

Aug. 22, 2019 Order Denying Fisher's Post-Trial Motions

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON)	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT
RITA JOYCE GLENN, Individually and as Personal Representative of the Estate of THOMAS HAROLD GLENN,)	C/A No.: 2015-CP-04-01607
Plaintiff,)	ORDER ON DEFENDANT FISHER CONTROLS INTERNATIONAL LLC'S POST-TRIAL MOTIONS
v.)	RECEIVED
FISHER CONTROLS INTERNATIONAL LLC, <i>et al.</i>)	SEP 20 2019
Defendants.)	SC Court of Appeals

In this asbestos case, Defendant Fisher Controls International LLC (“Fisher”) moves for relief from the jury’s verdict of January 24-25, 2019, in favor of Plaintiff Rita Joyce Glenn. For the reasons set forth below, Fisher’s motion for judgment notwithstanding the verdict, new trial, and new trial *nisi remittitur* is DENIED. Fisher’s motion for setoff is GRANTED in part.

I. Trial and Verdict

Decedent Thomas Glenn (“Glenn”) died of mesothelioma at the age of 69. His widow Rita Joyce Glenn brought this tort action against Fisher and other companies that made asbestos products Glenn worked with and around during his career as an instrument technician at Duke Power. Fisher made valves that utilized asbestos gaskets, packing, and insulation.

This case was tried against Fisher and two other Defendants, Crosby Valve, LLC, and Carboline Company, from January 14-25, 2019. After a two-week trial, the jury returned a verdict in Plaintiff’s favor against Fisher on theories of negligence and breach of warranty and in Fisher’s favor on strict liability. A defense verdict was reached for Crosby and Carboline. The jury awarded \$1,000,000 in wrongful death damages, \$1,000,000 in survival damages, and \$1,000,000 in loss

of consortium damages. The jury also found by clear and convincing evidence that Fisher's conduct was willful, wanton, or reckless, and awarded \$2,125,000 in punitive damages.

II. Ruling on Motion for Judgment Notwithstanding the Verdict

A. Standard of Review

In ruling on a JNOV motion, the Court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Swicegood v. Lott*, 379 S.C. 346, 351, 665 S.E.2d 211, 213 (Ct. App. 2008); *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 287, 356 S.E.2d 123, 127 (Ct. App. 1987). The court must deny the motion for JNOV when the evidence yields more than one inference or its inference is in doubt. *Id.*; *Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). The jury's verdict may not be overturned if *any evidence* sustains the factual findings implicit in its decision. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.W.2d 408, 419 (Ct. App. 2000); *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000).

B. Open and Obvious Danger

Fisher first contends that it had no duty to warn Glenn because the danger was open and obvious. "A seller is not required to warn of dangers or potential dangers that are generally known and recognized." *Moore v. Barony House Rest., LLC*, 382 S.C. 35, 41-42, 674 S.E.2d 500, 504 (Ct. App. 2009) (quoting *Anderson v. Green Bull, Inc.*, 322 S.C. 268, 270, 471 S.E.2d 708, 710 (Ct. App. 1996)). The jury was instructed to this effect in this case. It was told that there is no duty to warn of a danger that is "obvious" or that is "generally known and recognized." (TT 1/24/19, at 185:11-17).

The jury resolved this issue in Plaintiff's favor and their determination is supported by the

evidence that Glenn did not know that asbestos gaskets and packing were hazardous. Testimony from Glenn's co-workers established that they did not know that it was dangerous to work with asbestos gaskets and packing. (TT 1/16/19, at 177:2-6). His co-worker, James Black, testified that Glenn was a meticulous worker and that if Glenn had known about the dangers of working with asbestos gaskets and packing he would have informed his crew and would have taken precautions. (TT 1/16/19, at 179:8-23).

Fisher took the position at trial that asbestos gaskets and packing are not dangerous. (TT 1/15/19 at 249:23-25, 307:14-16, 309:11-22). Fisher never warned Duke about the potential for asbestos exposure when working with asbestos gaskets and packing. (TT 1/15/19, at 249:23-25, 309:11-22, 311:11-312:3). Fisher did not always inform Duke that the gaskets and packing materials it supplied were asbestos-containing. (TT 1/15/19, at 310:16-313:18; TT 1/16/19, at 83:23-90:10; Pl's Ex. 17; Pl's Ex. 45; Pl.'s Ex. 46; Pl's Ex. 47). Because Fisher did not inform Duke about the potential for asbestos exposures from its gaskets and packing, Duke could not properly determine that it needed to implement safety measures required by OSHA. (1/18/19, at 172:3-8).

There was ample evidence that Duke did not know that asbestos gaskets were hazardous, and thus was not warning its employees. (Pl's Ex. 36). A Duke document from September 1984 instructing employees how to protect themselves from asbestos insulation, states that asbestos used in gasket material is "bonded, which means it produces virtually no dust." (*Id.* at Script, p. 3). This is consistent with the information that Fisher was providing to Duke that the asbestos in gaskets is encapsulated and is not released during use. (TT 1/15/19, at 220:5-10, 221:4-8, 296:18-297:17). There was evidence that this was a common misconception about gaskets and that Fisher contributed to its customers' misunderstanding that asbestos gaskets were encapsulated. (Pl's Ex.

29; TT 1/15/19, at 289:11-190:4).

It is not possible to conclude, as a matter of law, that asbestos gaskets and packing were obviously dangerous to Glenn when Fisher completely denied that they were dangerous at all and did not even consistently notify Duke and its employees that valve gaskets and packing were asbestos-containing. The question of whether Glenn knew about the danger of working around asbestos gaskets and packing was for the jury.

C. Sophisticated Intermediary Defense

A product manufacturer cannot raise the sophisticated intermediary defense without first showing that it placed a warning label on its products. *See Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 226, 781 S.E.2d 548, 557 (2015), *reh'g denied* (Feb. 12, 2016). This is an affirmative defense on which Fisher had the burden of proof. *Webb v. Special Elec. Co.*, 63 Cal. 4th 167, 187, 370 P.3d 1022, 1034 (2016).

In *Lawing*, the Court held that it was error to charge the jury with the sophisticated user defense when the product supplier had not placed a visible warning label on the product at issue, pallets of sodium bromate. 415 S.C. at 228. The Court held that “[t]he sophisticated user doctrine is typically applied as a defense to relieve the supplier of liability for failure to warn where it is difficult or even impossible for the supplier to meet its duty to warn the end user of the dangers associated with the use of a product, and the supplier therefore relies on the intermediary or employer to warn the end user.” *Id.* at 226. The Court determined that “the proper focus is the *labeling* on the sodium bromate shipped to [the purchaser], not the *use* of sodium bromate in [the] plant.” *Id.* at 227. The purchaser’s “knowledge of the dangers of sodium bromate does not affect the suppliers’ duty to properly label sodium bromate as a hazardous and flammable product, because the knowledge of sodium bromate’s inherent qualities are useless to a person who comes

into contact with the chemical but cannot identify it.” *Id.* “The fact that a sophisticated user of a particular product ultimately receives the product does not permit the supplier to decide whether or not to adequately label the dangerous product as such.” *Id.* at 228.

At trial, it was undisputed that Fisher supplied asbestos gaskets and packing with its valves and as replacement parts but that it never labeled its valves, gaskets, or packing with warnings about the dangers of asbestos exposure. Because Fisher failed to include any kind of asbestos warning on its products, Fisher did not meet the requirements for raising the sophisticated intermediary defense under South Carolina law.

D. Product in Same Condition

Fisher contends that it is not liable for Glenn’s exposure to asbestos flange gaskets because the “flange gaskets were placed on those valves by Duke Power employees long after they left Fisher’s hands.” JNOV Motion, at 11. Because the flange gaskets were applied to the flange during the installation of the valve at the power plant, Fisher argues that the valve was not in the same condition as when Fisher sold it.

The evidence refutes Fisher’s contention that connecting a flanged valve to a pipeline in the field was an alteration of the valve. Fisher sold valves that were connected to the pipeline with a flange connection that utilized flange gaskets. (TT 1/15/19, at 214:1-8, 214:19-24; TT 1/16/19, at 121:20-122:10). Fisher intended that flange gaskets would be used to connect their valves to the pipe line. (Pl’s Ex. 16, at 24; TT 1/16/19, at 72:3-24, 73:2-6).

To the extent that the use of a flange gasket on a flanged valve could be considered an “alteration” of the valve, it was an entirely foreseeable and expected modification. “Liability may be imposed on a manufacturer or seller notwithstanding subsequent alteration of the product when the alteration could have been anticipated by the manufacturer or seller.” *Small v. Pioneer*

Machinery, Inc., 329 S.C. 448, 466, 494 S.E.2d 835, 844 (Ct. App. 1997). Only “if it can be shown that the product was (1) materially altered before it reached the injured user and (2) such alteration could not have been expected by the manufacturer or seller, then the manufacturer or seller is not liable.” *Fleming v. Borden, Inc.*, 316 S.C. 452, 457, 450 S.E.2d 589, 592–93 (1994).

Fisher failed to show that placing a flange gasket in the valve flange was unexpected. The valves could not be placed in service without use of a flange gasket. Viewed in the light most favorable to Plaintiff, the evidence supports the jury’s determination that there was no unexpected alteration of valves from application of a flange gasket that was necessitated by Fisher’s flanged valve design.

E. Proximate Causation

Fisher contends that Plaintiff did not meet the proximate cause element of her failure to warn claim because she did not show that Glenn would have heeded a warning about asbestos exposure if it had been given. Fisher relies on *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998), which states the basic rule that the failure to warn must be the proximate cause of the plaintiff’s injuries. *Allen* makes clear, however, that the issues of proximate cause, and the adequacy of the defendant’s warning, are for the jury to decide. *Id.* at 432-33, 505 S.E.2d at 360. In *Allen*, the product manufacturer did warn and the plaintiff did not follow the warning. But because there was evidence that the warning was inadequate, that created a fact issue as to whether a different warning would have caused the plaintiff to behave differently. *Id.*

The Court finds that this was a fact issue for the jury. Not only did Plaintiff submit evidence showing that Glenn was a meticulous worker, it is undisputed that Fisher never warned about the hazards of asbestos on the asbestos-containing products it sold to Duke. (TT 1/15/19, at 249:9-25; TT 1/16/19, at 179:25-180:4). Product warning labels were required by OSHA as of 1972. (TT

1/18/19, at 172:13-22). Plaintiff's expert, Dr. Frank, testified that from an occupational safety and health perspective, it was not reasonable for Fisher not to warn asbestos hazards when it had so many opportunities to do so. (TT 1/18/19, at 170:10-171:7).

The record supports the jury's conclusion that Glenn would have followed an adequate warning if one had been present on Fisher products. Under *Allen*, the mere fact that an adequate warning was missing from the products was sufficient to create a jury question regarding whether an adequate warning would have changed Glenn's behavior. 332 S.C. at 432-33, 505 S.E.2d at 360. The evidence supports the jury's determination that Fisher's failure to warn was a proximate cause of Glenn's mesothelioma.

F. Design Defect

Fisher contends that Plaintiff failed to prove her design defect claim because, it argues, there was no evidence of a reasonable alternative design. While a reasonable alternative design must be shown, this is part of the risk-utility test for design defect that is a matter for the jury to decide. See *Branham v. Ford Motor Co.*, 390 S.C. 203, 219, 701 S.E.2d 5, 13 (2010). The jury weighs the availability of a feasible alternative design, as well as the associated costs, safety, and functionality. *Id.* at 225, 701 S.E.2d at 16.

Evidence at trial established that Fisher had alternative feasible designs available at the time it sold asbestos gaskets and packing with its valves and as replacement parts. Fisher's corporate representative, Ronald Duimstra, testified that non-asbestos gasket and packing materials were always available for its valves. (TT 1/15/19, at 191:10-24). No matter what the application was, if the customer "selected a nonasbestos alternative, [Fisher] would have provided that." (*Id.* at 193:1-8). Fisher, in fact, sold some valves to Duke that did not contain asbestos materials. (TT 1/16/19, at 73:24-74:12).

Given Duimstra's admission that Fisher would have provided any nonasbestos alternative selected by Duke, the evidence created a fact issue for the jury on reasonable alternative design, and supports their finding in Plaintiff's favor.

G. Standard of care.

Fisher contends that there was a lack of evidence regarding the standard of care and its deviation from that standard.

Under South Carolina law, a product manufacturer is held to the skill of an expert in its business and to an expert's knowledge of the materials and processes in its industry. *Carolina Home Builders, Inc.*, 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972); see also *Humphries v. Mack Trucks, Inc.*, 198 F.3d 236 (4th Cir. 1999); § 32-20 Products Liability - Standard of Care - Manufacturer, Anderson, S.C. Requests to Charge - Civil, 32-20. The manufacturer is therefore required to keep abreast and aware of current standards and scientific knowledge in his industry. *Id.* Because the manufacturer is held to the knowledge and skill of an expert, "[t]his is relevant in determining (1) whether the manufacturer knew or should have known the danger, and (2) whether the manufacturer was negligent in failing to communicate this superior knowledge to the user or consumer of its product." *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089-90 (5th Cir. 1973). Industry knowledge may be established through expert testimony. *Reed v. Tiffin Motor Homes, Inc.*, 697 F.2d 1192 (4th Cir. 1982).

Manufacturers have a duty to test and inspect their products. *Nelson v. Coleman Co.*, 249 S.C. 652, 657, 155 S.E.2d 917, 920 (1967). "A manufacturer who incorporates into his product a component made by another has a responsibility to test and inspect such component, and his negligent failure to properly perform such duty renders him liable for injuries proximately caused as a consequence." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 133, 682 S.E.2d 877, 884 (Ct. App.

2009). In addition, “[s]afety standards promulgated by government or industry organizations [] are relevant to the standard of care for negligence.” *Elledge v. Richland/Lexington Sch. Dist. Five*, 341 S.C. 473, 477–78, 534 S.E.2d 289, 290–91 (Ct. App. 2000), *aff’d*, 352 S.C. 179, 573 S.E.2d 789 (2002) (collecting cases).

The record supports the jury’s finding that Fisher failed to meet the standard of care. There was evidence that it was widely known in industry that working with asbestos products could cause fatal disease, that Fisher had early knowledge of asbestos hazards, that Fisher failed to test its products to determine whether they were exempt from OSHA labeling regulations, that Fisher failed to comply with OSHA labeling requirements, and that Fisher failed to warn about asbestos hazards.

Dr. Frank testified that the dangers of asbestos exposure became known in industry around the turn of the century. (TT 1/18/19, at 51:11-52:7, 128:22-129:18). In 1930, British researchers Meriwether and Price published a paper that not only described the risk of lung diseases from asbestos exposure, but set forth the precautions that could be taken to reduce exposures and reduce the risk. (*Id.* at 130:20-131:6).

By 1955, it was established that occupational asbestos exposure could cause lung cancer. (*Id.* at 131:7-18). By 1960, it was known that asbestos exposure could cause mesothelioma. (*Id.* at 131:19-132:6). It has been known at least since the 1930s that asbestos diseases are preventable. (*Id.* at 133:2-6).

In 1942, Dr. Hueper reported that bystanders were at risk of disease when nearby workers were working with asbestos products in a manner that produced dust. (TT 1/18/19, at 176:25-177:12). This same publication identified gaskets and products as asbestos products that were of

concern, even if workers were exposed as bystanders and on an incidental basis. (*Id.* at 177:13-21).

By 1970, when Glenn began working around asbestos gaskets and packing associated with Fisher valves, there were hundreds, probably thousands, of scientific articles documenting the diseases caused by asbestos exposure, some of which specifically identified asbestos gaskets as dangerous. (*Id.* at 130:3-13).

Fisher had direct early knowledge about the hazards of asbestos exposure. As a government contractor, Fisher had to comply with U.S. Department of Labor regulations established in the 1950s that required employers to take steps to control asbestos exposure levels below a certain threshold. (TT 1/15/19, at 262:21-22; PI's Ex. 18). Fisher also could have known about asbestos hazards through its memberships in trade organizations, such as the American Society of Mechanical Engineers, that published about workplace asbestos exposures from an early date. (TT 1/15/19, at 264:3-265:25, 266:12-281:23; PI's Ex. 20; PI's Ex. 21; PI's Ex. 22; PI's Ex. 23).

OSHA regulations required Fisher to place warning labels on asbestos products as of 1972. (TT 1/18/19, at 172:13-22). 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. (PI's Ex. 74; PI's Ex. 75; TT 1/18/19, at 173:7-25). Fisher specifically had information that manipulation of asbestos gaskets can cause asbestosis, lung cancer, and mesothelioma. (PI's Ex. 75; TT 1/18/19, at 174:1-7). Given this available information, a jury could reasonably conclude that was not reasonable for Fisher to represent that the asbestos gaskets it was selling did not release asbestos fibers and did not cause harm. (TT 1/18/19, at 174:1-12).

Fisher acknowledged that it could have discontinued the sale of asbestos components at any time. (TT 1/16/19 at 80:17-81:1). Fisher agreed 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. (TT 1/15/19, at 287:16-289:6). But Fisher never warned Duke. (TT 1/15/19, at 249:9-14).

Fisher claims that the asbestos fibers in gaskets and packing were not friable. This was refuted by Fisher's internal testing in 1980 that indicated a serious hazard just from handling asbestos gaskets. (Pl's Ex. 24; TT 1/15/19, at 223:6-224:1, 234:1-235:18). Dr. Frank testified that asbestos fibers do not stay "encapsulated" or locked into the gasket during their normal course of use. (TT 1/18/19, at 148:22-149:4). Industrial hygiene studies have found that removal of asbestos gaskets can exceed OSHA's excursion limits for maximum, short-term asbestos exposures. (*Id.* at 116:8-11).

There was evidence that Fisher did not consider discontinuing its sales of asbestos-containing gaskets and packing until its customers demanded it and manufacturers stopped making these products. (TT 1/15/19, at 196:1-25, 197:9-23). Documentary evidence showed that Fisher decided to eliminate asbestos "as a result of the increasing safety and liability concerns of our customers and suppliers, many of whom have already eliminated asbestos from their products." (Pl's Ex. 6). Even when Fisher eliminated asbestos gaskets and packing in 1987, it continued to sell its stock of these asbestos materials and still failed to warn about the hazards. (TT 1/15/19, at 309:11-22).

Plaintiff presented ample evidence regarding the standard of care and Fisher's conduct that deviated from that standard in multiple respects. The Court will not disturb the jury's conclusions on these disputed issues.

H. Liability for asbestos products sold, specified, or required

1. Direct sales to Duke

Fisher contends that it is entitled to JNOV because it did not manufacture or provide the asbestos materials to which Glenn was exposed. This assertion is refuted by the evidence that Fisher sold asbestos gaskets and packing to Duke with some of its valves, and that Fisher also supplied replacement gaskets and packing.

Under South Carolina law, “[a] manufacturer or assembler who incorporates a defective component part into its finished product and places the finished product into the stream of commerce is liable for injuries caused by a defect in the component part.” *Baughman v. General Motors Corp.*, 780 F.2d 1131, 1132 (4th Cir. 1986). In fact, “[a] manufacturer who incorporates into his product a component made by another has a responsibility to test and inspect such component, and his negligent failure to properly perform such duty renders him liable for injuries proximately caused as a consequence.” *Duncan*, 385 S.C. at 133, 682 S.E.2d at 884. “The fact that the manufacturer or assembler did not actually manufacture the component part is irrelevant, as it has a duty to test and inspect the component before incorporating it into its product.” *Baughman*, 780 F.2d at 1132.

It is undisputed that Fisher sold asbestos gaskets and packing for decades. (TT 1/15/19, at 195:21-25; TT 1/16/19, at 81:2-5). Fisher sold valves to Duke that contained asbestos gaskets and packing. (TT 1/16/19, at 53:7-18, Fisher also sold asbestos replacement gaskets and packing to Duke. (TT 1/15/19, at 248:24-249:4). The gaskets Fisher sold to Duke contained 80 to 85% asbestos. (Pl’s Ex. 1; TT 1/15/19, at 224:14-225:11).

Given Fisher’s extensive sales of asbestos gaskets and packing to Duke, the jury could infer that Glenn was exposed to asbestos materials supplied directly by Fisher. There is sufficient

evidence to support Plaintiff's position that Glenn was exposed to asbestos gaskets supplied by Fisher with its valves and as replacement parts.

2. Liability for foreseeable harm

Fisher raises the "bare metal" defense, contending that it did not specify or require the use of asbestos-containing gaskets, packing, and insulation, and that instead these asbestos components were requested by Duke.

A manufacturer's duty to warn extends to foreseeable dangers resulting from the anticipated and intended use of its products. *See* Ralph King Anderson, Jr., South Carolina Requests to Charge - Civil § 32-27 (2d ed. 2009); *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 84 (4th Cir. 1962); *Claytor v. General Motors Corp.*, 277 S.C. 259, 286 S.E.2d 129 (1982); *Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 259 S.C. 346, 359-60, 191 S.E.2d 774, 870 (S.C. 1972); *Mickle v. Blackmon*, 252 S.C. 202, 233, 166 S.E.2d 173, 187 (S.C. 1969). A manufacturer is "expected to anticipate the environment which is normal for the use of his product and . . . must anticipate the reasonably foreseeable risks of the use of his product in such environment." *Mickle*, 252 S.C. at 233 (quoting *Spruill*, 308 F.2d at 83-84). "Liability may be imposed on a manufacturer or seller notwithstanding subsequent alteration of the product when the alteration could have been anticipated by the manufacturer or seller." *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 466, 494 S.E.2d 835, 844 (Ct. App. 1997).

This Court's decisions in *Garvin* and *Jolly* resolved the liability of asbestos equipment manufacturers for the reasonably foreseeable use of replacement asbestos gaskets and packing. When a "manufacturer recommends specifies, or requires that asbestos gaskets and packing be replaced with like materials," liability may be imposed for replacement gaskets and packing because the product remains in essentially the same condition as when it was sold. *Garvin v. Agco*

Corp., No. 2012-CP-40-6675, at 18 (S.C. Ct. Comm. Pleas Nov. 14, 2014). This Court reasoned that, “Crane’s liability arises because its own valves caused injury as manufactured, supplied, and designed by Crane with asbestos gaskets and packing. When the asbestos gaskets and packing were replaced with the same materials that came with the valve, it was not a ‘substantial change’ in the condition of the product.” *Id.* at 16-17.

The Court rejected the “bare metal defense” on the basis that Crane Co. valves were not sold as mere bare metal, but with asbestos materials that needed to be replaced. When asbestos replacement parts are recommended, specified, or required, the manufacturer cannot reasonably claim that its product somehow ceases to be harmful when such replacements are used. The Court reasoned that, “[t]o say Crane was no longer part of the ‘chain of distribution’ when the original gaskets and packing wore out on its still-functioning product would be artificial, if not silly.” *Id.* at 13-14. The evidence showed that the asbestos gaskets and packing used as replacements were no different than that originally supplied by Crane Co., that Crane Co. knew those parts would have to be replaced, and knew that exposure to asbestos was hazardous. *Id.* at 13. The Court determined that Crane Co. “occupied the best position in the chain of distribution to warn consumers of those risks.” *Id.* This conclusion is supported by the comments to the Restatement of Torts (Second) § 402A, incorporated by reference by S.C. Code Ann. § 15-73-30, which espouses the policy that “the consumer of such products is entitled to the maximum of protection . . . and the proper persons to afford it are those who market the products.” *See id.* at 14 (quoting Comment c to the Restatement of Torts (Second) § 402A).

At trial, Plaintiff presented evidence that Fisher sold its valves with asbestos components, knew that the gaskets and packing would have to be changed according to the valve design, and intended that asbestos replacements be used. Fisher had a material specification for asbestos

gaskets. (Pl's Ex. 1; TT 1/15/19, at 224:14-225:11). Glenn's co-worker, Dale Jolly, recalled that the manuals for Fisher and valves specified the type of gaskets that must be used. (TT 1/17/19, at 130:20-131:10). There was evidence that Fisher decided whether or not to utilize asbestos-containing materials for the parts it supplied with its valves and as replacement parts. (TT 1/16/19 at 80:17-81:1).

The evidence also showed that Fisher knew that asbestos gaskets and packing are components that wear out and anticipated that these components would need to be replaced periodically. (TT 1/15/19, at 245:20-25). Fisher also knew that its valves would be insulated. (TT 1/15/19, at 246:16-22; TT 1/16/19, at 21:7-10).

Fisher designed its valves with flanged connections. The majority of valves at Oconee had flanged connections. (TT 1/16/19, at 121:20-122:10). Plaintiff's evidence showed that Fisher knew and intended that flanged connections were used with gaskets and knew asbestos gaskets would be used. (Pl's Ex. 16, at 24; TT 1/16/19, at 72:3-73:6.) It was obvious to Fisher that gaskets would be used on the flanged connections of its valves. (TT 1/18/19, at 111:19-23).

Plaintiff's evidence supports the conclusion that when Glenn's co-workers used replacement asbestos gaskets and packing in Fisher valves, the valves remained unchanged from Fisher's original design. This evidence supports a jury finding that Fisher was negligent in failing to warn Glenn of the asbestos hazards associated with Fisher valves.

I. Expert Causation Testimony

1. Admissibility of Plaintiff's Expert Testimony

a. Standard of Review

The admissibility of expert testimony is governed by South Carolina Rule of Evidence 702. That rule provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier

of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” S.C. R. Evid. 702.

Courts evaluating the admissibility of scientific expert evidence “must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.” *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508 (S.C. 1999). The reliability of scientific evidence is evaluated based on several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684 (S.C. 2009) (citing *Council*, 335 S.C. at 19).

“[C]ross-examination, presentation of contrary evidence, and careful instruction on the burden of proof” are the ordinary means to attack an opposing expert. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993). Courts should not exercise their gatekeeping responsibility by excluding expert testimony that falls within the range of matters on which reasonable experts can disagree. *See Milward v. Acuity Specialty Prods. Group, Inc.*, 639 F.3d 11, 22 (1st Cir. 2011). While the trial court may look at the reliability of the expert’s methodology, it is for the jury to determine the soundness of the facts underlying the expert’s opinion and the correctness of the expert’s conclusions. *See id.* 22.

b. General Causation Opinions of Dr. Frank and Dr. Brody

The Court finds that the expert opinion testimony of Dr. Frank and Dr. Brody regarding the cumulative nature of asbestos diseases and the lack of any safe threshold of exposure has ample support in the scientific evidence and that Plaintiff’s experts were entitled to rely on these basic

medical facts in reaching their opinion in this case. As this Court previously found in *Jolly v. General Electric Co.*, experts' reliance on these basic medical facts is not the equivalent of the opinion that "each and every exposure" was a substantial factor in causing the decedent's disease.

In *Jolly*, this Court relied on the Pennsylvania Supreme Court's opinion upholding the admissibility of Dr. Frank's causation opinions and finding them consistent with the substantial factor standard. See *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1045-46 (Pa. 2016). As explained in *Rost*, the defendant "has confused or conflated the 'irrefutable scientific fact' that every exposure cumulatively contributes to the total dose (which in turn increases the likelihood of disease), with the legal question . . . as to whether particular exposures to asbestos are 'substantial factors' in causing the disease." *Id.* Experts are not precluded from "informing juries about certain fundamental scientific facts necessary to a clear understanding of the causation process for mesothelioma, even if those facts do not themselves establish legal (substantial factor) causation." *Id.*

The Eleventh Circuit has recently held the same. In *Bobo v. Tennessee Valley Auth.*, 855 F.3d 1294 (11th Cir. Apr. 26, 2017), the court noted that expert testimony that "there is no evidence that there is a threshold level of exposure below which there is zero risk of mesothelioma," and that "all 'significant' exposures to asbestos 'contribute to cause mesothelioma,'" is not the same thing as saying that each and every exposure is causative. *Id.* The expert's causation opinion was admissible because it was based on the exposure facts in the case and was supported by scientific literature, including the Helsinki Criteria. *Id.*

Dr. Frank has explained that he does "not believe that exposure to a single asbestos fiber or a single breath of air containing asbestos fibers has ever caused a mesothelioma or any other asbestos related cancer or any non-malignant asbestos disease." (Pl's Ex. 76, at 211). It is

important to recognize that “an ‘exposure’ is never a single fiber . . . when someone breathes visible dust from an asbestos product, there may be millions or billions of asbestos fibers present.” (*Id.* at 212). Even one day of exposure at the current OSHA limit results in the inhalation of hundreds of thousands of fibers. (*Id.* at 211).

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

Judge Hill has previously found Dr. Brody’s causation opinions to be reliable and admissible. *Garvin v. Agco Corp.*, No. 2012-CP-40-6675, at 21-25 (S.C. Ct. Comm. Pleas Nov. 14, 2014). In *Garvin*, Dr. Brody’s testimony was found to be reliable and helpful to the trier of fact. *Id.* Judge Hill rejected the defendant’s contention that Dr. Brody holds the opinion that every asbestos exposure contributes to cause disease, noting that “[t]he trial record does not contain any such testimony from any of Plaintiffs’ experts.” *Id.* at 23.

Dr. Brody’s testimony has likewise been admitted by courts across the country. *See, e.g., Waite v. All Acquisition Corp.*, 194 F. Supp. 3d 1298, 1315 (S.D. Fla. 2016); *Rabovsky v. Air & Liquid Sys. Corp.*, No. CIV.A. 10-3202, 2012 WL 876752, at *3 (E.D. Pa. Mar. 13, 2012); *In re Asbestos Prod. Liab. Litig. (No. VI) (Rabovsky)*, No. 10-CV-03202, 2012 WL 252919, at *1 (E.D. Pa. Jan. 25, 2012); *In re Asbestos Products Liab. Litig. (No. VI) (Larson)*, No. 09-69123, 2010 WL 4676563, at *3-4 (E.D. Penn. Nov. 15, 2010); *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1045 (Pa.

2016); *Startley v. Welco Mfg. Co.*, 78 N.E.3d 639, 647 (Ill. Ct. App. 2017); *Hennegan v. Cooper/T. Smith Stevedoring Co.*, 837 So. 2d 96, 105-06, 110 (La. Ct. App. 2002).

Fisher relies on the Southern District of South Carolina's opinion in *Haskins v. 3M Co.*, No. 2:15-cv-02086, No. 3:15-cv-02123, 2017 WL 3118017 (D.S.C. July 21, 2017). There, Judge Norton excluded the testimony of the plaintiff's expert, Dr. Carlos Bedrossian, on the grounds that it was inconsistent with the substantial factor causation standard. *Id.* at *6. While he did not question the underlying scientific foundation for the expert's opinions, he held that the opinion was inconsistent with the legal requirements for demonstrating causation because the expert did not determine that the plaintiff's exposure to the defendant's product had a substantial impact on the plaintiff's total cumulative exposure. *Id.* at *7. He concluded that the expert's opinion that every occupational exposure contributes to cause mesothelioma "is sound science [but] is inconsistent with the law." *Id.* at *6.

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

to ground his interpretation of the legal standard in the scientific realities of mesothelioma, Judge Norton overly narrowed the amount of admissible scientific evidence that can demonstrate specific causation.” *Id.* at 665. “Requiring evidence on the dose threshold or quantification of exposure pushes against the legal community’s virtual agreement that asbestos diseases do not respect traditional tort rules.” *Id.* The court should have instead used the science to guide his interpretation of the legal standards, which would respect the appropriate balance between the standard of proof and the limits of science. *Id.*

The Court finds that in reaching their causation opinions, Dr. Frank and Dr. Brody relied on their many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including animal studies, epidemiology, and other scientific literature, the dose-response relationship, and the science regarding the low levels of exposure that can cause mesothelioma. Fisher’s attack on their opinions as “unreliable” is contradicted by the record evidence.

c. Specific Causation Opinions of Dr. Frank

The Court finds that Dr. Frank’s specific causation opinion is grounded in the exposure evidence presented at trial. As he testified, a documented history of occupational exposure to asbestos is sufficient to attribute mesothelioma to asbestos. (TT 1/18/19, at 65:8-20, 83:17-20). Dr. Frank explained that “[t]o link asbestos to a mesothelioma, you have to have exposure, you have to have the right latency . . . and you have to have the proper diagnosis.” (TT 1/18/19, at 83:17-25). Dr. Frank reviewed Glenn’s medical records, (*id.* at 53:24-54:1), and determined that “[t]here’s no question in this case that Mr. Glenn had a mesothelioma.” (*Id.* at 83:25-84:1).

Dr. Frank also relied on industrial hygiene studies measuring asbestos exposure levels from the removal of asbestos materials in the same manner used by Glenn’s co-workers, and concluded

that Glenn's asbestos exposures from the removal of gaskets and other asbestos components were hundreds of thousands to millions of times higher than background levels. (TT 1/18/19, at 75:10-76:7, 114:15-116:7, 116:8-11, 119:15-23).

In stating his causation opinion, Dr. Frank relied on a summary of the exposure facts proven to the jury, including that Glenn had regular exposure to the removal of gaskets and packing from Fisher valves, that he was within a few feet of that work, that these exposures occurred for years, that the asbestos gaskets used on Fisher valves contained 85% asbestos, and that the gaskets were removed with scrapers, wire brushes, and grinders. (*Id.* at 116:25-118:4). Such exposures were a substantial factor in causing Glenn's mesothelioma. (*Id.*)

The Court finds that Dr. Frank's specific causation testimony was reliable and admissible under the standards set forth in South Carolina Rule of Evidence 702 and *Daubert*. His opinions were supported by the scientific literature as well as the facts of this case, and his testimony was relevant and helpful to the jury.

2. Causation Standard

Fisher contends that Plaintiff's experts failed to meet the "most probable" causation standard. Dr. Frank, the only expert to give a specific causation opinion, testified that Glenn's repeated exposures to asbestos from Fisher valves was a substantial cause of his disease. (TT 1/18/19, at 116:25-120:22). He stated that even if this was Glenn's only asbestos exposure, his opinion is that "exposure to Fisher valves in the manner described here was the source of [Glenn's] exposure to asbestos that caused [his] mesothelioma." (TT 1/18/19, at 118:8-15). These opinions were given within a reasonable degree of scientific and medical certainty. (TT 1/18/19, at 53:17-20).

South Carolina does not require that an expert use any particular magic words when expressing a medical causation opinion. The expert does not have to say the words “most probably,” as long as the causation opinion provides a “significant causal link between the alleged negligence and the plaintiff’s injuries, rather than a tenuous and hypothetical connection.” *Hoard ex rel. Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 546, 694 S.E.2d 1, 5 (2010) (quoting *Ellis v. Oliver*, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996)). For example, in *Jamison v. Hilton*, 413 S.C. 133, 143, 775 S.E.2d 58, 64 (Ct. App. 2015), a medical expert’s opinion supported a causation finding even though the words “most probably” appeared nowhere in his opinion. Rather, the expert testified “to a reasonable degree of medical certainty” that a “delay in treatment caused or contributed to [the decedent’s] death,” and explained how the delay was causative. *Id.*

Dr. Frank’s causation opinion was expressed to a reasonable degree of scientific and medical certainty and he identified Glenn’s Fisher exposures as a cause of his mesothelioma. There was nothing tenuous or uncertain about his opinion and he expressed the reasons for this opinion in detail. His opinion meets the requirements of South Carolina law.

3. Sufficiency of Plaintiff’s Expert Testimony

A plaintiff in an asbestos case need only present evidence of “actionable exposure” to a defendant’s asbestos product. *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). To determine whether exposure is actionable, South Carolina courts apply the “frequency, regularity and proximity” factors set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). *Id.* Therefore, “[t]o 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 plaintiff actually worked.” *Id.* (quoting *Lohrmann*, 782 F.2d at 1162).

The Court finds that the *Henderson* causation standard is satisfied by the evidence presented at trial. Plaintiff presented evidence from which the jury could conclude that Glenn had frequent, regular, and proximate exposure to asbestos gaskets and packing from Fisher valves over the course of many years. This evidence supports the jury's determination that Glenn's mesothelioma was caused by his exposure to asbestos products sold by Fisher and for which Fisher is responsible.

4. Intervening Cause

Fisher argues that actions taken by Duke and/or Glenn himself constituted intervening and superseding causes. Specifically, Duke should have warned Glenn about asbestos hazards and Glenn should have heeded those warnings and used personal protective equipment.

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

More importantly, "[f]or an intervening act to break the causal link and insulate the tortfeasor from further liability, the intervening act must be unforeseeable." *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 463 S.E.2d 636, 640 (Ct. App. 1995). "If the intervening acts are (1) set in motion by the original wrongful act and (2) are the normal and foreseeable result of the original act, the final result, as well as every intermediate cause, is considered in law to be the proximate result of the first wrongful cause." *Wallace v. Owens-Illinois, Inc.*, 300 S.C. 518, 521, 389 S.E.2d 155, 157 (Ct. App. 1989).

The jury could have reasonably determined that Duke's conduct was entirely foreseeable. Plaintiff's evidence showed that Duke didn't warn about gaskets because Fisher misled Duke about

the safety of asbestos gaskets. Fisher could not expect Duke to warn about the dangers of asbestos gaskets when it portrayed the asbestos as “encapsulated” and safe, a position it also took in front of the jury.

With regard to Glenn’s own actions, “an intervening act does not break the chain of causation if it is a normal response to the situation created by the original wrongful act.” *Wallace v. Owens-Illinois, Inc.*, 300 S.C. 518, 522, 389 S.E.2d 155, 157 (Ct. App. 1989). Glenn cannot be found at fault for not protecting himself against a danger he did not know about because of Fisher’s failure to inform him of the hazards of working with its valves. Glenn continued to perform his work as he always had, without protective measures, which is an entirely “normal response” to Fisher’s failure to warn. The evidence does not support a finding that Glenn’s own conduct was an intervening cause of his disease.

J. Loss of consortium

The Court finds that Plaintiff Rita Glenn is entitled to loss of consortium damages based on the jury’s liability and causation findings against Fisher, which Fisher has failed to show were erroneous or unsupported by the evidence.

K. Punitive Damages

Under South Carolina law, punitive damages may be awarded to punish tortfeasors who have acted in a “reckless, willful, or wanton” manner. S.C. Code Ann. § 15-32-520(D); *Duncan v. Ford Motor Co.*, 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct. App. 2009) (citing *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996)); *see also Berberich v. Jack*, 392 S.C. 278, 288, 709 S.E.2d 607, 612 (2011). “A tort is characterized as reckless, willful or wanton if it was committed in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff’s rights. A conscious

failure to exercise due care constitutes willfulness.” *Taylor*, 324 S.C. at 221, 479 S.E.2d at 46 (citations omitted); *see also Berberich*, 392 S.C. at 288, 709 S.E.2d at 612.

Plaintiff introduced significant evidence of Fisher’s direct knowledge about the hazards of asbestos exposure long before Glenn started working with asbestos-containing Fisher valves at Duke in 1970. Those sources include the Walsh-Healey Act, as well as its early ASME membership, as well as the voluminous scientific literature generally available to industry.

Fisher contended at trial that its knowledge of asbestos hazards began in the mid-1970s. Even if the jury accepted that as true, Fisher continued to sell asbestos-containing materials to Duke for more than a decade after it had actual knowledge of the danger. Fisher sold asbestos gaskets and packing until at least December 1, 1987, when it undertook an “asbestos elimination program.” (TT 1/16/19, at 54:10-12; Def’s Ex. 1).

Plaintiff’s evidence showed that even when Fisher decided to discontinue its asbestos sales in the late 1980s, it continued to sell its existing stock of asbestos materials instead of destroying those materials safely. (TT 1/15/19, at 309:11-22). Records show that during this period Fisher began misrepresenting the asbestos content of these components, referring to asbestos packing materials with the term “composition” instead of “asbestos.” (Pl’s Ex. 17; TT 1/15/19, at 310:16-313:18). It informed its own employees of this discrepancy, but not its customers. (*Id.*)

Plaintiff also established that Fisher continued to sell gaskets to Duke in 1990 under the parts number for asbestos gaskets, even while claiming that the gaskets were nonasbestos. (Pl’s Ex. 45; Pl.’s Ex. 46; Pl’s Ex. 47; TT 1/16/19, at 83:23-90:10). It was undisputed that despite those late sales, Fisher never put any warning on its asbestos-containing valves, gaskets, and packing. When it decided to discontinue its asbestos sales in 1987, it did so because it knew its customers

and its suppliers were worried about liability and safety. Yet it still did not issue a warning when selling off its existing stock of asbestos materials. (TT 1/15/19, at 309:11-22).

Plaintiff showed that Fisher never conducted tests to determine exposure levels from working with asbestos gaskets and packing in the field or sought to determine if those exposures exceeded permissible levels. (TT 1/15/19, at 236:6-237:3, 253:23-254:3). It conducted no tests until 1980, and then only measured exposure levels from handling gaskets, which indicated relatively high exposures of .48 fibers/cc. (TT 1/15/19, at 223:6-224:1, 234:1-235:18; Pl's Ex. 24). One later test showed that earlier findings indicating an "exposure problem" could be addressed with wet-down methods that reduced the exposures. (Pl's Ex. 28; TT 1/15/19, at 239:12-22, 241:15-21, 242:8-13). There was no evidence that Fisher acted on this information.

The magnitude of the risk is significant. Plaintiff's evidence showed that a risk assessment by the National Academy of Sciences found that at an environmental exposure level of .0004 fibers/cc there would be an average of nine mesotheliomas. (TT 1/18/19, at 69:4-70:25). At exposure levels of .002, approximately one magnitude greater, six times as many people would die of mesothelioma. (*Id.* at 70:11-71:13). One of 3 cancer deaths in the occupational setting in the U.S. are attributed to asbestos exposure. (*Id.* at 99:6-9). OSHA has published that it is "aware of no instance in which exposure to a toxic substance has more clearly demonstrated detrimental health effects on humans than has asbestos exposure." (*Id.* at 99:18-21).

The Court finds that the jury had ample evidence to support a finding that Fisher's consciously failed to exercise due care for Glenn's safety and that its award of punitive damages is appropriate under the facts proven in this case.

III. Ruling on Motion for New Trial

A. Standard of Review

A new trial is warranted only if the trial court determines that the verdict is contrary to the fair preponderance of the evidence. *See Dent v. Redd*, 270 S.C. 585, 243 S.E.2d 460 (1978). The court considers the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996).

B. Jury Verdict

Fisher contends that the jury's verdict is inconsistent because they found in favor of Plaintiff on negligence and breach of warranty but in favor of Fisher on strict liability. The Court finds that *Bragg v. Hi-Range, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1996), forecloses Fisher's argument. Under *Bragg*, directed verdict on a strict liability claim was not inconsistent with a jury verdict on a negligence claim in a product liability case. 319 S.C. at 538, 541. In *Bragg*, the court granted directed verdict on a strict liability cause of action on a number of grounds, including that the plaintiff had failed to introduce evidence that the defendant's product was defective or unreasonably dangerous in design. 319 S.C. at 538. The jury then found the defendant liable under a negligence theory. The court of appeal disagreed that there was any inconsistency in the verdict, finding that "[a]lthough substantial similarities in analysis exist between strict liability for the sale of defective products and negligence principles of liability, especially in design and inadequate warning cases, differences do exist." *Id.* The court emphasized that "[s]trict liability and negligence are not mutually exclusive theories of recovery; that is, an injury may give rise to claims that can be established under either principles of strict liability or negligence, and failure to prove one theory does not preclude proving the other." *Id.* Accordingly, "it is possible

under certain circumstances for a supplier of products to be held liable under a negligence theory even though the supplier is not strictly liable.” *Id.* at 541.

Fisher relies on *Branham v. Ford Motor Company*, 390 S.C. 203, 701 S.E.2d 5 (2010), which recognized that “[i]f one claim is dismissed and the basis of the dismissal rests on a common element shared by the companion claim, the companion claim must also be dismissed.” *Id.* at 211-12. Fisher has not shown that the jury’s finding on strict liability was due to the absence of an element shared by the companion negligence claim in this case.

For a verdict to be inconsistent, there must be no “no rational, non-speculative way to reconcile . . . two essential jury findings.” *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 773 (5th Cir. 1976). The jury’s questions about the strict liability instructions indicated division regarding whether to find for Plaintiff or Fisher on this claim. Their unanimous verdict on all three claims, finding in favor of Plaintiff on two and in favor of Fisher on one, was the jury’s prerogative. This Court will not “speculate what was in the jurors’ minds” in reaching their verdict. *Stoneledge at Lake Keowee Owners Ass’n, Inc. v. Cincinnati Ins. Co.*, No. 8:14-CV-01906-BHH, 2018 WL 4689135, at *24 (D.S.C. Sept. 28, 2018). The Court does not find any inconsistency in the jury’s verdict.

C. Apportionment of Fault

Fisher contends that under S.C. Code Ann. § 15-38-15 the jury should be allowed to apportion fault to “all potential tortfeasors,” including settled parties and non-parties. This issue is controlled by the Supreme Court’s decision in *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017). In *Smith*, the Supreme Court interpreted Section 15-38-15 to preclude apportionment of fault to a settled party. *Id.* at 561. This is compelled by the language of the statute that there should be apportionment of fault “among defendants.” *Id.* at 557 (quoting section 15-38-15(B)). More

importantly, it is the result clearly intended by the legislature when construed with other related statutory provisions. *Id.* Section 15-38-50 provides that when a defendant settles a claim against it, it gains protection from liability to nonsettling tortfeasors. *Id.* at 561. Any inequity to nonsettling tortfeasors is addressed by provisions giving them the right to argue the liability of “empty chair defendants” under Section 15-38-15(D) and receive a setoff for settlement proceeds under Section 15-38-15(E). *Id.* at 557.

The Court summarized the myriad of problems with the position taken by Fisher:

Appellant’s desired result would require (1) a plaintiff to maintain a suit against someone with whom he has already settled; (2) a settling defendant to defend a lawsuit he has already settled; (3) this Court to ignore the legislature’s express acknowledgement in section 15-38-15(D) that not all potential tortfeasors will necessarily be parties to the suit; and (4) would create a conflict with other provisions of the Act, including sections 15-38-15(E) and 15-38-50(1), which address a nonsettling defendant’s right to setoff.

Id. at 558-59.

Under the reasoning and holding of *Smith*, settled parties and non-parties cannot be apportioned fault by the jury. Fisher retained the right to argue its empty chair defense under Section 15-38-15(D) and has the right to a setoff under Section 15-38-15(E). The Court does not find that this legislative scheme offends the right to due process and equal protection.

D. Dr. Oury’s Test Results and Testimony

Fisher contends that the exclusion of Dr. Timothy Oury’s tissue digestion study and related testimony warrants a new trial. The Court disagrees. This is not simply an issue of relevancy and prejudice under Rule of Evidence 403. The evidence was excluded due to Fisher’s discovery violations in having its expert Dr. Oury conduct last-minute destructive testing of Glenn’s lung tissue in the absence of an agreement with Plaintiff or a court order and in taking a “sworn statement” from Dr. Oury—effectively a deposition—without notice to Plaintiff and in

contravention of this Court's direct order. Dr. Oury was not prevented from testifying at all, he was prevented from testifying about destructive testing performed in violation of the discovery rules and the Court's orders.

"To encourage compliance with discovery procedures, trial courts can impose sanctions upon parties who violate the rules, including exclusion of witnesses whose identities have been withheld." *McGaha v. Mosley*, 283 S.C. 268, 277, 322 S.E.2d 461, 466 (Ct. App. 1984). Imposition of sanctions is a matter committed to the discretion of the trial court. *Id.* Among the factors to be considered by the trial judge in making his decision are the type of witness involved and the degree of surprise to the other party. *Id.*

The Court finds that Fisher's conduct reflected a disregard for this Court's authority to control the discovery process, to control its docket, to move cases toward resolution, and to ensure that all of the relevant facts are presented to an unbiased jury. Both Plaintiff and the Court were surprised by Oury's last-minute tissue digestion and Fisher's unilateral deposition of Oury. The Court gave Fisher the opportunity to work with Plaintiff to conduct further testing in a manner allowed by the discovery rules, but Fisher declined to do so. Under these circumstances, the Court found it necessary to exclude Dr. Oury's test results and related deposition testimony out of fairness to Plaintiff and as a consequence of Fisher's blatant discovery violations.

Fisher has not shown that the exclusion of Oury's tissue digestion study and related testimony was prejudicial. The point of the tissue digestion study was to determine what type of asbestos fibers, if any, were present in Glenn's lungs. Fisher argues that Oury's finding of amosite asbestos fibers in Glenn's lung tissue was critical evidence, but at trial Plaintiff did not dispute that Glenn had exposure to amosite insulation. Plaintiff even argued that Fisher was responsible for that amosite insulation. Further evidence of amosite exposure was cumulative. *See Henderson v.*

Allied Signal, Inc., 373 S.C. 179, 186, 644 S.E.2d 724, 727 (2007) (exclusion of cumulative asbestos studies was not prejudicial or an abuse of discretion).

Fisher fails to mention that Oury's tissue digestion study also found but dismissed a tremolite asbestos fiber, a fiber known to occur with chrysotile asbestos, the type of fiber that all parties agree was in the asbestos gaskets and packing sold by Fisher. Plaintiff contends that the nuances of Oury's tremolite finding were such that she needed to retain her own expert to address his findings and also conduct a separate tissue digestion study, which she could not accomplish less than 30 days before trial. Fisher's failure to timely disclose this evidence that was damaging to its case is another reason why exclusion is appropriate.

E. Sophisticated Intermediary

Fisher was not entitled to an instruction on the sophisticated intermediary defense, for the reasons set forth above. Under *Lawing*, the sophisticated intermediary defense cannot be raised unless the product manufacturer can show that it properly labeled the products as hazardous. *Lawing*, 415 S.C. at 226, 781 S.E.2d at 557. It is undisputed that Fisher never put asbestos warnings on its asbestos-containing products.

F. Admission of Plaintiff's Evidence

Fisher contends that the Court allowed two types of inadmissible evidence, first from Plaintiff's expert causation witnesses and second pertaining to Fisher Service Company, a sister corporation. For the reasons set forth above, the Court disagrees with Fisher's arguments against Plaintiff's experts and finds their testimony reliable and admissible.

With regard to Fisher Service Company, Plaintiff never argued that the actions of Fisher Service Company should be imputed to Fisher. The jury first heard about Fisher Service Company from Fisher's corporate representative, Ronald Duimstra, who testified about testing performed by

Fisher Service Company on asbestos gaskets and packing. (TT 1/15/19, at 238:6-24). Plaintiff's evidence was that Fisher Service Company was involved in servicing the Fisher valves at Duke and used asbestos gaskets and packing. Duke documents contained both the name Fisher Service Company and the name Fisher Controls International, Inc. (Pl's Ex. 38; TT 1/16/19, at 21:19-24:12). Duimstra had the opportunity to explain Fisher's position that Fisher Service Company was a separate entity that serviced Fisher valves. (TT 1/16/19, at 21:19-24:12).

The Court finds that Duke documents bearing the names of both Fisher and Fisher Services Company were properly before the jury. This evidence was relevant and admissible to establishing the presence of Fisher valves and asbestos gaskets and packing at Duke, and Fisher has shown no prejudice from its admission.

G. Trial Subpoena

Fisher argues that the Court should have quashed Plaintiff's trial subpoena of its corporate representative and that it was prejudiced because Duimstra was only available to testify in Plaintiff's case-in-chief and not in other phases of the trial.

The trial subpoena was proper. Fisher is a party to this action that has submitted to the jurisdiction of this Court and cannot quash a trial subpoena. Rule 45, SCRCP (allowing only non-parties to quash a trial subpoena). Fisher's status as nonresident corporations does not change the fact that it submitted to the jurisdiction of this Court by making a general appearance and litigating this case to trial. A general appearance constitutes a voluntary submission to the jurisdiction of the court. *See, e.g., Stickland v. Consol. Energy Prod. Co.*, 274 S.C. 554, 555, 265 S.E.2d 682, 683 (1980); *Brays Island Plantation, Inc. v. Harper*, 245 S.C. 399, 405, 140 S.E.2d 781, 784 (1965).

Fisher had ample opportunity to present Duimstra's testimony. Fisher's counsel questioned Duimstra at length. (TT 1/16/19, at 34-68). Duimstra's apparent scheduling conflicts that

prevented him from appearing on Fisher's behalf later in the trial are not due to any actions of Plaintiff or this Court. Fisher is not entitled to a new trial on this basis.

H. Punitive Damages Instructions

The Court finds no merit in Fisher challenges to the Court's punitive damages instructions. First, the jury did not base punitive damages on its breach of warranty finding. The jury found not only that Fisher was negligent, but that Fisher had engaged in conduct that was willful, wanton, or reckless. This is indisputably the proper standard for imposition of punitive damages. *Clark v. Cantrell*, 339 S.C. 369, 381, 529 S.E.2d 528, 534 (2000). Fisher presents no authority in support of its contention that the jury should be instructed that punitive damages are not available in a breach of warranty case. The case it relies on, *Rhodes v. McDonald*, 345 S.C. 500, 548 S.E.2d 220 (Ct. App. 2001), did not involve a negligence action and did not hold that juries should be instructed regarding the causes of action that give rise to a claim for punitive damages.

Second, the jury was properly allowed to consider harm to other parties and Fisher's entire net worth when deciding punitive damages. The United States Supreme Court has recognized that "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . ." *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007). A jury may consequently take into account harm to nonparties in determining reprehensibility. *Id.* at 357.

The South Carolina Supreme Court has approved the use of net worth evidence in assessing punitive damages. *Branham*, 390 S.C. at 239–40, 701 S.E.2d at 24–25 (2010). "Consideration of a defendant's net worth is well-rooted in the common law of punitive damages." *Id.* at 240. Net worth is, in fact, the only financial indicator that juries may be given. *Id.* A new trial is not warranted.

I. Thirteenth Juror Doctrine

Fisher asks the Court to grant a new trial under the thirteenth juror doctrine. “The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when [s]he is convinced that a new trial is necessitated on the basis of the facts in the case.” *Vinson v. Hartley*, 324 S.C. 389, 403–04, 477 S.E.2d 715, 722–23 (Ct. App. 1996). “Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge’s finding that justice has not prevailed.” *Id.*

The Court finds that the jury’s liability and damages findings were supported by the evidence and that a new trial is not warranted under the facts of this case. In making this determination, the Court incorporates its rulings on the other issues raised by Fisher in seeking JNOV and a new trial.

IV. Ruling on Motion for New Trial *Nisi Remittitur*

Fisher moves for a new trial *nisi remitter* with regard to the jury’s punitive damages award. A new trial *nisi remittitur* may be granted “when the verdict indicates the jury was unduly liberal in determining damages.” *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). “A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice.” *Id.*

“Compelling reasons must be given to justify invading the jury’s province by granting a new trial *nisi remittitur*.” *Proctor v. Dep’t of Health & Envtl. Control*, 368 S.C. 279, 320–21, 628 S.E.2d 496, 518 (Ct. App. 2006). The consideration for a motion for a new trial *nisi remittitur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. *Id.*

“In South Carolina, ‘punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future.’” *Gamble v. Stevenson*, 305 S.C. 104, 110, 406 S.E.2d 350, 354 (1991) (quoting *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964)). The amount of the punitive damages award is largely within the discretion of the jury, and, like the compensatory award, is entitled to substantial deference. *McCourt By and Through McCourt v. Abernathy*, 318 S.C. 301, 309-10, 457 S.E.2d 603, 608 (1995).

Nevertheless, punitive damages awards should be reviewed for compliance with the Due Process Clause. *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006). In *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), the South Carolina Supreme Court set forth three guideposts to be applied in conducting a post-judgment review of a punitive damages award: “(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135, 150-151 (2010). These guideposts incorporate the relevant factors set forth in *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991) and *BMW of North America v. Gore*, 517 U.S. 559 (1996). See *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185.

Reprehensibility is the most important consideration. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185. A number of factors are relevant to reprehensibility, including whether: “(i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial

vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.” *Id.*

At trial, there was evidence from which the jury could find Fisher’s conduct reprehensible. Glenn died a premature from mesothelioma at the age of 69, and, as the jury was instructed, had a life expectancy of an additional 14 years. (TT 1/24/19, at 204:13-17). The jury found that his death was caused by Fisher’s negligence and breach of implied warranty and that Fisher engaged in conduct that was willful, wanton, and reckless. The jury’s assessment is supported by the evidence of the devastating physical and emotional losses that Thomas Glenn and Rita Glenn have suffered and will suffer due to Fisher’s conduct.

Fisher argues that the ratio between the compensatory damages award and the punitive damages award requires reversal. Due process requires consideration of the ratio between the compensatory damages award, which represents the plaintiff’s actual or potential harm, and the punitive damages award. *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185. A single-digit ratio is generally thought to comport with due process. *Id.* The South Carolina Supreme Court has upheld verdicts with a 6.82 to 1 ratio, 3.75 to 1 ratio, 2.54 to 1 ratio, 9.96 to 1 ratio, and a 28 to 1 ratio. *Id.* at 593, 686 S.E.2d at 188 (collecting cases). In *Mitchell*, the Court remitted a punitive damages award from \$15 million to \$10 million so that it would be a 9.2 to 1 ratio. *Id.* at 594, 686 S.E.2d at 188.

In this case the jury awarded \$3 million in compensatory damages, and \$2.125 million in punitive damages. There is less than a 1:1 ratio of compensatory to punitive damages. The Court finds that this ratio comports with due process. Fisher’s motion for new trial *nisi remittitur* is denied.

V. Ruling on Motion for Setoff

Fisher is entitled to a set-off in the amount of Plaintiff's settlements with other defendants in this case. S.C. Code Ann. § 15-38-50 provides that, "[w]hen a release . . . is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) . . . it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater" S.C. Code Ann. § 15-38-50.

Defendants correctly assert that Plaintiffs have received settlement money from other defendants in this case. The Court has verified that Plaintiffs have received \$2,805,000 in pre-trial settlements. This is not the end of the matter, however. In determining setoff, the Court must take into account the allocation of these pre-trial settlements to the various claims that the Glens had or may have had at the time the settlement releases were executed.

In *Ellis v. Oliver*, 335 S.C. 106, 112-13, 515 S.E.2d 268, 271-72 (Ct. App. 1999), the Court of Appeals held that "when a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law." *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012). However, when the settlement involves compensation for an injury different from the one tried to verdict, there is no setoff as a matter of law. *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct. App. 1998).

Fisher is only entitled to "credit for the amount paid by another defendant who settles for the same cause of action." *Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 216, 734 S.E.2d 142, 145 (2012). When the settlement "is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the

factual determination of how to allocate the settlement between” the claims. *Smith*, 397 S.C. at 473, 724 S.E.2d at 191.

The claims tried to verdict in this matter were for survival, wrongful death, and loss of consortium. The jury awarded \$3,000,000 in compensatory damages against Fisher—\$1,000,000 for each cause of action.

The settlements received by Plaintiff included compensation only for wrongful death and survival. On October 26, 2017, the Court entered an Order Approving Wrongful Death and Survival Settlements that apportioned 90% of the settlement proceeds to wrongful death and 10% to survival. The order specified that this approval of apportionment applied to all future settlements. Fisher’s entitlement to a setoff does not arise as a matter of law, but is determined in relation to the allocation of settlement proceeds already made.

In accordance with *Rutland* and *Smith*, only the amounts received by Plaintiff in settlement for the wrongful death and survival claims should be considered when determining the setoff amount. The allocation of settlement proceeds between those two claims was approved by the Court long before trial as fair and reasonable. While Fisher now complains that there should be a different allocation, it had no objection at the time. The Supreme Court has noted that “[s]ettling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests. That fact alone is insufficient to justify . . . reapportionment for the sole purpose of benefitting [non-settling defendants].” *Riley v. Ford Motor Co.*, 414 S.C. 185, 196-97, 777 S.E.2d 824, 830-31 (2015).

Fisher may only receive a setoff for that portion of the wrongful death and survival damages already settled by other defendants. The setoff for wrongful death is 90% of the aggregate settlements of \$2,805,000, amounting to \$2,524,500, which exceeds the jury’s award of

\$1,000,000 damages for wrongful death. The wrongful death award is entirely eclipsed by the pre-trial settlements and Fisher owes zero for wrongful death damages.

The setoff for survival is 10% of the aggregate settlements of \$2,805,000, amounting to \$280,000. Given the jury's award of \$1,000,000 for survival damages, Fisher owes \$720,000 for survival damages.

There is no setoff for loss of consortium, as that claim was not settled pre-trial by any defendants. Fisher is responsible for the jury's \$1,000,000 loss of consortium award.

Fisher's total setoff is \$1,280,000 and it remains responsible for \$1,720,000 of the compensatory damages awarded by the jury, plus punitive damages.

VI. Conclusion

The Court DENIES Fisher's motion for judgment notwithstanding the verdict, new trial, and new trial *nisi remittitur*. The Court GRANTS in part Defendants' motion for setoff, and allows a setoff of \$1,280,000 against the jury's \$3,000,000 compensatory damages award. Judgment will be entered against Fisher in the amount of \$1,720,000 in compensatory damages and \$2,125,000 in punitive damages, for a total judgment of \$3,845,000, plus cost and interest.

AND IT IS SO ORDERED.

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

August _____, 2019
Columbia, South Carolina



Anderson Common Pleas

Case Caption: Rita Joyce Glenn , plaintiff, et al VS Air & Liquid Systems Corporation , defendant, et al
Case Number: 2015CP0401607
Type: Order/JNOV

IT IS SO ORDERED.

s/ Jean H. Toal #2758