at 8. Moreover, the Supreme Court cautioned that the holding in *Bragg v. Hi-Ranger* that "strict liability and negligence are not mutually exclusive theories of liability" should not be read broadly. *Id.* at 211, 701 S.E.2d at 9.

Here, after erroneously finding the verdict was not inconsistent at trial, the circuit court issued an erroneous written order denying Fisher a new trial based on *Bragg*. (R. 39–40). The circuit court found that Fisher did not show "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. 40). The circuit court, and now this Court, have done exactly what the Supreme Court cautioned against in *Branham*—finding that strict liability and negligence claims are not mutually exclusive and denying Fisher's motion for a new trial without analyzing whether the claims in this case depended on a common element. (R. 39–40).

This Court opined that it was speculative to attribute the strict liability defense verdict on the absence of a finding that the product was unreasonably dangerous. But in the same breath, the Court's explanation to reconcile the jury's verdict were based on speculation regarding the jury's decision-making, unsupported by any evidence, regarding "recommendations" by Fisher respecting asbestos-containing gaskets. "…[W]hen a verdict is so confused ***that the jury's intent is unclear,*** the safest and best course is to order a new trial." *Vinson v. Jackson*, 327 S.C. 290, 293, 491 S.E.2d 249, 250 (1997). Here, the verdict was inconsistent and the jury's intent was unclear. Fisher noted this and made the appropriate motion for new trial prior to juror discharge. The circuit court erroneously declined to recharge the jury and instruct them regarding their inconsistent and unclear verdict. Instead, the circuit court discharged the jury, and denied Fisher's new trial motion. A new trial is required, and the rehearing petition should be granted.

II. This Court Overlooked Or Misapprehended Controlling South Carolina Law That Required The Circuit Court To Instruct The Jury On The Sophisticated Intermediary Doctrine, Superseding Cause, and Punitive Damages.

This Court in its Opinion concluded that the circuit court was correct to decline jury instructions on certain important defenses. With respect to the sophisticated intermediary doctrine, this Court concluded that there was no evidence presented below tending to show it may have been reasonable for Fisher to have relied on Duke Energy to relay warnings to its employees. This ruling was supported by this Court's factual assessment of testimony by Fisher's corporate

representative, Ronald Dumistra, who testified that Fisher, as a threshold matter, did not consider the asbestos gaskets to pose a health risk. Considering that evidence in isolation, this Court determined that a sophisticated intermediary instruction was foreclosed as a matter of law. This was error.

The South Carolina Supreme Court has directed that Courts "***cannot pass* upon the credibility of witnesses or the weight of the testimony; these are matters for the jury[.]**" *Dickson v. Girard Fire & Marine Ins. Co.*, 144 S.C. 183, 187 142 S.E. 348, 349 (1928) (emphasis added); *see also Bass v. S.C. Dep't of Soc. Servs.*, 414 S.C. 558, 570, 780 S.E.2d 252, 258 (2015) ("[***N]either an appellate court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence***.") (emphasis added). The circuit court's refusal to instruct on the sophisticated intermediary doctrine contravened this cardinal principle. Fisher presented competent evidence below from which a reasonable jury *could infer* that the sophisticated intermediary doctrine applied. *See Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000) ("It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge.") Specifically, a jury *could have found* that Fisher actually and reasonably relied upon Duke to convey warnings to its employees, based on the record, including but not limited to:

- As an employer, Duke is obligated to manage all asbestos exposure. (R. 1446) (testimony of Fisher's industrial hygiene expert, John Spencer).
- All workers must follow Duke's site regulations. (R. 951–952) (testimony of Plaintiff's expert Charlie Ay).
- In 1977, Duke established and communicated a policy requiring its employees to place caution labels—or warnings—on all products containing asbestos. (R. 3392).

- The policy applied to Oconee Nuclear Station, where Mr. Glenn worked. (R. 1725–26) (testimony of Mr. Glenn's coworker, Donald Rogers).

- Duke instructed its employees which work practices to follow, and Fisher did not direct any work practices. (R. 1206–07) (testimony of Mr. Glenn's coworker, Dale Jolly).

From this evidence, a jury could determine that Duke directed its employees' work practices and was responsible for warning and protecting its employees, that Duke was aware or should have been aware of the alleged hazards of working on asbestos-containing gaskets,[2] that Fisher reasonably relied on Duke to warn and protect its employees, and that Fisher is therefore not liable for Plaintiff's damages. *Webb v. Special Elec. Co.*, 370 P.3d 1022, 1034–35 (2016). But it was for the jury- not this Court- to evaluate the weight and credibility of this evidence. The jury's prerogative was to evaluate this evidence along with Mr. Dumistra's testimony that Fisher did not deem the subject gaskets, as a threshold matter, to pose a health risk. *See Hussman Refrigerator & Supply Company v. Cash & Carry Groceries, Inc.*, 134 S.C. 191, 132 S.E. 173 (1926).

Litigants are permitted to try cases based on alternative theories. *Anderson v. West*, 270 S.C. 184, 241 S.E. 2d 551 (1978) (recognizing that a case can be submitted to the jury on alternative theories and a general verdict will be upheld if it is supported by at least one theory). The circuit court's inquiry is limited to determining whether any competent evidence exists to support Fisher's defense. That evidence certainly existed, and the circuit court thus had a duty to charge the sophisticated intermediary doctrine to the jury and allow the jury to assess the defense

[2] Plaintiff asserts that Duke did not know gaskets could be hazardous "because" Fisher represented that gaskets were safe. (Resp. Br. 5, 27). The record contains no evidence of this alleged cause-and-effect relationship. Plaintiff's contention is at best a question of fact that must be decided by the jury, not the circuit court.

for itself. *See Clark*, 339 S.C. at 390, 529 S.E.2d at 539. The circuit court abused its discretion by denying Fisher's request to charge the sophisticated intermediary doctrine, and Fisher should have been awarded a new trial.

The Supreme Court has directed that "questions concerning reliance and its reasonableness are factual questions for the jury [, since] issues of reliance and its reasonableness going as they do to subjective states of mind and applications of objective standards of reasonableness, are preeminently factual issues." *Unlimited Servs. v. Macklen Enters.*, 303 S.C. 384, 387, 401 S.E.2d 153, 155 (1991). This Court should grant rehearing and reverse the circuit court's ruling in order to protect the jury's time-honored role as a fact finder in South Carolina.

This Court reached the same erroneous conclusion with respect to Fisher's request for a superseding cause instruction. This Court's Opinion missed the mark by failing to recognize that although the circuit court correctly recognized that foreseeability is a jury question, it improperly weighed the evidence itself, found the intervening causes were foreseeable, and refused to submit the question to the jury. (R. 2607–08) ("I think the linchpin is foreseeability, and the plaintiff is correct. The intervening causes we're talking about, whether it be Duke or some other intervening cause, were completely foreseeable. *The jury could certainly find that on the basis of the evidence viewed in the light most favorable to the nonmoving party*." (emphasis added)); *see also Steele v. Rogers*, 306 S.C. 546, 551, 413 S.E.2d 329, 332 (Ct. App. 1992) ("Ordinarily, foreseeability is a question of fact to be decided by the jury.").

This Court compounded the circuit court's error by also acknowledging that foreseeability presents a traditional fact question for a jury, but continued to assess weight and credibility regarding superseding cause. This Court again impermissibly pointed to a single piece of evidence to justify declining to charge the defense-- that Fisher viewed the gaskets as safe due to their

encapsulation. Thus, this Court factually determined that "Fisher's claim that it could not have reasonably foreseen Duke's similar oversight ***lacks credibility***," and that "***it is unrealistic to infer*** from the evidence that the existence of other sources of asbestos dust in Tommy's workplace was unforeseeable." *Opinion* at * 46. (emphasis added). Such inferences and credibility determinations are for the jury alone. The record contains sufficient evidence of intervening causes to have charged the jury on superseding cause—particularly evidence of Duke's conduct and failure to adequately warn or protect its employees and evidence that Mr. Glenn was exposed to asbestos from dozens of other manufacturers' products, including insulation. *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 467, 494 S.E.2d 835, 844–45 (Ct. App. 1997) (finding the question whether an intervening cause was foreseeable "was properly directed to the jury"); (R. 1084–85, 1088) (testimony of James Freeman acknowledging the presence of "[m]iles and miles of insulated pipe," that Mr. Glenn worked around insulators replacing asbestos-containing insulation, and that he knew the insulation contained asbestos); (R. 1731–32) (testimony of Donald Rogers describing exposure to dry materials used by insulators).[3] The foreseeability of those potential causes must be determined by the jury. *Steele*, 306 S.C. at 551, 413 S.E.2d at 332; *see also Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) ("Only in rare or exceptional cases may the issue of proximate cause be decided as a matter of law." (quoting *Baily v. Segars*, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct. App. 2001))). Rather than allow the jury to determine foreseeability, the circuit court, and this Court, impermissibly weighed the evidence itself and invaded the jury's

[3] *See also* (R. 1714–15) (testimony of Donald Rogers stating "the majority of [dust] come from insulation. They was welding, burning, grinding going on throughout the turbine generator building. So it was a combination. But there was probably more insulation fibers than - - the other - - the grinding and the burning was kind of localized on a particular pump or valve, where they're working on the pipe and doing grinding and welding); (R. 1717–18) (acknowledging exposure to insulation dust from disturbing insulation while doing instrumentation work on boilers).

province. In essence, by declining to give these charges, the circuit court granted directed verdict to Plaintiff on these defenses.

This Court's prejudicial error analysis is likewise flawed. The Opinion points to generalized proximate cause language contained in the boilerplate negligence instruction to render any error in failing to instruct on superseding cause harmless. *Opinion* at *47. But as a threshold matter, if a general negligence instruction *ipso facto* renders harmless a failure to instruct on superseding cause, then the superseding negligence doctrine itself becomes meaningless here and in every case. That cannot be the law of South Carolina. The circuit court's ruling on the superseding cause instruction was necessarily prejudicial. It deprived Fisher of the ability to convince the jury that its affirmative cause defense was meritorious, and no general instruction based on plaintiff's burden of proof could possibly cure that error. The lack of a superseding cause instruction also deprived Fisher of the chance to present its defense with sufficient clarity and detail in order to explain to the jury precisely what was at issue. For example, a proper superseding negligence instruction would have specifically informed the jury that, in this case, Fisher contends that if it was negligent, it was insulated by the superseding and intervening negligence of Duke Energy. The lack of an instruction on these particulars of Fisher's affirmative defense was damaging and a general proximate cause instruction could not cure that error.

Finally, this Court misapplied South Carolina law by affirming the circuit court's ruling which declined to instruct the jury that a plaintiff cannot recover punitive damages for a breach of warranty claim. *Rhodes v. McDonald*, 345 S.C. 500, 504–05, 548 S.E.2d 220, 222 (Ct. App. 2001). This Court first reasoned that the failure to provide this instruction was not prejudicial because the jury found for plaintiff on her negligence claim. However, there is no exception to the rule prohibiting punitive damages for a breach of warranty claim where a plaintiff also asserts a

negligence claim, and the circuit court's finding that the jury did not base punitive damages on its breach of warranty finding is speculation. Had the circuit court given the requested instruction, the parties and this Court would know with certainty that the jury awarded punitive damages only for Fisher's alleged negligence. Because the circuit court refused to give the instruction, however, the jury should be considered to have given punitive damages as to all claims against Fisher.

Moreover, the suggestion that *Rhodes* did not hold juries must be instructed regarding the causes of action that give rise to a claim for punitive damages is incorrect, and ignores the law that punitive damages are unavailable for a breach of warranty claim. *See* (R. 45). This Court should not have assumed that the jury knew this particular legal principle. The only reliable way to prevent the jury from awarding punitive damages for the breach of warranty claim was for the circuit court to instruct the jury that the law prohibits it. *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 104, 727 S.E.2d 407, 414 (2012). The circuit court's failure to comply with its duty to instruct the jury on the law entitles Fisher to a new trial.

III. This Court's Opinion Overlooked Or Misapprehended This State's Substantial Factor Causation Jurisprudence.

This Court's decision to affirm the circuit court's proximate causation ruling and related expert testimony admissibility rulings based on "cumulative dose" is based on several legal errors. To prove proximate cause, an asbestos plaintiff in South Carolina must prove that the asbestos exposure was attributable to a particular defendant and constitutes substantial causation by satisfying the "frequency, regularity, and proximity" test. *Henderson v. Allied-Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007) ("To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the Plaintiffs actually worked." Substantial factor causation thus requires more than proof a decedent had "occupational"

or "above background" exposures from a defendant's product. *Haskins v. 3M Co.*, No. 2:15-CV-02086-DCN, 2017 WL 3118017, at *7 (D.S.C. July 21, 2017) (cited as an example of persuasive reasoning). It also requires a *contextual analysis*—causation experts must evaluate the relative significance of a decedent's exposures. *Haskins*, 2017 WL 3118017, at *8.

This Court's conclusion that Dr. Brody and Dr. Frank's proximate causation testimony was reliable is erroneous. Both experts testified that ***every asbestos exposure*** contributes to a person's cumulative dose that causes mesothelioma and, therefore, all exposures are the cause of his mesothelioma. *See* (R. 452–53, 490–91, 1336–39). These opinions are inadmissible because they are unreliable and necessarily inconsistent with Plaintiff's burden of proof under South Carolina law. The opinions are incompetent since both experts testified that all asbestos exposures above background make up a person's cumulative dose, and the cumulative dose is a substantial factor in causing mesothelioma. (R. 452–53, 490–91, 1297, 1303–05, 1362). At Plaintiff's request, Dr. Frank assumed "years" of "regular or routine" and—"in terms of proximity"—"close" exposure ("from elbow to elbow, to ten feet") to Fisher valves and opined that the exposure was a substantial factor in causing Mr. Glenn's mesothelioma. (R. 1336–37). Dr. Frank then assumed, at Plaintiff's request (while conceding the assumption was "not real life"), that those exposures were Mr. Glenn's only exposures and opined that the exposures caused Mr. Glenn's mesothelioma. (R. 1336). This abstract, devoid of context type approach cannot be condoned, as it allows a jury to escape the "real life" situation involving Mr. Glenn's disease and what substantially contributed to that disease, and instead allows for an general explanation of "cumulative dose" and diseases, and then a hypothetical discussion of whether a person exposed to a product under certain circumstances ***could have*** contracted disease from that exposure.

The "every exposure" or "cumulative exposure" theory is unreliable because it does not satisfy any evidentiary reliability factors. *See Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 846 (E.D.N.C. 2015) (rejecting the "each and every exposure" theory as unreliable because it "cannot be tested, has not been published in peer-reviewed works, and has no known error rate"). Those theories and their supportive testimony are legally improper because they evade the required legal standard of proof and invite the jury to find causation based on an improper standard. *See Haskins*, 2017 WL 3118017, at *6 (finding the "each exposure" or "cumulative exposure" theory "evaluate[s] causation in a manner that is inconsistent with the appropriate legal standard"). This analysis necessarily requires Plaintiff's experts to draw distinctions between Mr. Glenn's dose of asbestos from Fisher products and his overall dose. Plaintiff's experts failed to draw these distinctions or engage in any such analysis. Instead, these experts testified that if any exposure is "above background," it is causal. Such an approach allows Plaintiff to assert that any exposure that *might* cause mesothelioma is a substantial factor. (R. 1362). Rather than establishing the facts of Mr. Glenn's injuries, Dr. Frank begins with essentially a legal conclusion masquerading as a scientific fact that Mr. Glenn's "cumulative dose" was a substantial factor of his disease, and extends that legal conclusion to each exposure allegedly making up Mr. Glenn's "cumulative dose." He rules all exposures "in" solely because they cannot be ruled "out."

While this Court rejected the "every exposure" legal theory of causation, recognizing that such is not in conformity with *Henderson*, this Court nevertheless deemed the "cumulative dose" testimony as "scientific fact[4]" background information essential for the jury's understanding of the

[4] Fisher disputes the summary conclusion of *Rost v. Ford Motor Co*., 637 Pa. 625, 151 A.3d 1032, 1050-51 (Pa. 2016) (and this Court's adoption of *Rost*) that it is an "irrefutable scientific fact" that a person's disease comes from their "cumulative dose." As an initial matter, this supposed irrefutable "fact" makes no sense, because the expert proponents of this "fact" rule out dosage deemed by government officials to be "background level" dosage. Therefore, from the start, plaintiff's experts are not talking, in reality, about "cumulative dose," because they are not including all dosage. Further, some "dose exposures" simply do

scientific causation, and failed to reverse the circuit court for allowing such expert testimony. **But such conflation of standards cannot be reconciled.** This Court's opinion indicates that if experts' opinions are purportedly based on basic scientific facts, the experts are free to present causation opinions that contradict the controlling legal standard. This approach ignores the requirement—adopted by the South Carolina Supreme Court for application in asbestos cases—that a plaintiff must prove that exposure to *each* defendant's product was a substantial factor in causing the mesothelioma. *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727.

Put simply, Plaintiff's standard impermissibly suggests that all exposures above background are a proximate cause of mesothelioma. This nullifies the requirements of the substantial factor test and collapses the causation standard into the experts' opinion that all doses making up the "cumulative dose" cause mesothelioma. *See Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 677 (7th Cir. 2017); *McIndoe*, 817 F.3d at 1177; *Haskins*, 2017 WL 3118017, at *6. After all, the purpose of the *Henderson* standard is not to set some minimal threshold—for example, "above background"—above which any exposure is deemed a substantial factor. *See Haskins*, 2017 WL 3118017, at *7 ("[T]he mere fact that 'occupational' or 'above-background' exposures contribute to the total cumulative dose fails to explain why [a plaintiff's expert] views them as more causative than non-occupational or below-background exposures."); *see also Lindstrom*, 424 F.3d at 493. The purpose of the *Henderson* test is to ensure that only those entities who played a

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not cause any harm, nor do they "accumulate" as a matter of scientific fact, in some people. *See, e.g., Moeller v. Garlock Sealing Technologies, Inc.*, 660 F.3d 950, 955 (6th Cir. 2011) (stating that finding every exposure to asbestos to be "substantial" in causing mesothelioma is "akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean's volume."); *Smith v. Ford Motor Co.*, 2013 WL 214378 (D. Utah Jan. 18, 2013) (expert's opinion that plaintiff's mesothelioma "was caused by his total and cumulative exposure to asbestos, *with all* exposures and all products playing a contributing role' . . .asks too much from too little evidence as far as the law is concerned.") *See also* Mark G. Zellmer, *No Validity to No Safe Dose: Part II- the LNOT Model and Low Dose Epidemiology*, Harris Martin Asbestos Rptr at p. 4 (April, 2021*) and* Mark G. Zellmer, *No Validity to No Safe Dose: Part III- Mechanisms of Repair* – 22 Harris Martin Asbestos Rptr, No. 3 at p. 4 (March 2022)

substantial role in the development of mesothelioma are liable. *See Haskins*, 2017 WL 3118017, at *8 ("[A] robust concept of 'substantial causation' should account for the broader context in which a particular exposure occurs—including the defendant's relative contribution to the overall exposure, rather than an assessment of whether its contribution was sufficiently harmful in the abstract."). By combining these two naturally incompatible standards, this Court's opinion affirms a problematic result. If a plaintiff's expert testifies that all exposures above background contribute to the plaintiff's "cumulative dose" (but shrouds such testimony as a medical opinion about fundamental disease causation via dose), and then lay witnesses further attest as to plaintiff's occupational exposures, and the jury receives a pattern *Henderson* substantial factor test instruction, a plaintiff's verdict will be deemed proper under this Court's jurisprudence. But it should not be so.

This is because this Court's Rule 403 analysis is flawed. The cumulative exposure testimony improperly allowed necessarily muddies the proper substantial factor causation lens, leading a jury to be confused and misled. In such circumstances, the jury could well conclude that nearly any exposure is frequent, regular and proximate to suffice. The danger that Fisher will suffer unfair prejudice from the jury's consideration of opinions that conflict- on a fundamental level- with the correct legal causation standard substantially outweighs the probative value of the opinions, even if they are characterized as background scientific explanations of "dose" or disease caused by dose. *See* Rule 403, SCRE; (App. Br. 21–22 & n.7) (citing cases excluding the "every exposure" opinion under Rule 403). Accordingly, the circuit court erred in admitting the testimony and opinions, and rehearing should be allowed here to reverse the erroneous rulings and grant Fisher judgment notwithstanding the verdict or, failing that, a new trial.

IV. This Court Overlooked Or Misapprehended South Carolina Apportionment Jurisprudence and Fisher's Arguments on Apportionment.

This Court summarily affirmed the circuit court's rulings against Fisher's apportionment arguments under Rule 220(b), SCACR. This Court's citations do not support an artificial restriction on the jury's ability to apportion fault among all potential tortfeasors. The abbreviated analysis appears to improperly focus first on the word "defendants" in section 15-38-15 to suggest that the use of "defendants" in the statute precludes Fisher's requested apportionment of fault. However, Fisher requested that a settled ***defendant*** be included on the verdict form, and all defendants in this case were potential tortfeasors. *See* (R. 2882). Every entity named in the complaint opposite plaintiff was a "defendant" in this case, and nothing in the statute requires a defendant to remain an active litigant at the time the case is submitted to the jury. *See* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a "defendant" as "[a] person sued in a civil proceeding" and a "party" as "[o]ne by or against whom a lawsuit is brought"); S.C. Code Ann. § 15-38-15. Moreover, stipulations of dismissal for several defendants were not filed until after the trial concluded. *See, e.g.*, (R. 3332). Consequently, even if the statute limits apportionment to "active" defendants, any defendant not formally dismissed remained a defendant at the time of the verdict and should have been included on the verdict form.[5]

This Court's opinion also does not sufficiently address the distinction between fault and liability. Adding a settled defendant or nonparty to the verdict form for apportionment of fault has no effect on Plaintiff's right to choose her defendants. Although a plaintiff may choose which person or entity she sues, that plaintiff does not have a substantial right to choose which person or

[5] Plaintiff's reliance on *Smith v. Tiffany* is misplaced; the settled person in *Tiffany* was never a party or defendant. *See* (App. Br. 30–31) (distinguishing *Tiffany*); *Smith v. Tiffany*, 419 S.C. 548, 553–54, 799 S.E.2d 479, 482 (2017) (explaining Mizell settled and entered a covenant not to execute before a plaintiff filed the lawsuit).

entity is at fault for her injuries.[6] The purpose of the statute is to relieve a defendant who is less than 50% at fault from joint and several liability. S.C. Code Ann. § 15-38-15(A). Artificially limiting the jury's consideration of fault to a small number of defendants or tortfeasors conflicts with that purpose by *increasing* the likelihood that a defendant will be subjected to joint and several liability. Moreover, here, Plaintiff in fact "chose" all settled defendants as defendants.

This Court's opinion also appears to embrace the propriety of the empty-chair defense, which allows a defendant to shift the blame for a plaintiff's damages to a settled defendant, (Resp. Br. 36), yet determine that apportionment of fault to a settled defendant would somehow discourage plaintiff from settling with the defendant in the first place. (Resp. Br. 39). A full apportionment of fault would not meaningfully alter the conduct of trial or a plaintiff's proof; it would merely effectuate the General Assembly's intent to limit joint and several liability. *See* S.C. Code Ann. § 15-38-15. This Court's opinion did not sufficiently address the public policy prong of Fisher's argument. The General Assembly provided for both apportionment of fault and setoff in section 15-38-15. S.C. Code Ann. § 15-38-15; *see also* S.C. Code Ann. § 15-38-50. When the General Assembly enacts a statute, it declares the public policy of South Carolina, and a court cannot reject a legislative enactment on public policy grounds. *McNeil v. S.C. Dep't of Corr.*, 404 S.C. 186, 191, 743 S.E.2d 843, 846 (Ct. App. 2013).

This Court's abbreviated constitutional analysis is also erroneous. Fisher has not argued the statute is facially unconstitutional. Rather, the circuit court's *interpretation* of the statute to preclude apportionment of fault to settled defendants or other potential tortfeasors would be

[6] Plaintiff's argument that a full apportionment of fault undermines the truth-seeking function of the court should be given no weight. The suggestion that artificially limiting the jury's consideration to a single defendant, rather than all entities potentially responsible, somehow *undermines* the truth-seeking function of the court is absurd. If the court and the parties desire to seek the truth, the jury must be allowed to consider all entities which potentially caused the harm.

unconstitutional ***as applied to this defendant under the particular facts and circumstances at bar***. (App. Br. 34) ("*The trial court's interpretation* renders the [South Carolina Contribution Among Tortfeasors Act] unconstitutional because it deprives Fisher of its rights to due process, equal protection, and trial by jury." (emphasis added)). By prohibiting a full and fair apportionment of fault, the circuit court's actions deprived Fisher of its constitutional rights. *See* (App. Br. 32–34) (explaining how the circuit court's interpretation deprived Fisher of its rights to due process and equal protection and its right to have a jury determine all triable issues). Rehearing and reversal on this issue is thus warranted, as the circuit court's interpretation of the statute and its application should have been reversed by this Court.

V. This Court's Affirmance of the Circuit Court's Discovery Sanctions Order Also Overlooks or Misapprehends The Facts and Law.

This Court's opinion faults Fisher for choosing to take the subject Oury sworn statement without consulting the circuit court or opposing counsel and for acting in bad faith regarding a tissue digestion division. But these grounds for affirming the sanctions order are unsupported by the record and the law.

The record does not support affirmance of the sanctions order on the basis that Fisher "wholly disregarded the Court's order prohibiting Dr. Timothy Oury's deposition" by taking a sworn statement from Dr. Oury. (R. 59). The taking of a sworn statement was not a violation of any order or rule and is not a basis for imposing sanctions. The record reflects the circuit court sanctioned Fisher because Fisher did not disclose the sworn statement until the end of trial and did not mention it at the January 9 pretrial hearing. (R. 59). But neither the circuit court, nor this Court, has identified any requirement that Fisher disclose the existence of the sworn statement at the pre-trial hearing, or at any particular point in time. Sanctions may not be imposed in the absence of the violation of some order or rule. *See* Rule 37(b) SCRCP (providing for sanctions when a party or

other person "fails to obey an order"). Nothing in Rule 37 or the cases relied upon by the circuit court supports the imposition of sanctions. To the contrary, four of the following five cases relied upon by plaintiff involved litigants who failed to respond to discovery directed to them and caused their opponents to experience delay or other forms of prejudice, thus falling within the ambit of Rule 37. *See Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014) (affirming sanctions where an appellant provided incomplete discovery responses and caused delay); *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 644, 579 S.E.2d 151, 154 (Ct. App. 2003) (discussing sanctions where a litigant failed to produce requested discovery about a central issue in the case and prejudiced opponent as a matter of law by first producing records at trial and seeking to avoid effect of its failure to respond to requests for admission); *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 305, 529 S.E.2d 45, 56 (Ct. App. 2000) (discussing a litigant's repeated failure to produce requested records despite multiple orders requiring it to do so); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999) (affirming sanctions where the appellants failed to comply with four orders compelling discovery). In the fifth case relied upon by the circuit court, this Court did not rule on the merits of a sanctions issue and, therefore, the case contains no holding relevant to this case. *See Arnal v. Arnal*, 363 S.C. 268, 297, 609 S.E.2d 821, 836 (Ct. App. 2005).

Importantly, the circuit court also found the tissue digestion dispute was ***not*** a product of any improper conduct or discovery abuse by Fisher or its counsel. The circuit court specifically stated that it understood the importance of the tissue digestion evidence, that the dispute was a misunderstanding, and that it did not find any bad faith regarding the dispute. *See* (R. 169–72) (stating, after listening to counsel explain the importance of the tissue digestion and the impact the issue could have on all defendants left in the trial, "I understand. I am very troubled about this,

and I realize what impact Dr. Oury's testimony has. . . . It's evident to me that there was a miscommunication about this big time and no meeting of the minds about this matter. . . . ***I'm not assigning any bad faith to anybody*** in connection with this, but I do not see on this record an indication that agreement was reached about this matter.")(emphasis added). Because it found the parties did not reach a complete agreement regarding the tissue digestion study and the tissue "was not divided as to provide a mirror image of half of the tissue to the Plaintiff," however, it excluded the tissue digestion and related testimony and entered a written order explaining its ruling and reasoning. *See* (R. 7); *see also* (R. 56) ("This Court ruled that the tissue digestion was inadmissible because it was completed in the absence of an agreement between the parties . . . .").

Hence, the circuit judge, who personally heard from the lawyers at trial on the tissue digestion dispute, made a specific finding that Fisher had ***not*** acted in bad faith with respect to the dispute. This Court should not justify the sanctions order via a different finding of its own that "Fisher's counsel made no effort to respond [to an email] or to advise opposing counsel that the tissue samples had already been divided at that point. Additionally, they made no effort to respond to Mr. Holder's letter…." Opinion. By making these conclusions, this Court is erroneously making its own findings contrary to the circuit court on the good faith of Fisher with respect to the tissue digestion agreement dispute. This Court is not positioned to make such a determination and thus this Court should grant rehearing and modify the Opinion to vacate the sanctions. In deciding what discovery sanction is appropriate, a circuit court is charged to weigh certain required factors, including willfulness, and the failure to do so amounts to an abuse of discretion. *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997). The appellate courts, however, cannot fill in gaps in a sanctions order by assessing the evidence itself since an appellate court in South Carolina is "***not a fact finding court***[.]" *State v. Torrence*, 317 S.C. 45, 46 451 S.E.2d 883

(1994) (emphasis added); *cf. Bodiford v. Spanish Oak Farms*, 317 S.C. 539, 544-545, 455 S.E.2d 194, 197 (Ct. App. 1995) (holding *an appellate court cannot judge the weight or credibility of testimony on appeal in a law case*.).

Fisher was also entitled to communicate with its own expert to learn the details of the expert's opinions, and it was entitled to record those details in any manner it desired, including a question-and-answer session recorded by a court reporter. The deposition of Dr. Oury had been noticed to all counsel, but the circuit court quashed that deposition. The deposition therefore did not occur, and the sworn statement was ***not*** a deposition.

The parties also complied with the circuit court's evidentiary ruling at trial. Near the end of trial, Fisher sought to properly preserve its right to appellate review of the evidentiary ruling by proffering the sworn statement from Dr. Oury so an appellate court might review the substance of the testimony Dr. Oury would have offered if the circuit court had not excluded the tissue digestion evidence. *See* Rule 103(a), SCRE ("Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context."). Rule 103(a), SCRE does not require that a party obtain the circuit court's permission to preserve an argument for appeal. A party should not be faulted with sanctions for creating a proffer.

Moreover, the recording of the sworn statement is irrelevant to the issues decided by the circuit court at the pretrial hearing—whether the parties reached an agreement as to the tissue digestion and, if so, whether Fisher complied with the terms of the agreement.[7] Fisher never

[7] Plaintiff mischaracterizes the circuit court's findings—that Fisher destroyed tissue without an agreement and in violation of the circuit court's standing order—as "undisputed" and accuses Fisher of changing its position on appeal. (Resp. Br. 47). Fisher disputes Plaintiff's arguments

attempted to use the testimony against Plaintiff at trial, and Plaintiff does not argue that she suffered any prejudice from the taking or proffering of the sworn statement. Additionally, Fisher had already disclosed the substance of Dr. Oury's testimony by producing his December 18, 2018 report *and* the detailed digestion report from RJ Lee. Dr. Oury's opinions in the sworn statement do not differ substantively from the reports.

Plaintiff's and the circuit court's surprise that Fisher proffered Dr. Oury's opinions when it did does not justify the circuit court's decision to issue sanctions. The circuit court's sanctions order is therefore unsupported by any evidence and should be vacated upon rehearing. *See City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000).

Finally, this Court characterized the sanctions order as "mild" and that it constituted a "written slap on the wrist," but this is not so. This Court noted Fisher did not appeal the Order excluding the tissue digestion evidence. That is correct. Fisher ***did*** appeal the sanctions order, however, because other litigants will no doubt attempt to use the sanctions order against Fisher in the future. There will be efforts to unfairly color or portray Fisher as a litigant who engages in sanctionable conduct based on the order. The order has no proper basis and must be vacated. The primary basis upon which this Court affirms the sanctions order – the conduct of Fisher regarding the tissue digestion agreement dispute – was found ***not*** to constitute bad faith by the circuit court.

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and maintains that it had an agreement with Plaintiff to divide the tissue evenly and perform the tissue digestion, and it acted in compliance with the agreement. *See* (App. Br. 43) ("Fisher maintains the parties reached an agreement to divide the tissue and perform the study . . . .").

Conclusion

Fisher respectfully requests that this Court grant rehearing and fully reverse the circuit court.

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May 5, 2023

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Jean H. Toal, 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 Thomas Harold Glenn,..... Respondent,

v.

3M Company, f/k/a Minnesota Mining and Manufacturing Co., et al.,..... Defendants,

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

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, hereby certify that I have served all counsel in this action with a copy of the pleading(s) specified below by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Pleadings: Petition for Rehearing

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5/5, 2023

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Subject: Rita Glenn v. 3M Company - Appellate Case No. 2019-001600
Attachments: 2023.05.05 Petition For Rehearing (Glenn).pdf; 2023.05.05 Proof of Service (Glenn).pdf

Good morning:

Attached for service upon you is a Petition for Rehearing and Proof of Service in the above matter.

Thank you,

NELSON MULLINS

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