

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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Oct 13 2023

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

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

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Appellate Case No. 2023-001404

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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 .....

Petitioner.

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**REPLY TO RESPONDENT'S RETURN TO  
PETITION FOR WRIT OF CERTIORARI**

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C. Mitchell Brown (12872)

E-Mail: [mitch.brown@nelsonmullins.com](mailto:mitch.brown@nelsonmullins.com)

A. Mattison Bogan

SC Bar No. 72629

E-Mail: [matt.bogan@nelsonmullins.com](mailto:matt.bogan@nelsonmullins.com)

Nelson Mullins Riley & Scarborough LLP

1320 Main Street, 17th Floor

Columbia, SC 29201

803-799-2000

[mitch.brown@nelsonmullins.com](mailto:mitch.brown@nelsonmullins.com)

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner Fisher Controls International LLC (“Fisher”) hereby replies to Plaintiff Respondent’s (“Plaintiff”) Return and respectfully requests that this Court fully grant its petition for writ of certiorari to review the Court of Appeals opinion in *Glenn v. 3M Co. et al.* Op. No. 5975 (S.C. Ct. App. filed April 5, 2023) (“Opinion”) as special and important reasons exist to do so. Fisher incorporates all arguments raised by Fisher in its petition and raised by Fisher in the Court of Appeals into this reply related thereto and does not abandon such arguments.

### **I. Jury Instructions**

Plaintiff argues that certiorari is improper to review the circuit court’s refusal to instruct the jury on intervening cause and the sophisticated intermediary doctrine. Plaintiff first posits that Fisher was not entitled to plead and try its case on alternative or inconsistent defenses. Once testimony was admitted below from Fisher that opined that the product at issue was safe (in its encapsulated form), Plaintiff argues that Fisher was precluded- *as a matter of law*- from proceeding, *in the alternative*, of showing or arguing that even if the product is not safe, the causal chain was broken for other legal reasons (for example, by the actions or omissions of Duke). But South Carolina law expressly authorizes pleading and proving alternative and inconsistent defenses. *See Myers v. Evans*, 225 S.C. 80, 89, 81 S.E.2d 32, 36 (1954) (“Inconsistent defenses are permitted.”); *MacFarlane v. Manly*, 274 S.C. 392, 395, 264 S.E.2d 838, 840 (1980) (“Defendants are permitted to plead inconsistent defenses.”). Second, Plaintiff supports the Court of Appeals’ fact finding to assess whether jury instructions on these important defenses were warranted. South Carolina courts, however, “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.”) The contravention by the Court of Appeals of these principles supports certiorari review.

Plaintiff appears to fault Fisher because it points to evidence on the sophisticated intermediary doctrine arising from Duke and pertaining to Duke’s conduct. But Plaintiff’s argument is rebutted by the Restatement upon which it relies, which sets forth a flexible standard- “*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 the circuit court’s deprivation of a critical alternate defense from the jury’s consideration- *as a matter of law*- on a sufficient factual record. The jury should determine “reasonableness in the circumstances,” a quintessential factual question, based on the evidence at trial. The following evidence addresses both Fisher and Duke’s conduct and supports both the sophisticated intermediary and intervening cause charges as the jury, in the alternative, could have legitimately 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).<sup>1</sup>

Plaintiff next 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 (encapsulated) product was safe. However, under this Court’s settled directives, Fisher was permitted to contend that the gaskets were safe, but even if the jury concluded otherwise, Fisher was 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 of particular significance here, the record confirms that Fisher shipped only a specified type of encapsulated gasket for use in the Duke plant. (R. p. 549-550) Under such circumstances, a reasonable jury could legitimately find that Fisher may be able to rely on Duke to warn its own employees that if they were going to grind the subject encapsulated gaskets into floating dust while in the workplace, such dust could be dangerous to repeatedly inhale. (R. 1714–15) Duke, not Fisher, was positioned to properly communicate such information to Duke’s employees. These inferences are far from outlandish or bizarre as Plaintiff postulates. The record evidence was ample support the requested sophisticated intermediary jury instruction below.

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<sup>1</sup> 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).

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 points to a single piece of evidence to justify declining to charge the defenses-- that Fisher viewed the gaskets as safe due to their encapsulation. Thus, Plaintiff adheres to the Court of Appeals' 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 by the Court of Appeals is problematic, as it substitutes itself for the jury's role as fact finder under South Carolina law in this case. Fisher thus should have been allowed to rely on alternate and inconsistent defenses, here pertaining to legal causation.

The record likewise contains sufficient evidence of intervening causes to have charged the jury accordingly—particularly evidence of Duke's 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).

Plaintiff further posits that the circuit court's causation instruction cured any prejudice resulting from the failure to instruct separately on intervening cause. Not so. Intervening cause is an affirmative defense in this state. *See Fairchild v. SCDOT*, 398 S.C. 90, 104, 727 S.E.2d 407,

415 (stating intervening cause is an affirmative defense); *Dawkins v. Sell*, 434 S.C. 572, 590–92, 865 S.E.2d 1, 10–11 (Ct. App. 2021) (explaining that Sell's assertion of the affirmative defense of intervening and superseding negligence, [was one] for which Sell had the burden of proof.”); *Small*, 316 S.C. at 489, 450 S.E.2d at 615 (stating the negligent intervening act of a third party is an affirmative defense to a negligence claim). Thus, Fisher- **not plaintiff**- has the burden of proof on this affirmative defense. Jury instructions- which are supported by the evidence but which fail to correctly assign the burden of proof- constitute prejudicial error. *See e.g. CarMax Auto Superstores West Coast, Inc. v. S.C. Dep't of Revenue*, 411 S.C. 79, 87-90, 767 S.E.2d 195, 199-200 (2014). Whether plaintiff met its burden of proof is a separate question from whether defendant could meet its own burden had the jury been correctly instructed. As Plaintiff acknowledges, the instructions given “advised the jury that it **could** consider the actions of others in causing Mr. Glenn’s disease.” (Plt. Ret. p. 11) (emphasis added) But an intervening negligence instruction placing the burden of proof on Fisher, and spotlights the alleged actions of third-parties front and center, such that the jury **must** consider them. *See Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995) (“Whether an intervening act breaks the causal connection is a question for the fact finder . . .”). Essentially, the existing instructions informed the jury that its consideration of the actions of others **was optional**. Thus, Fisher has sufficiently shown prejudice here because its requested additional instructions were not given on intervening causation.

Regarding 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 circuit 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 circuit court had given proper instructions.

### **I. Inconsistent Verdicts**

Plaintiff argues that Fisher ignores that an abuse of discretion standard governs new trial motions. Not so. 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. *Menne v. Keowee Key Prop. Owners' Ass'n, Inc.*, 368 S.C. 557, 568, 629 S.E.2d 690, 696 (Ct. App. 2006). 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 found lacking. The trouble with the circuit court's procedure instead relates to a different point in time in the trial. When the jury returned from their deliberations with the inconsistent verdict, under the facts and circumstances in this matter, Fisher properly noted that the verdict was inconsistent, and asked that the Court not accept the verdict.

At that time, the jury was still available, and the circuit court should have acknowledged the inconsistency in the verdict and given clarifying instructions for the jury to go about amending their verdict and removing the inconsistency. Instead, the circuit court declined to reinstruct the jury and instead erroneously accepted the inconsistent verdict. As a result, the Court of Appeals erroneously declined to reverse for a new trial.

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 negligent conduct. Both lower courts failed to recognize this point.

Plaintiff’s contention regarding instructions about recommending parts is also unavailing. The record is devoid of any competent evidence that Fisher *actually recommended* the particular asbestos gaskets to Duke for use in relation to any valve Mr. Glenn ever encountered. Instead, Plaintiff points to evidence that shows certain flange gaskets *were available* and “*were an option.*” (Plt. Return to Pet for Certiorari at p. 15, 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). That is inaccurate. This portion of the transcript relied upon by Plaintiff includes general reference made to Fisher manuals “that had sections *on all the different types of valve positioners,*” which would be reviewed when replacement parts were needed. *Id.* (emphasis added). Plaintiff simply points to 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). Significantly, Plaintiff fails to point to any evidence that Duke even had such information or relied upon the manuals in its design of the plant or otherwise. This is not competent evidence sufficiently showing that Fisher actually recommended any specific asbestos gaskets valves for the particular uses sought by Duke and used by Plaintiff. Specifying that certain parts are generally available is necessarily not a recommendation of the parts for use to Duke.

Thus, the courts below have done exactly what this Court cautioned against in *Branham*—concluding 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). The Court of Appeals’ expansive reading of *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995) is the root of the problem here. 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) (emphasis added). Here, the verdict was inconsistent and the jury’s intent unclear. A new trial is required, the Court of Appeals failed to provide for one. Certiorari should consequently be granted.

## **II. Substantial Factor Causation**

Plaintiff contends that its experts permissibly relied upon “cumulative dose” evidence in presenting their causation opinions. This argument lacks credence because the “Cumulative Dose” theory is indistinguishable from the widely-rejected 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); see also *Smith v. Ford Motor Co.*, No. 2:08-CV-630, 2013 WL 214378, at \*3 (D. Utah Jan. 18, 2013) (same).

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 this Court adopted in *Henderson v. Allied Signal, Inc.*, 373 S.C. 179 (2007). 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.”).

Plaintiff does not meet their burden of proof under *Henderson* 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. The substantial factor test was designed to avoid precisely 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). Certiorari review is consequently proper on this issue too.<sup>2</sup>

### **III. Apportionment**

Plaintiff contends that nothing in Section 15-38-15 gives Fisher the right to have asked the circuit court to apportion fault to non-parties or defendants who have settled because it runs contrary to the plain meaning of the statute. Fisher contends otherwise.

Plaintiff focuses first on the word “defendants” in Section 15-38-15 and argues 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”—and thus a party—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.

Plaintiff also argues that section 15-38-15 is not unconstitutional because a rational basis for such interpretation of the statute exists. Plaintiff misunderstands Fisher’s argument. Fisher has not argued the statute is facially unconstitutional. Rather, the circuit court’s *interpretation* of the

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<sup>2</sup> This Court has recently granted certiorari on this issue. *Edwards v. Scapa Waycross, Inc.*, 2023 S.C. LEXIS 114 (S.C., May 23, 2023)

statute to preclude apportionment of fault to settled defendants or other potential tortfeasors would make application of the statute unconstitutional, and thus that interpretation should be rejected. *cf. State v. Pittman*, 373 S.C. 527, 562, 647 S.E.2d 144, 162 (2007) (“This Court has held that where a statute is susceptible to more than one construction, the court should interpret the statute so as to avoid constitutional questions.”).

Further, Plaintiff’s point that punitive damages were awarded and such automatically means that recklessness was found and apportionment is disallowed must be rejected. The verdict form below included a stand-alone section on punitive damages for the jury to assess. (R. pp. 3234-37) Plaintiff found against Fisher based on Plaintiff’s negligence *and* breach of warranty claims. However, the circuit court erroneously decided to not inform the jury that it was prohibited from awarding punitive damages for Plaintiff’s breach of warranty claim, overruling Fisher’s request for that charge. Since Fisher is challenging the punitive damages award, such challenge means Fisher’s apportionment statute argument is not mooted by the punitive damages award, because we don’t know if the jury improperly awarded punitive damages based on breach of warranty.

Finally, the circuit court denied Fisher’s request on the ground that allowing the jury to apportion fault conflicted with this Court’s ruling in *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017). (Trial Tr. 1741–42). However, the questions presented in *Tiffany* were framed purely as statutory interpretation questions, and constitutional arguments were not properly raised there, because they were unpreserved. *Id.* No preservation concerns exist here as to this argument.

#### **IV. Discovery Sanctions Order**

Plaintiff’s Return on this issue is telling as to the points 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 a circuit court’s sanction.

Here, the circuit judge specifically found below that Fisher had *not* acted in bad faith with respect to the tissue sample dispute. The Court of Appeals 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. Thus, this Court should grant certiorari and reverse the sanctions order. 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 Court of Appeals, 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); *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.).

This Court’s opinion in *Kovach v. Whitley*, 437 S.C. 261, 878 S.E.2d 863 (2022) confirms this point. In *Kovach*, this Court reversed a Rule 11 sanction order entered against a party based on a record bereft of any competent evidence to have supported the sanction. *Id.*, 437 S.C. at 263-65, 878 S.E.2d at 864-65. Similarly, sanctions under Rule 26(g) “are a potent weapon and should, therefore, be deployed in a balanced manner’ and they should be imposed in proportion to the magnitude of the misconduct.” *Gonsalves v. City of New Bedford*, 168 F.R.D. 102, 116 (D. Mass. 1996). While the sanction here is non-monetary, it is *not* a non-event. Clients care how other courts view them, as do counsel, and public admonishments, sanctions, reprimands and the like are powerful and meaningful, and they should respectfully not remain on an unsupported factual record.

**Conclusion**

For the reasons stated herein, Fisher requests certiorari be fully granted.

Respectfully submitted,

By: s/ C. Mitchell Brown

C. Mitchell Brown

SC Bar No. 012872

E-Mail: [mitch.brown@nelsonmullins.com](mailto:mitch.brown@nelsonmullins.com)

A. Mattison Bogan

SC Bar No. 72629

E-Mail: [matt.bogan@nelsonmullins.com](mailto:matt.bogan@nelsonmullins.com)

Nelson Mullins Riley & Scarborough LLP

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

*Attorneys for Petitioner Fisher Controls International LLC*

Columbia, South Carolina

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