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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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. 2023-001404

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

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.....Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The Court of Appeals unanimously affirmed the jury's verdict in favor of Plaintiff-Respondent Rita Glenn and against Appellant Fisher Controls International LLC ("Fisher"), finding Fisher liable for the death of decedent Thomas Glenn from mesothelioma caused by his exposure to asbestos from Fisher valves. Fisher has asked this Court to issue a writ of certiorari to review virtually every issue decided unanimously by the Court of Appeals in *Glenn v. 3M Co.*, 440 S.C. 34, 890 S.E.2d 569 (Ct. App. 2023). Fisher has failed to demonstrate, however, that it is entitled to relief under the facts of this case or applicable South Carolina law. Fisher largely ignores the extensive reasoning offered by the Court of Appeals and fails to acknowledge that the abuse of discretion standard governs most of the issues in this appeal.

Fisher contends, for example, that it was entitled to jury instructions on its affirmative defenses of sophisticated intermediary and superseding cause although it failed to carry its burden of raising questions for the jury on these defenses. The sophisticated intermediary defense requires Fisher to show both that it was reasonable to rely on Mr. Glenn's employer, Duke Power, to warn decedent Thomas Glenn about asbestos gaskets and that it actually relied on Duke. There was a complete failure of proof on both points, with the evidence showing the exact opposite: Fisher was telling everyone, including Duke, that asbestos gaskets were safe. It claimed it did not need to warn about asbestos gaskets because they were so safe. This is undisputed and uncontradicted. As the Court of Appeals noted, "Fisher's belief that asbestos gaskets posed no health risk is inconsistent with Fisher's claim that it relied on Duke to warn Tommy of the dangers of asbestos gaskets." *Glenn*, 440 S.C. at 73, 890 S.E.2d at 590.

All of Fisher's complaints in this Court follow a similar pattern. Fisher consistently seeks to blame the lower courts for its own failures at trial. Fisher's many disagreements with the lower courts do not meet the criteria for this Court's review as set forth in Rule 242, SCACR. Fisher has, in fact, made no effort to argue that any of those criteria are met. It has not identified novel questions of law, any dissent in the Court of Appeals, any conflict with the prior decisions of this Court, any substantial constitutional issues, any federal questions, or anything of a similarly weighty character. As Fisher has provided no sound reason for certiorari to the Court of Appeals, Fisher's petition should be denied.

STATEMENT OF THE CASE

I. Summary of facts regarding asbestos, Fisher valves, and Duke Power

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). Mr. Glenn worked with asbestos gaskets on Fisher valves at Duke. (R. p. 780, line 4-p.783, line 20; R. p. 790, line 9-p. 792, line 5; R. p. 815, line 24-p. 816, line 24; R. p. 823, line 7-p. 825, line 15; R. p. 1075, line 2-p. 1076, line 8; R. p. 1193, line 5-p. 1194, line 22; R. p. 1196, lines 2-21; R. p. 1197, lines 4-11). 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).

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).

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). The regulations of the Occupational Safety and Health Administration (OSHA) 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. (R. p. 638, line 7-p. 641, line 15; R. p. 740, line 5-p. 748, line 15; R. p. 3841; 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 verified this in 1980 when it tested asbestos 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. 566, lines 15-21; R. p. 3881; R. p. 3888). 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).

Nevertheless, Fisher's corporate representative testified categorically that that the asbestos gaskets it sold did not release asbestos fibers and did not cause harm: "There was no health hazard associated with the use of asbestos gaskets and asbestos-containing packing." (R. p. 635, lines 3-5). Fisher did not warn based on its position that there was no danger from its asbestos products: "[W]e did warn but not with respect to asbestos gaskets or asbestos-containing packing because there's no hazard." (R. p. 576, lines 22-24). Fisher never warned anyone, including Duke, about the dangers of asbestos gaskets. (R. p. 576, line 8-p. 577, line 7). 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 never attempted to find out what Duke understood about the hazards of asbestos during the years it was selling asbestos gaskets to Duke. (R. p. 577, lines 8-13). It claims that it did not ask Duke about its knowledge, or any warnings, "because our understanding at the time was there was no hazard associated." (R. p. 577, lines 14-21). Fisher could not, however, produce any proof that it was informed asbestos gaskets were safe. (R. p. 578, lines 12-17).

Duke was 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).

II. 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 Mr. Glenn'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 Mr. 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 Plaintiff's pre-trial settlements, which was granted. (R. p. 13). Judgment was entered against Fisher for $3,845,000, plus costs and interest. (R. p. 51).

ARGUMENT

I. The jury was instructed correctly.

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). 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).

Fisher raises three complaints about the jury instructions, none of which has

merit. Notably, Fisher has not bothered to present the Court with the actual wording of any of the instructions it contends should have been given in this case, nor has it established that its requested instructions properly state applicable law.

First, Fisher contends that it was entitled to an instruction on the sophisticated intermediary defense because this was an issue for the jury, not the Court. Fisher insists that a jury could find that it was reasonable to rely on Duke to warn its employees about asbestos hazards, but it has failed to offer any evidence of its *own conduct* that would support such a jury finding. Its evidence pertains only to Duke's conduct, not Fisher's conduct. In focusing entirely on Duke's conduct, Fisher ignores the applicable legal standards that govern the sophisticated intermediary defense, standards which no reasonable jury could find to be satisfied here. There has been no usurpation of the jury's factfinding role; rather, Fisher failed to introduce evidence from which the jury could draw a reasonable inference of reliance on Mr. Glenn's employer as a "sophisticated intermediary."

"'The [sophisticated intermediary] doctrine originated in the Restatement Second of Torts, section 388, comment n, . . . which addresses when warnings to a party in the supply chain are sufficient to satisfy the supplier's duty to warn.'" *Glenn*, 440 S.C. at 71-72, 890 S.E.2d at 589 (quoting *Webb*, 370 P.3d at 1033). The Restatement drafters' most recent articulation of the sophisticated intermediary doctrine appears in the Restatement Third of Torts, Products Liability, section 2, comment i, which states:

There is *no general rule* as to whether one supplying a product for the

> use of others through an intermediary has a duty to warn the ultimate product user directly or may rely on the intermediary to relay warnings. *The standard is one of reasonableness in the circumstances*. Among the factors to be considered are the *gravity of the risks* posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user.

Id. at 72, 890 S.E.2d at 589 (quoting Restatement (Third) of Torts: Prods. Liab. § 2, cmt. i (Am. Law Inst. 1998)) (emphases added by the Court of Appeals).

Fisher has ignored the Restatement factors, both here and in the Court of Appeals. The Court of Appeals, however, applied these factors to determine that the circuit court did not err in declining an instruction on this defense. The Court of Appeals found that the gravity of the risks of asbestos-related disease and death "could not have been greater" and that Fisher failed to show that its own warnings would have been infeasible or ineffective. *Id.* Under those circumstances, the Court was "not convinced" that it was "reasonable for a supplier of asbestos gaskets to rely on Duke to relay warnings to its employees." *Id.*

"Moreover, it is not enough to show that the supplier's reliance would have been reasonable—the supplier must also show that it actually relied on the intermediary to convey warnings to end users." *Id.* (following *Webb*, 370 P.3d at 1036). Fisher produced no evidence of actual reliance, even when this failure of proof was highlighted by Mrs. Glenn's brief. *Id.* Fisher contends that such actual reliance could be inferred from Duke's conduct (not Fisher's conduct), but this dubious assertion is not sufficient to meet Fisher's burden of showing that the circuit court abused its discretion.

Fisher would have the Court disregard Ronald Duimstra's testimony that no warning was necessary because asbestos gaskets do not cause disease, arguing that it was entitled to advance "alternative theories" at trial. This is not an alternative theory, this is direct evidence that Fisher did not rely on Duke to warn because it did not believe any warning was necessary. Fisher has offered nothing to contradict that evidence other than Duke's own conduct. That evidence is not sufficient to allow a reasonable inference regarding Fisher's reliance. The circuit court was not required to draw outlandish or unsupported inferences. In fact, "where only one reasonable or legitimate inference can be drawn from the evidence, the question is one of law for the court." *Hart v. Doe*, 261 S.C. 116, 119, 198 S.E.2d 526, 527 (1973).

The Court of Appeals properly determined that Fisher failed to demonstrate that the circuit court erred in declining an instruction on the sophisticated intermediary defense as unsupported by the evidence. *Glenn*, 440 S.C. at 73, 890 S.E.2d at 590. Under established South Carolina law, the circuit court need only instruct the jury on issues "developed by the evidence" or "proved" at trial. *Id.* (quoting *Clark*, 339 S.C. at 389, 529 S.E.2d at 539).

Fisher's requested superseding/intervening cause instruction suffers from a similar evidentiary failure. A superseding cause must be unforeseeable. *Roddey v. Wal-Mart Stores E., LP*, 415 S.C. 580, 590, 784 S.E.2d 670, 676 (2016); *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 463 S.E.2d 636, 640 (Ct. App. 1995). "An intervening force may be a superseding cause that relieves an actor from liability, but for there to be relief from liability, the intervening cause must be one that could not have

been reasonably foreseen or anticipated." *Roddey*, 415 S.C. at 590, 784 S.E.2d at 676. Fisher failed to offer any evidence that Mr. Glenn's other sources of asbestos exposure were unforeseeable. Fisher likewise failed to offer any evidence that Duke's decision not to warn about asbestos gaskets was unforeseeable. Although Fisher complains that foreseeability issues should not have been taken from the jury, it points to *no evidence* from which a reasonable juror could find that Fisher *did not know* that there was other asbestos in Mr. Glenn's workplace or that Duke would consider asbestos gaskets safe when Fisher was the source of that information. Fisher failed to show that the jury could reasonably find such lack of knowledge on this record. *Glenn*, 440 S.C. at 74-75, 890 S.E.2d at 590-91.

Moreover, the Court of Appeals found that Fisher did not suffer any prejudice given that other causes were adequately covered by the instructions. *Id.* at 76, 890 S.E.2d at 591. The jury was instructed that it was Plaintiff's burden to prove "legal cause" and that Fisher could not be liable for unforeseeable injuries:

> Plaintiffs must also prove something called "legal cause." And that is proven by showing that the injury was foreseeable. And that means the injury occurred as the natural and probable consequence of defendants' negligence.
>
> The plaintiffs must prove that some injury from defendants' negligence was foreseeable. But they do not have to prove that the particular injury that occurred was foreseeable.
>
> However, *the defendant cannot be held responsible for something that could not be expected to happen.*

Id. at 75-76, 890 S.E.2d at 591 (quoting R. p. 2368, lines 15-25) (emphasis added by the Court of Appeals). The instructions also advised the jury that it could consider

the actions of others in causing Mr. Glenn's disease:

> Under South Carolina law, a defendant is entitled to assert that other persons or entities contributed to the alleged injury or damage. The matter of others' alleged fault causing the plaintiff's injury has been raised by the defendant. *It's proper for you to consider the actions of others*, but only insofar as plaintiffs have met their burden of proof.

Id. (quoting R. p. 2369, line 22 – p. 2370, line 3) (emphasis added by Court of Appeals). Because these instructions adequately advised the jury "that an unforeseeable intervening force relieves the defendant from liability," Fisher failed to show any prejudicial error. *Id.* at 76, 890 S.E.2d at 591.

In its Petition, Fisher complains that this instruction was insufficient, but does not explain how its requested instruction differs significantly from what was given. If anything, this charge is more favorable to Fisher as it was given in the context of *Plaintiff's burden* of showing causation. Fisher had every opportunity to argue to the jury that Duke's conduct was the cause of Mr. Glenn's disease and this was brought to the jury's attention in the instructions as a proper consideration. As the Court of Appeals determined, an additional instruction on this same point would not have changed the jury's decision.

Finally, Fisher has failed to show any error in the punitive damages instructions. There is no question that the jury was given the proper standard for awarding punitive damages and found affirmatively that Fisher's conduct was "willful, wanton, or reckless." *Glenn*, 440 S.C. at 77, 890 S.E.2d at 592; R. p. 3234; R. p. 3236. There is also no dispute that the jury's negligence verdict provides the

proper underlying predicate for the jury to consider punitive damages. And there is no challenge to the actual punitive damages award itself.

Fisher nevertheless insists that the jury should have been instructed punitive damages cannot be recovered for breach of warranty. There is no case law mandating such an instruction. *Glenn*, 440 S.C. at 77, 890 S.E.2d at 592. Nor does *Rhodes v. McDonald*, 345 S.C. 500, 503-05, 548 S.E.2d 220, 221-23 (Ct. App. 2001) help Fisher, as it involved causes of action for which punitive damages were not available. Fisher has not explained how this instruction would possibly have changed the outcome given that the jury found that Fisher was negligent, which indisputably supports an award of punitive damages. Fisher has failed to show that it was entitled to its requested instruction or that there was any harm from the circuit court's decision. Fisher has not provided any reasonable basis for this Court to review this or any other issue related to the jury instructions in this case.

II. The Court properly determined that the verdict is not inconsistent.

Fisher ignores that the denial of a new trial is governed by the abuse-of-discretion standard of review. It does not argue that the circuit court abused its discretion in declining to grant a new trial on the basis of Fisher's inconsistent verdict argument. Analyzing this issue under the proper standard of review, the Court of Appeals found that the circuit court acted within its discretion in denying Fisher's new trial motion. *Glenn*, 440 S.C. at 49, 890 S.E.2d at 577. Fisher has failed to show how that holding is in error or warrants review.

Fisher fails to acknowledge that the jury was properly instructed regarding

Mrs. Glenn's theories of liability. First, as the Court of Appeals noted, the jury was informed that it did not have to find the same way on all three theories—negligence, strict liability, and breach of implied warranty. *Glenn*, 440 S.C. at 49-50, 890 S.E.2d at 577. The instructions stated that "[*t]he plaintiffs are not required to prove all these theories in order to recover*" and that they "must meet their burden of proof as to at least one of these theories in order to recover." *Id.* (quoting jury instructions, emphasis added by the Court of Appeals). These instructions have never been challenged by Fisher.

Nor has Fisher challenged the jury instructions regarding the legal standards for finding negligence and strict product liability.[1] While Fisher's argument is premised on its insistence that there is complete overlap in the elements of negligence and strict products liability, the jury instructions differed as to those two causes of action. The jury was instructed "to place the focus on the product rather than the defendant's conduct when evaluating a strict liability claim but to focus on the defendant's conduct when evaluating a negligence claim." *Glenn*, 440 S.C. at 50, 890 S.E.2d at 577. The negligence instructions also contained two other significant provisions—regarding liability for component parts and liability for parts recommended or supplied—that were not in the strict liability instructions. The Court of Appeals agreed with the Glenns that "if the jurors understood 'the product' to be Fisher's valves rather than the asbestos gaskets themselves, they could perceive the [negligence] instruction to provide more flexibility than the strict

[1] Fisher has waived any challenge to these instructions. *Glenn*, 440 S.C. at 55 n.5, 890 S.E.2d at 580 n.5.

liability instruction given because it would allow them to consider the gaskets as a component of Fisher's valves." *Id.* at 55-56, 890 S.E.2d at 580. Further, "the presence of the words 'recommend' and 'specify' in the [negligence] instruction provides an additional basis for negligence liability that was not present (and should not have been present) in the circuit court's strict liability instruction . . . ." *Id.* at 56, 890 S.E.2d at 580. The Court determined that "[t]hese differences in the jury instructions for strict liability and negligence provide a logical reason for reconciling the verdicts on these claims." *Id.*

Contrary to Fisher's denials, the evidence easily supports a jury finding that Fisher recommended and specified that asbestos gaskets be uses in its valves at Duke. Fisher had a material specification for asbestos gaskets. (R. p. 551, line 20-p. 552, line 9; R. pp. 3395-98). Mr. Glenn's co-worker, Dale Jolly, recalled that the manuals for Fisher valves specified the type of gaskets that must be used. (R. p. 1079, line 19-p. 1080, line 9). Fisher's handbook provided that flange gaskets made of asbestos were an option. (R. p. 729, line 4-p. 730, line 7). Combined with the voluminous evidence of Mr. Glenn's exposure to asbestos from Fisher valves, this evidence supports the jury's negligence finding against Fisher.

The Court of Appeals followed established law that "'[i]t is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found.'" *Glenn*, 440 S.C. at 52, 890 S.E.2d at 578 (quoting *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 50, 691 S.E.2d 135, 149 (2010)). The court found that "the general verdict form, in its entirety, clearly shows the jury's intent to hold Fisher

liable for the unreasonably dangerous products it sold to Duke (the asbestos gaskets and packing) regardless of the theories on which Mrs. Glenn sought recovery, especially when viewed in light of the circuit court's instructions to the jury regarding products liability in general and the elements for each theory of recovery . . . ." *Id.*

The Court of Appeals did not adopt "an expansive reading of *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995)," as Fisher contends. Rather, the Court followed *Bragg*'s guidance that a jury may reasonably render a verdict on either negligence or strict liability and "'failure to prove one theory does not preclude proving the other.'" *Glenn*, 440 S.C. at 53, 890 S.E.2d at 579 (quoting *Bragg*, 319 S.C. at 539, 462 S.E.2d at 326). Application of this principle must turn on the evidence offered to support each theory at trial. *Id.* Not only does the Glenns' evidence support their negligence theory, but the jurors' intent was not unclear. Rather, "the jurors' punitive damages award and finding for Rita on the breach of warranty claim (in addition to their finding for Rita on the negligence claim) clearly indicates their intent to hold Fisher accountable for Tommy's deadly exposure" to asbestos from Fisher valves. *Id.* at 56, 890 S.E.2d at 581.

With regard to *Branham v. Ford Motor Co.*, 390 S.C. 203, 210, 701 S.E.2d 5, 8 (2010), the Court of Appeals found it to be "instructive." *Glenn*, 440 S.C. at 53, 890 S.E.2d at 579. The court determined, however, that *Branham* does not support Fisher's argument because Fisher's contention that the jury did not find its product unreasonably dangerous is speculative. *Id.* at 53-54, 890 S.E.2d at 579-80. Strict

liability has two other elements that the jury could have found lacking in this case. *Id.* at 53, 890 S.E.2d at 579.

The Court of Appeals properly found that the circuit court acted within its discretion in determining that the jury's verdicts could be reconciled and denying Fisher's motion for new trial on the ground of inconsistent verdicts. *Glenn*, 440 S.C. at 56, 890 S.E.2d at 581. Fisher has not shown that this determination warrants review by this Court.

III. The lower courts properly applied South Carolina law on causation and the admission of expert testimony.

Fisher argues that the Court of Appeals has "threaten[ed] the integrity of this Court's precedent" by affirming the circuit court's rulings on causation and expert witnesses. Fisher's arguments are premised on its false contention that Mrs. Glenn's experts espouse the theory that "every asbestos exposure" causes mesothelioma. Petition, at 17. The Court of Appeals "disagree[d] with Fisher's characterization of the expert testimony." *Glenn*, 440 S.C. at 61, 890 S.E.2d at 583. Rather than relying on the "each and every exposure" theory of causation, "Rita's experts relied on the cumulative dose theory, and their reliance on basic medical facts reaching their opinion is not the equivalent of testifying that 'each and every exposure' was a substantial factor in causing Tommy's mesothelioma." *Id.* at 64, 890 S.E.2d at 585.

Not only does the expert testimony of Dr. Brody and Dr. Frank meet the legal standard for admissibility, their opinions are "not an attempt to supplant the

Henderson/Lohrmann test"[2] for causation in an asbestos case. *Glenn*, 440 S.C. at 66, 890 S.E.2d at 586. Dr. Frank's specific causation opinion was based on Mr. Glenn's medical records, his exposure history, studies establishing asbestos exposures of 2.1 to 31 fibers per cubic centimeter from the type of gasket work Mr. Glenn performed on Fisher valves, and the peer-reviewed, published scientific literature indicating that his asbestos exposure levels increase the risk of mesothelioma. *Id.* at 62-65, 890 S.E.2d at 584-86. The Court of Appeals determined that "[b]oth of Rita's experts were guided by the facts specific to Tommy's occupational exposure to Fisher's products in forming their opinions concerning causation." *Id.* at 66, 890 S.E.2d at 586. The Court concluded that "only when the science of cumulative exposure is distorted through the lens of the inapt 'but for' analysis can it be viewed as unreliable." *Id.* at 67, 890 S.E.2d at 586.

The Court of Appeals found it significant that the jury was instructed on the *Henderson/Lohrmann* causation standard, under which it was required to find that "'the plaintiff's exposure to the defendants' asbestos product was *of such a frequency, regularity, and duration that it was a substantial factor in bringing about the disease or injury . . . .*'" *Glenn*, 440 S.C. at 67, 890 S.E.2d at 587 (quoting the jury instructions, emphasis added by the Court of Appeals). Under these instructions, "the jury was capable of distinguishing between the science-based testimony concerning asbestos exposure and the legal standard for establishing causation in the fact of multiple possible sources of the plaintiff's exposure." *Id.* at 67-68, 890

[2] *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007); *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986).

S.E.2d at 587; *see also Jolly v. General Electric Company*, 435 S.C. 607, 635-639, 869 S.E.2d 819, 834-36 (Ct. App. 2021), *reh'g denied* (Feb. 25, 2022), *certiorari granted on other grounds* (Jan. 12, 2023) (same). As Fisher has failed to show that this conclusion is contrary to South Carolina law, no review is warranted.

IV. Fisher's apportionment arguments were properly rejected by the lower courts.

Fisher has failed to demonstrate that review is warranted on the Court of Appeals' holding that damages may be apportioned only among trial defendants. The Court of Appeals followed longstanding South Carolina law in affirming this apportionment rule under both the South Carolina Contribution Among Joint Tortfeasors Act and the South Carolina Constitution. *Glenn*, 440 S.C. at 79-80, 890 S.E.2d at 593-94. Nothing in S.C. Code § 15-38-15 gives Fisher the right to apportion fault to non-parties or settled parties, as the term "defendant" is used in the statute and must be given its plain meaning. *Id.* Moreover, according to Section 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 provision "codif[ies] a defendant's right to argue the 'empty chair' defense." *Id.* at 80, 890 S.E.2d at 593.

In affirming, the Court of Appeals relied on Rule 220(b), SCACR, which provides in relevant part that "[t]he Court of Appeals need not address a point which is manifestly without merit." *Glenn*, 440 S.C. at 79-80, 890 S.E.2d at 593. The Court also noted that any changes to the Contribution Among Joint Tortfeasors Act

must come from the legislature. *Id.* at 82, 890 S.E.2d at 594. Fisher's outlandish request that the Court of Appeals change codified law on apportionment is not something that the court was required to address in any greater detail than it did.

An additional ground supporting the Court of Appeals' conclusion is that Section 15-38-15 "does not apply to a defendant whose conduct is determined to be wilful, wanton, reckless . . . ." S.C. Code § 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). Fisher neglects to address this additional ground for the Court of Appeals' decision.

Finally, there is no merit to 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. 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 Mr. Glenn'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. Review should not be granted on this issue.

V. The Court of Appeals properly found that the circuit court did not abuse its discretion in sanctioning Fisher.

Fisher asks this Court to review the issue of the circuit court's sanctions order, an order that did not involve monetary sanctions or the exclusion of any evidence or witnesses but that merely noted Fisher's pattern of disobeying the circuit court's discovery and trial process orders and engaging in sanctionable conduct. *Glenn*, 440 S.C. at 95-96, 890 S.E.2d at 601-02. This order was based on: (1) Fisher's decision to divide Tommy Glenn's lung tissue in violation of the circuit court's standing order requiring an agreement among the parties or a court order for any tissue digestion study; (2) the unequal division of the tissue that left Plaintiff without sufficient tissue for her own digestion study, again in violation of the circuit court's standing order; (3) Fisher's deposition of its expert Dr. Oury in contravention of the circuit court's order, which it tried to evade by calling the deposition a "sworn statement" that consisted of answering questions in front of a court reporter about the tissue digestion and the substance of his opinions; and (4) Fisher's conduct in blindsiding the circuit court and Plaintiff with Dr. Oury's sworn statement at the end of the trial (which Fisher mischaracterized as a "proffer") that Plaintiff had no opportunity to respond to. *Id.*

After a lengthy recitation of the events at trial leading to the sanctions order, the Court of Appeals determined that Fisher acted in bad faith in dividing Mr. Glenn's lung tissue in the absence of an agreement and ignoring Plaintiff's counsel's request to facilitate another tissue division by an independent lab. *Id.* at 97, 890

S.E.2d at 602-03. The Court was "concerned that reversing the sanctions order would send a message to Fisher's counsel that they are not required to be forthright with opposing counsel or the circuit court when rushing to pursue evidence advantageous to their case on the eve of trial." *Id.* at 97, 890 S.E.2d at 603.

The Court also found it necessary to "uphold the [circuit] court's authority to enforce its own orders—here, the order of protection [regarding Dr. Oury]—when a lawful means of challenging a particular order is available." *Id.* Fisher could have easily asked the circuit court for permission to preserve Dr. Oury's testimony, but instead acted in contravention of the circuit court's order that he was not to be deposed. *Id.* at 97, 890 S.E.2d at 602.

The Court of Appeal properly concluded that sanctions were warranted by Fisher's bad-faith conduct and "blindsid[ing]" of Mrs. Glenn and the circuit court. *Id.* at 98, 890 S.E.2d at 603. Fisher's insistence that the circuit court found it had not acted in bad faith is selectively drawn from the circuit court's statements on the record at the hearing on motions in limine, on January 9, 2019, (R. 102, 172), before Fisher's full pattern of deceptive conduct had come to light by the end of trial. (R. 54-60 (Sanctions Order dated Aug. 22, 2019 discussing Fisher's conduct up until the verdict on January 24, 2019)). The Court of Appeal was right to reject Fisher's misleading characterization of the facts.

The Court of Appeal was also correct in describing the sanctions as a "written slap on the wrist" and "mild" given that Fisher suffered no adverse consequences from its sanctionable conduct. *Glenn*, 440 S.C. at 97, 890 S.E.2d at 603. Because

Fisher has failed to show that the circuit court abused its discretion in imposing the lightest possible sanction—a mere admonishment, with no prejudice to Fisher—the Court of Appeals properly affirmed the sanctions.

CONCLUSION

Fisher has not met the review criteria of Rule 242, SCACR. It has failed to demonstrate that the Court of Appeals' unanimous opinion erred in affirming the circuit court on all issues, or that there are any important issues for this Court's review. Accordingly, its petition for writ of certiorari should be denied.

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Respectfully submitted,

s/Theile B. McVey
Theile B. McVey (SC Bar 16682)
tmcvey@kassellaw.com
KASSEL MCVEY, ATTORNEYS AT LAW
1330 Laurel Street
Post Office Box 1476
Columbia, South Carolina 29202
803-256-4242
803-256-1952(Facsimile)
Other email: emoultrie@kassellaw.com

Lisa W. Shirley (admitted *Pro Hac Vice*)
lshirley@dobslegal.com
Jonathan M. Holder (SC Bar 77935)
jholder@dobslegal.com
DEAN OMAR BRANHAM SHIRLEY, LLP
302 N. Market Street, Suite 300
Dallas, TX 75202
214-722-5990
214-722-5991 (Facsimile)

ATTORNEYS FOR RESPONDENTS