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, 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.

Appellant Fisher Controls International LLC's Reply to Respondent's Return to Petition for Rehearing

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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. Inconsistent Verdicts

Plaintiff argues that Fisher ignores that an abuse of discretion standard governs new trial motions and Fisher failed to show that the circuit court abused its discretion. Not so on both points.

There is some important nuance to the applicable standard of review that Plaintiff avoids. Whether to grant a new trial is under a general discretionary umbrella, but if such decision is controlled by an error of law, that legal error constitutes an automatic abuse of discretion. *Vinson v. Hartley*, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996); *Menne v. Keowee Key Prop. Owners' Ass'n, Inc*., 368 S.C. 557, 568, 629 S.E.2d 690, 696 (Ct. App. 2006). And such legal error is precisely what occurred below- where the verdicts are inconsistent, as they were, this Court must reverse the judgment and award a new trial. *Prego v. Hobart*, 287 S.C. 116, 118, 336 S.E.2d 725, 726 (Ct. App. 1985).

Next, Plaintiff argues that Fisher fails to acknowledge that the jury was properly instructed in the first instance. Plaintiff, however, misconstrues Fisher's contentions. The circuit court's initial instructions regarding Plaintiff's alternative theories of recovery were not *per se* error. The jury could have, for example, found for Plaintiff based on strict liability but for Fisher on negligence because the tortious conduct may have been absent from the negligence claim. The trouble with the circuit court's procedure instead relates to a different point in time regarding the trial. When the jury returned from their deliberations with the inconsistent verdict, under the facts and circumstances in this matter, Fisher properly made a motion for new trial based on inconsistent verdicts. At that time, the jury was still available and the circuit court should have acknowledged the inconsistency in the verdict and given clarifying instructions to the jury, while the jury was still available. But the circuit court did not properly reinstruct the jury to address the legal error created by the irreconcilably inconsistent verdict. It instead erroneously accepted the verdict and entered a judgment consistent with it. This was the root of the error below.

Plaintiff next contends that certain jury instructions differed with respect to strict liability and negligence. But this is a distinction without a difference. Plaintiff must make a threshold

showing that the subject product was unreasonably dangerous for both strict liability and negligence. *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 "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. *Id.* at 212 n.5, 701 S.E.2d at 9 n.5. 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. Plaintiff fails to recognize this point.

Plaintiff's contentions with respect to instructions about recommending parts is equally unavailing. The related citations on page 5 of Plaintiff's Return confirm that the record is devoid of any competent evidence illustrating that Fisher *actually recommended* the particular asbestos gaskets at bar to Duke for use in relation to any valve Mr. Glenn ever encountered. Instead, Plaintiff can only point to evidence that shows certain flange gaskets *were simply available* and "***were an option***." (Plt. Return to Pet for Rehearing at p. 5, citing R. pp. 729, line 4- 730 line 7) (emphasis added). Plaintiff further argues that the evidence shows that Fisher "specified the type of gaskets that *must* be used." (*Id.*, citing R. pp. 1079, line 19- 1080, line 9) (emphasis added). Not so. This portion of the transcript instead reveals that only general reference was made to Fisher manuals "that had sections ***on all the different types of valve positioners***," which would be reviewed when replacement parts are needed *Id.* (emphasis added). All Plaintiff can point to is general information about the different ways valves connect to systems, and an internal

specification for a type of gasket Fisher had created for one possible component of some valves. (R. p. 3824). And significantly, Plaintiff fails to point to any evidence that Duke even had such information or relied upon them in its design of the plant or otherwise. This is not competent evidence sufficiently illustrating that Fisher actually recommended any specific asbestos gaskets valves at bar for the particular uses sought by Duke. Specifying that certain parts are generally available is necessarily not a endorsement actually recommending them for use to Duke. Plaintiff improperly conflates these two distinct concepts in her Return. The lack of evidence of such recommendation further confirms the inconsistency of the strict liability and negligence verdicts.

Thus, this Court, and the court below, 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). Plaintiff's attempt to reconcile the jury's verdict continues to be based on speculation regarding the jury's decision-making, unsupported by any evidence, regarding "recommendations" by Fisher respecting asbestos-containing gaskets. Under these circumstances, "when 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. A new trial is required, and the rehearing petition should be granted.

II. Jury Instructions

Plaintiff's argument defending this Court's affirmance of the circuit court's refusal to instruct the jury on superseding cause and the sophisticated intermediary doctrine lacks merit. It rests upon two structural misunderstandings of South Carolina law. Plaintiff takes the position that Fisher was not entitled to plead and try its case on alternative or inconsistent defenses. Once testimony

was admitted below which opined that the product at bar was safe, Plaintiff argues that Fisher was precluded- *as a matter of law*- from proceeding, *in the alternative,* that even if product is not safe, Duke broke the causal chain for other legal reasons. That is no different from a defendant in an ordinary negligence case arguing, at baseline, that she was not negligent, but even if she was, the conduct of the plaintiff, in whole or in part, bars plaintiff's right to recovery for various legal or equitable reasons.

It is axiomatic that South Carolina law authorizes pleading and proving alternative and inconsistent defenses. *See Charping v. Toxaway Mills*, 70 S.C. 470, 475, 50 S.E. 186, 188 (1905) ("But even under the technical pleading of the common law, it was proper to plead the general issue, and in the second place, setting up a defense inconsistent with a general denial.") *MacFarlane v. Manly*, 274 S.C. 392, 395, 264 S.E.2d 838, 840 (1980) ("Defendants are permitted to plead inconsistent defenses."). The South Carolina Supreme Court's opinion in *Myers v. Evans*, 225 S.C. 80, 89, 81 S.E.2d 32, 36 (1954) is particularly instructive on this point. In *Myers*, the Supreme Court concluded that the trial court properly instructed the jury on contributory negligence because there was "some evidence to warrant submission to the jury of the question of contributory negligence and recklessness," even though "[i]t must be conceded that the facts stated in this defense are entirely inconsistent with respondents' testimony on the trial of the case that the driver of the truck did not strike the appellant." *Myers* 225 S.C. at 89, 81 S.E.2d at 36. The Court ruled that "***inconsistent defenses are permitted***." *Id.* (emphasis added). The Supreme Court further noted that "Respondent Evans testified that the facts contained in the answer relating to contributory negligence were given to him by appellant shortly after the accident when she stated to him that she walked into the truck." *Id.* Even though this is the only evidence in the case of

contributory negligence . . . it was sufficient to justify the trial Judge in refusing to eliminate this issue." *Id.*

Second, South Carolina 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); *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.")

Both principles govern here and Plaintiff fails to even address the latter. Plaintiff appears to first fault Fisher because some of its evidence on sophisticated intermediary doctrine pertains to Duke's conduct. But Plaintiff's argument collapses upon itself by pointing to the Restatement which sets forth a remarkably flexible standard- "***The standard is one of reasonableness in the circumstances.***" *Glenn v. 3M*, 2023 S.C. App. LEXIS 34 at *41-42 (internal citations omitted and emphasis added). Such a standard necessarily cannot support a circuit court's deprivation of a critical alternate defense from the jury's consideration- as a matter of law- as occurred below on a sufficient factual record. The decision should have been for the jury to determine reasonableness, *a quintessential factual question*, based on the evidence below. The following evidence, which addresses both Fisher and Duke's conduct, supports both the sophisticated intermediary and intervening cause charges as the jury, ***in the alternative,*** could have found the following facts:

- Duke was knowledgeable about the hazards of asbestos during the period in which Mr. Glenn worked at Duke facilities and was aware of OSHA laws in existence at the time, which required employers to warn of the hazards of asbestos dust beginning at least in 1972. (R. 849, 852–53, 1082-83, 3385, 3386-87, 7172)

- 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).

- (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).[1]

In response, Plaintiff argues that Fisher failed to offer any competent evidence tending to show actual reliance because the circuit court would have had to disregard Ronald Dumistra's testimony that no warning was necessary because the product was safe. But plaintiff again fails to recognize Fisher's permissible reliance on its alternative defenses. In summarily concluding that Dumistra's testimony "is direct evidence that Fisher did not rely on Duke to warn because it did not believe any warning was necessary," (Plt. Ret. to Pet. For Rehearing p. 8) Plaintiff makes an impermissible factual inference that was for the jury alone to assess. Under the Supreme Court's long standing directives, Fisher was permitted to contend that the gaskets were safe, in the first instance, but assuming *arguendo* the jury concluded otherwise, Fisher was also entitled to rely on its *alternative defenses* that Duke should have warned or that the causal chain was otherwise broken. *Myers*, 225 S.C. at 89, 81 S.E.2d at 36. And, nonetheless, sufficient evidence of reliance was presented below

[1] *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).

to justify the jury instruction. (R. 849, 852–53, 951-52, 1082-83, 1206-07, 1446, 1725-26, 3385, 3386-87, 3392, 7172)

Plaintiff next argues that Fisher failed to offer any competent record evidence tending to show that Duke's decision not to warn, and Plaintiff's asbestos exposure from other sources, were both unforeseeable. Plaintiff appears to again impermissibly point 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, Plaintiff adheres to this Court's impermissible factual determination 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." *Glenn* at * 46. But that reasoning is problematic. Fisher should have been allowed to rely on alternate and inconsistent defenses, here pertaining to legal causation. That deprivation constitutes reversible error.

The record likewise 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). *See also*, footnote 1, *supra*.

Finally, with respect to punitive damages, under *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 104, 727 S.E.2d 407, 414 (2012) and *Rhodes v. McDonald*, 345 S.C. 00, 503-05, 548 S.E.2d 220 (Ct App. 2001), the circuit court should have instructed the jury that it could not award punitive damages for Plaintiff's breach of warranty claim. A circuit court has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence, and the important points relating to the appropriateness of that instruction under *Rhodes* should govern here. Plaintiff also fails to address the issue of harm from such legal error. A misleading charge is harmless only if the charge as a whole properly conveys the law to the jury or allows the jury to understand the law and issues involved. The trial court's failure to charge a critical principle is not rendered harmless by the mere possibility that the jury would have reached the same result if the trial court had given proper instructions.

III. Substantial Factor Causation

Plaintiff contends that its experts permissibly relied upon "cumulative dose" evidence in presenting their causation opinions. This argument lacks merit. The "Cumulative Dose" Theory is indistinguishable from the junk science "Every Exposure" theory.

A products liability plaintiff must prove that the product defect was the proximate cause of the injury, regardless of the plaintiff's theory of recovery. *Bray v. Marathon Corp.*, 356 S.C. 111, 116, 588 S.E.2d 93, 95 (2003); *Young v. Tide Craft, Inc.*, 270 S.C. 453, 461, 242 S.E.2d 671, 675 (1978). To prove proximate cause, an asbestos case plaintiff must prove the decedent's asbestos exposure attributable to a particular defendant constitutes substantial causation and satisfies 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.") (quoting *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986)).

Testimony that, regardless of frequency or regularity, each and every exposure represents substantial causation from that exposure is legally at odds with the *Henderson/Lohrmann* standard of proof requirements for substantial factor causation. Further, the "cumulative dose" theory does not differ from the "each and every exposure" theory. *See Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 675 (7th Cir. 2017) (rejecting cumulative exposure theory of causation because it is effectively the same as an each and every exposure theory); *Smith v. Ford Motor Co.*, No. 2:08-CV-630, 2013 WL 214378, at *3 (D. Utah Jan. 18, 2013) ("Dr. Hammar seeks to base his causation opinion not on the thin reed that he cannot rule any exposure out, but on the opposite: he rules all exposures 'in,' boldly stating that Mr. Smith's mesothelioma 'was caused by his total and cumulative exposure to asbestos, with all exposures and all products playing a contributing role.' This asks too much from too little evidence as far as the law is concerned.").

South Carolina's substantial factor causation test derives from the test in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), which the South Carolina Supreme Court adopted in *Henderson v. Allied Signal, Inc.*, 373 S.C. 179 (2007). The Supreme Court has never rejected the principle that the substantial factor causation test requires a comparative analysis of different exposures. Courts in the Fourth Circuit applying South Carolina law have concluded that substantial factor causation requires more than proof that a plaintiff merely had "occupational" or "above background" exposures from a defendant's product. *See Haskins v. 3M Co.*, No. 2:15-CV-02086-DCN, 2017 WL 3118017, at *7 (D.S.C. July 21, 2017) ("[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."). It also requires a *contextual analysis*—causation experts must evaluate the relative significance of a decedent's exposures. *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."). Thus, while short exposures *might* satisfy the standard if they are the *only* exposures, it is not enough to show "above background" exposure to a particular product and ignore all other causation context if significant evidence of other exposures exists. *See id.*

Fisher does not contend that Plaintiff must exclude every possible cause of his mesothelioma or that Plaintiff must prove a precise quantification of asbestos fibers that he was exposed to. Rather, consistent with Fourth Circuit law from which the substantial factor causation test derives, some qualitative analysis comparing Plaintiff's exposures to his exposures from other sources is necessary to determine whether Fisher's exposures were a substantial factor contributing to Plaintiff's disease. Plaintiff's experts cannot reliably opine that exposure to the asbestos gaskets was a substantial factor in causing Plaintiff's disease by pretending the exposures were Plaintiff's only exposures and ignoring context. This Court's ruling accepting Plaintiff's expert testimony, in effect, creates strict liability for any above-background exposures. And the substantial factor test was designed to avoid such unbounded liability. *See McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1177 (9th Cir. 2016). Further, *Lohrmann*, adopted by *Henderson*, is a product-specific test, inquiring whether the evidence would permit a reasonable jury to conclude that a manufacturer's product was a substantial cause of the plaintiff's disease. *Lohrmann*, 782 F.2d at 1162–63. A plaintiff cannot meet his burden by simply showing that general asbestos exposure from any and all sources cumulatively caused his disease. *See, e.g Honeywell Int'l, Inc.*, 102 N.E.3d at 482;

Martin, 561 F.3d at 443 (6th Cir. 2009) (rejecting the "any exposure" test as contrary to principles of substantial factor causation); *Yates v. Ford Motor Co.*, 115 F. Supp. 3d 841, 847 (E.D.N.C. 2015); Mark Behrens & William Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 SW. U. L. REV. 479, 480 (2008). Consequently, this Court's conclusion that Dr. Brody and Dr. Frank's proximate causation testimony was reliable and not misleading 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). Rehearing should be allowed and JNOV granted or, failing that, a new trial should be allowed on this basis.[2]

IV. Discovery Sanctions Order

Plaintiff's Return on this issue is telling as to the controlling issues which it fails to sufficiently address- that a sanction is not to be taken lightly and that a South Carolina appellate court cannot substitute its own findings to uphold the trial court sanction, which happened below.

Here the circuit judge specifically found below that Fisher had ***not*** acted in bad faith with respect to the tissue sample dispute. This Court should not have justified 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 erroneously made 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 institutionally equipped to make such a determination and thus this Court should grant rehearing

[2] The Supreme Court has recently granted certiorari on this issue. *Edwards v. Scapa Waycross, Inc*., 2023 S.C. LEXIS 114 (S.C., May 23, 2023)

and modify the Opinion to vacate the sanctions on that basis. 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.). Plaintiff has pointed to no controlling authority which permits an appellate court in this state to substitute its own findings to support a sanctions order. Rehearing is appropriate here to reaffirm the principle that appellate courts must defer to the trial courts for factual determinations and not create their own.

Conclusion

Fisher respectfully requests that this Court grant rehearing and reverse the circuit court in the manner consistent with Fisher's Petition.

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June 19, 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: Appellant Fisher Controls International LLC's Reply to Respondent's Return to Petition for Rehearing

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6/9, 2023

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Subject: Rita Glenn v. 3M Company - Appellate Case No. 2019-001600
Attachments: 2023.06.19 Fisher Reply to Respondent's Return to Petition for Rehearing (Glenn).pdf; 2023.06.19 Proof of Service (Glenn).pdf

Good afternoon:

Attached for service upon you in the above matter is Appellant Fisher Controls International LLC's Reply to Respondent's Return to Petition for Rehearing and Proof of Service.

Thank you,

NELSON MULLINS

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