THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-001600

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

v.

3M Company, f/k/a Minnesota Mining and Manufacturing Co.; Air & Liquid Systems Corporation, Individually and as Successor-In-Interest to Buffalo Pumps; Airgas USA, LLC; Aurora Pump; BW/IP Inc., a Subsidiary of Flowserve Corporation; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor By Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Products, Inc., f/k/a Carolina Gasket and Rubber Company, Inc.; Carboline Company; Crane Co. d/b/a Crane Chempharma & Energy d/b/a Aloyco, n/k/a Crane Energy Flow Solutions; Crosby Valve, Inc,; Dana Companies, LLC; Daniel International Corporation; Fisher Controls International, LLC.; Flowserve Corporation, Individually and as Successor in Interest to Anchor/Darling Valve Company; Flowserve Corporation, Individually and as Successor to Byron Jackson Pump Company; Fluor Daniel, Inc., f/k/a Daniel Construction Company, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; Goodyear Tire & Rubber; Goulds Pumps, Inc.; Grinnell LLC, f/k/a Grinnell Corp, f/k/a ITT Grinnell Corp., Individually and as Successor to Kennedy Valve Manufacturing Co., Inc.; Hajoca Corporation; Imo Industries, Inc., Individually and as Successor-in-Interest to De Laval Turbine, Inc.; Ingersoll Rand Company; ITT Corporation; John Crane, LLC; Linde LLC, a Delaware Limited Liability Company, formerly known as the BOC Group, Inc. and/or Airco, Inc.; MP Supply, Inc. f/k/a Mill Power Supply; Metropolitan Life Insurance Company, a

wholly-owned subsidiary of MetLife Inc.; Sepco Corporation; The J.R. Clarkson Company Solely as a Successor by Merger to Anderson Greenwood & Co., f/k/a Kunkle Valve Company, Inc.; The Sherwin- Williams Company; Trane U.S. Inc., f/k/a American Standard, Inc.; United Conveyor Corporation; United Seal & Rubber Company, Inc.; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; Velan Valve Corporation; Viking Pump, Inc.; and Weir Valves & Controls USA, Inc., Individually and as Successor in Interest to Atwood & Morrill Co., Inc., Defendants,

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

FINAL BRIEF OF APPELLANT

C. Mitchell Brown
A. Mattison Bogan
Nicholas A. Charles
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Appellant Fisher Controls International LLC

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STATEMENT OF THE CASE

Plaintiff Rita Joyce Glenn ("Plaintiff") filed the operative complaint on July 21, 2016, against forty-one defendants, including Appellant Fisher Controls International LLC ("Fisher"). (R. 62–63). Plaintiff alleged that her deceased husband, Thomas Harold Glenn ("Mr. Glenn"), developed mesothelioma from exposure to asbestos while working for Duke Power Company ("Duke"). (R. 68). Plaintiff asserted claims for negligence, strict liability, breach of implied warranty, and loss of consortium and sought compensatory and punitive damages. (R. 69–78). Trial was scheduled to begin on January 14, 2019, before The Honorable Jean H. Toal.

On December 28, 2018, Plaintiff moved to strike a tissue digestion study performed by Fisher's expert pathologist, Dr. Timothy Oury, and to preclude any evidence or testimony related to the tissue digestion study conducted on tissue remaining from the deceased. (R. 2734). Fisher opposed the motion. (R. 2825). On Friday, January 4, 2019, Plaintiff moved for a protective order precluding Dr. Oury's deposition. (R. 2783). The trial court entered an ex parte order granting the motion on January 7, 2019. (R. 3). The same day, Fisher filed a Rule 59(e) motion and response to Plaintiff's motion for a protective order, which the trial court immediately denied. (R. 5, 2855). The trial court held a pretrial hearing on January 9, 2019, and granted Plaintiff's motion to strike the tissue digestion study and exclude any evidence or testimony related to the study. (R. 102, 176–77). The trial court then entered a written order on January 11, 2019. (R. 7).

Six defendants began the trial: Fisher; Crosby Valve, LLC ("Crosby"); The J.R. Clarkson Company ("J.R. Clarkson"); Aurora Pump Company ("Aurora"); Carboline Company ("Carboline"); and John Crane, Inc. (R. 195–96). At the close of Plaintiff's case-in-chief, Fisher moved for directed verdict, which the trial court denied. (R. 1636–45, 2885). During trial, Fisher submitted proposed jury charges and a proposed verdict form, along with a motion requesting that the trial court adopt Fisher's proposed verdict form. (R. 2866, 2877, 3201). The trial court rejected

Fisher's proposed verdict form and declined Fisher's proposed jury charges addressing the sophisticated intermediary doctrine and intervening cause. (R. 1759–70, 1797–1804).

Aurora, J.R. Clarkson, and John Crane settled the case or were dismissed during trial, and only Fisher, Crosby, and Carboline tried the case to a verdict. (R. 3234). The jury rendered a verdict in favor of Plaintiff on her negligence and breach of implied warranty claims against Fisher and awarded $3,000,000 in compensatory damages. (*Id.*). The jury also found Fisher's conduct was willful, wanton, or reckless. (*Id.*). The jury returned a verdict in favor of Fisher as to Plaintiff's strict liability claim and in favor of Crosby and Carboline as to all of Plaintiff's claims. (*Id.*). Plaintiff and Fisher proceeded to a punitive damages phase, and the jury awarded Plaintiff $2,125,000 in punitive damages. (R. 2495–96, 3234).

On February 4, 2019, Fisher moved for judgment notwithstanding the verdict ("JNOV") or, in the alternative, a new trial. (R. 2931). Fisher also moved to set off the amounts Plaintiff received in settlements from the damages award against Fisher. (R. 2922). The trial court denied Fisher's motions for JNOV or a new trial. (R. 13). The trial court also denied in part and granted in part Fisher's motion for setoff. (*Id.*). After trial, Plaintiff moved for sanctions against Fisher based on a sworn statement from Dr. Oury that Fisher submitted as an offer of proof at trial to preserve its appellate rights. (R. 2916). The trial court granted Plaintiff's motion for sanctions. (R. 54).

STATEMENT OF FACTS

I. Background

Mr. Glenn worked for Duke from 1970 through 1996, primarily as an instrumentation worker at the Oconee Nuclear Station ("Oconee"). Mr. Glenn worked around other tradesmen tearing out asbestos insulation and gaskets, which released asbestos fibers into the air. *See* (R.

1090–91, 1193–97, 1678–82, 1691, 1700, 1717–19). Mr. Glenn was diagnosed with mesothelioma and died in February 2015. (R. 64).

Fisher, which has its headquarters in Marshalltown, Iowa, manufactures and sells process control valves used in industrial facilities, including nuclear power plants like Oconee. (R. 680, 692–95). During the time period at issue, Fisher built its valves to Duke's specifications, incorporated the type of internal gaskets and packing specified by Duke, and shipped the valves to Duke. (R. 717–18). Fisher valves were among thousands of different types of equipment and materials, made by numerous different manufacturers, present at the facilities where Mr. Glenn worked. (R. 1090–91, 1199–1201, 1701–07, 1717–19).

II. Pretrial Issues

A. Motion to Exclude Plaintiff's Expert Testimony

Prior to trial, Fisher moved to exclude the testimony of Plaintiffs' expert witnesses, Dr. Arthur Frank and Dr. Arnold Brody, on the grounds that the experts intended to present opinions that "each and every exposure" to asbestos causes mesothelioma. *See* (R. 2710). Fisher argued that no published or peer-reviewed literature supports the theory that "each and every exposure" to asbestos causes mesothelioma and the theory conflicts with substantial factor causation requirements. (*Id.*). The trial court denied the motion. (R. 183–85).

B. Dr. Oury's Tissue Digestion Study

Fisher and several other defendants retained pathologist Dr. Timothy Oury as a medical expert to review pathology slides from Mr. Glenn's lungs.[1] (R. 3245–46). On November 30, 2018, Fisher's counsel received a report from Dr. Oury dated November 28, 2018, in which Dr. Oury opined—based on his review of the pathology slides—that Mr. Glenn's mesothelioma "may be an

[1] Counsel for several other defendants served as liaison and coordinated with Dr. Oury on behalf of all defendants who retained him. (R. 3245–46).

asbestos associated mesothelioma," but his analysis "suggest[ed] that prior asbestos exposure may not have contributed to his mesothelioma." (R. 2790, 3245–46). Dr. Oury explained "there is plenty of lung tissue to perform digestion studies to more rigorously determine if asbestos did or did not contribute to his tumor." (R. 2790). Fisher's counsel learned for the first time when it received the report that Dr. Oury believed it was necessary to subject Mr. Glenn's lung tissue to testing" to determine whether Mr. Glenn's mesothelioma was caused by asbestos. (R. 3245–46).

Fisher's counsel contacted Emory University, which had custody of the tissue, in an effort to have some of the tissue sent to Dr. Oury for testing. (R. 2835, 3245–46). On December 6, 2018, Fisher's counsel contacted Plaintiff's counsel to discuss conducting a tissue digestion study, but Plaintiff's counsel objected to the study absent a court order. (R. 2738). Fisher then filed a motion requesting that the court allow it to perform the testing. (R. 2708). In response to the motion, Plaintiff's counsel informed the trial court and the parties that they "do not necessarily oppose doing a digestion process" but opposed the testing "until such time as, at a minimum, a protocol for the digestion and dividing the tissue could be worked out between experts for the plaintiffs and the defense." (R. 2837). Instead of a court order allowing testing, Plaintiff's counsel "propose[d] that the Court direct the parties to work together to determine a division of tissue protocol so that neither side is prejudiced by one party making unilateral decisions." (*Id.*).

Fisher's counsel immediately began communicating with Plaintiff's counsel in an effort to reach an agreement about the testing. (R. 2841, 2843). Plaintiff's counsel indicated their desire to reach an agreement about the protocol Fisher's experts would use for the division and digestion of tissue. (R. 2841) ("[W]e need to send the protocol to our guy and get him to sign off. Then you can do the division of tissue and send. The idea is that we get the mirror image of what you get. Make sense?"). Fisher's counsel complied with Plaintiff's counsel's request to see the protocol,

and Dr. Oury sent the tissue to the RJ Lee Group with instructions to "only use ½ of the [testable] material . . . so there will still be material if someone else wants to perform a digestion study." (R. 2843, 2846, 2849). Fisher's counsel also scheduled Dr. Oury's trial preservation deposition for January 8, 2019, because Plaintiff had not noticed a discovery deposition. (R. 2846).

On December 11, 2018 at 3:25 p.m., Plaintiff's counsel clarified that they would not agree to the protocol; rather, they wanted an agreement that the tissue blocks would be split in half and half of each block would be provided to them:

> All-
>
> I think we had a misunderstanding about the protocol. We are never going to agree on the protocols for the digestion. The reasons for this are multiple. What I was getting at was how we split the tissue. Can we agree that the tissue will be split evenly. That is if you have one block we get half of that block. If there are two blocks, we get half of each block.
>
> As long as this is agreeable, then have the blocks split and send them to us.
>
> Thanks.

(R. 2851). Fisher's counsel Yancey McLeod agreed with Mr. Branham's proposal at 3:41 p.m. on the same day: "Trey, yes, that is the plan. Thanks." (*Id.*). Fisher's counsel believed these emails confirmed the parties' existing agreement to have the tissue divided evenly. (R. 3246). The trial court relied on a subsequent email sent by Plaintiff's counsel Jonathan Holder two minutes later in which Mr. Holder attempted to add a requirement that a "neutral third party" divide the tissue. (R. 9). However, Fisher proceeded based on its understanding that the parties had agreed only to an even division of the tissue as Mr. Branham and Mr. McLeod confirmed in their December 11 emails.

Drew Van Orden from the RJ Lee Group divided the tissue the same day in accordance with Fisher's instructions to divide the tissue evenly. (R. 2792, 2853–54, 2794–95). Dr. Oury

performed the digestion study and issued a supplemental report explaining the study revealed "elevated levels of only amosite asbestos fibers" and asbestos bodies, which "indicates that prior exposure to amosite asbestos is the cause of Mr. Glenn's mesothelioma." (R. 2792). Amosite is an asbestos fiber-type commonly associated with insulation; it is not associated with Fisher products.[2] (R. 483, 719).

Plaintiff moved to strike Dr. Oury's tissue digestion and any evidence or testimony based on the tissue digestion on December 28, 2018, less than a month before trial, arguing the tissue had not been divided according to the parties' agreement and Plaintiff was prejudiced by having to hire a new expert. (R. 2734). Fisher opposed the motion, asserting the tissue digestion evidence was critical to the issue of causation because it "revealed that [Mr. Glenn's] lungs were full of amosite asbestos fibers, an asbestos fiber-type not associated with any of [Fisher's] products." (R. 2827). On Friday, January 4, 2019, four days before Dr. Oury's deposition, Plaintiff moved for a protective order precluding Dr. Oury's deposition. (R. 2783). The trial court entered an ex parte order granting the motion the following business day at 9:02 a.m. (R. 3). The same day, Fisher filed a Rule 59(e) motion in response to Plaintiff's motion and the trial court's ex parte order, which the trial court denied only hours later. (R. 5, 2855).

On January 8, 2019, Fisher took a sworn statement from Dr. Oury, in a question-and-answer format with a court reporter present, to use as an offer of proof of his opinions about the tissue digestion if the trial court granted Plaintiff's motion to strike. (R. 3334). The sworn statement provided the same opinions contained in Dr. Oury's December 18, 2018 report. (R. 2790, 3334).

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[2] Fisher did not make, sell, supply, or recommend insulation—whether asbestos-containing or not—and its products function with or without insulation. (R. 719). Mr. Glenn's former coworkers testified that pipe insulation was the primary source of dust at the Oconee plant. *See* (R. 1084–90).

At a pretrial hearing on January 9, 2019, the trial court and the parties debated whether Fisher and Plaintiff reached an agreement to divide Mr. Glenn's tissue for the tissue digestion study. (R. 117–77). The trial court found the parties had not reached an agreement and orally granted Plaintiff's motion to preclude any testimony related to the tissue digestion study, but it expressly stated it was "not assigning any bad faith to anybody in connection with this." (R. 172, 176–77). Fisher's counsel received the transcript of Dr. Oury's sworn statement the day after the hearing. (R. 3000). The trial court entered a written order memorializing its decision to exclude the tissue digestion evidence on January 11, 2019. (R. 7).

III. The Trial

The parties proceeded to trial on January 14, 2019. (R. 195). At the beginning of trial, at Plaintiff's request, the trial court reaffirmed its ruling prohibiting any evidence related to the tissue digestion: "I will not allow any information to be discussed with the jury about digestion tests." (R. 198-202). In compliance with the trial court's ruling, nobody mentioned tissue digestions or presented any evidence related to Dr. Oury's study to the jury. Fisher did not call Dr. Oury to testify because the exclusion of all tissue digestion-related evidence eliminated the significance of Dr. Oury's admissible testimony. (R. 2195, 2790).

Plaintiff focused her exposure evidence primarily on Mr. Glenn's work at Oconee by relying on testimony from five individuals who worked at Oconee. For example, James Freeman testified that he worked as an instrumentation worker and worked around other employees scraping flange gaskets off valves, disturbing insulation, and performing other types of work. (R. 1073–78). Several other former Duke workers testified that they sometimes worked around Fisher valves; however, they also worked around numerous other types of equipment and materials that may have exposed them to asbestos, including insulation, asbestos-containing cement and coatings, valves,

pumps, boilers, and turbines. *See, e.g.*, (R. 1090–91, 1193–97, 1199–1201, 1678–82, 1691, 1700–07, 1717–19).

Dr. Frank and Dr. Brody testified at trial. (R. 356, 1253). Neither expert had examined Mr. Glenn or analyzed the extent of his exposure to asbestos. (R. 434–35, 1357–58). Both testified generally that all exposures to asbestos cause mesothelioma and answered hypotheticals from Plaintiff's counsel in which they assumed certain amounts of asbestos exposure and opined that, in those hypothetical scenarios based on only some of the coworkers' testimony, Fisher caused Mr. Glenn's mesothelioma. *See* (R. 452–53, 490–91, 1336–39). Plaintiff did not present any testimony from an industrial hygienist or other expert who could demonstrate the actual dose of asbestos from any Fisher product to which Mr. Glenn was exposed while working for Duke. Fisher, however, presented specific testimony from an industrial hygienist that Mr. Glenn's cumulative asbestos exposure from Fisher valves was well below permissible limits. (R. 1435–36). Mr. Glenn's exposures from his or others' handling of friable asbestos insulation, in contrast, were "significant" and in excess of relevant standards and guidelines. (R. 1436).

Fisher submitted proposed jury instructions to the trial court. (R. 3201). The trial court held a charge conference during trial and declined to give two of Fisher's requested instructions addressing the sophisticated intermediary doctrine and intervening cause because it found Fisher did not warn Duke and Duke's actions in failing to warn its employees and using asbestos-containing insulation were foreseeable. (R. 1759–70, 1797–1804).

Fisher also submitted a motion requesting that the trial court adopt its proposed verdict form. (R. 2867, 2878). The proposed verdict form required the jury to apportion fault among multiple potential tortfeasors, including the defendants remaining at trial, some settled or bankrupt entities which the evidence showed may have been responsible for Mr. Glenn's asbestos exposure,

Duke, and others. (R. 2878). The trial court rejected Fisher's request to have the jury apportion fault among other potential tortfeasors and declined to use Fisher's proposed verdict form. (R. 1812–13).

Near the end of the trial, prior to the close of the defense's evidence, Fisher requested to make Dr. Oury's sworn statement a court's exhibit as an offer of proof to preserve the exclusion of tissue digestion evidence as an issue for appeal. (R. 2145–47). The trial court made the sworn statement a court's exhibit. (*Id.*). The trial court then stated that Fisher had violated court orders and discovery rules. (R. 2148–49). The trial court suggested it would grant sanctions if requested to do so by Plaintiff. (R. 2214).

IV. The Verdict and Post-Trial Issues

The jury returned a verdict for Plaintiff on her negligence and breach of implied warranty claims against Fisher and awarded $3,000,000 in compensatory damages. (R. 3234–36). The jury also found Fisher's conduct was willful, wanton, or reckless. (R. 3236). The jury found in favor of Fisher as to Plaintiff's strict liability claim. (R. 3235). After the verdict, but before the trial court discharged the jury, Fisher argued the verdict finding it liable in negligence but not in strict liability was inconsistent because negligence requires proof of the same elements as strict liability, plus an additional element of fault. (R. 2422–23). Rather than instruct the jury to return a consistent verdict, the trial court found the verdict was *not* inconsistent and discharged the jury. (*Id.*).

Because the jury found Fisher's conduct to be willful, wanton, or reckless, the trial proceeded to a punitive damages phase. (R. 2438, 3236). Fisher requested that the trial court instruct the jury that punitive damages cannot be awarded for a breach of warranty claim, but the trial court declined. (R. 2449–51, 2454, 2470–74). The jury awarded Plaintiff $2,125,000 in punitive damages. (R. 2495–96, 3237).

Fisher moved for JNOV or, in the alternative, a new trial. (R. 2931). The trial court denied the motions in full. (R. 13). Plaintiff settled with numerous defendants before and during trial. After trial, Fisher moved to set off the settlement amounts Plaintiff received pursuant to South Carolina Code section 15-38-50 and the trial court's equitable powers. (R. 2922). Fisher also requested that the trial court order Plaintiff to produce her settlement agreements so Fisher or the trial court may determine the terms and scope of the releases to determine the proper allocation of funds for purposes of the setoff. (R. 2928–29). At the time Fisher filed its setoff motion, Fisher did not know the amount or allocation of Plaintiff's numerous settlements. *See* (R. 3247–48). In response to Fisher's motion, Plaintiff claimed she had received $2,805,000 in total settlements and unilaterally allocated the funds 90% to the wrongful death claim, 10% to the survival claim, and 0% to the loss of consortium claim. (R. 3103–04).[3] At the post-trial motions hearing, Plaintiff's counsel stated that the settlement agreements do not contain any agreed-upon allocation of the settlement funds. (R. 2627). The trial court directed Plaintiff's counsel to provide the total amount of settlements with other defendants, but it did not review any settlement agreement or release and did not seek any proof of the settlement amounts. (R. 2620–21).

After learning of Plaintiff's unilateral allocation, Fisher argued the trial court must reallocate the settlement funds to protect Fisher's right to setoff and prevent a double recovery, and must order Plaintiff to produce her settlement agreements. (R. 3117–21). The trial court rejected Fisher's arguments and applied Plaintiff's unilateral allocation to the jury verdict, thus requiring Fisher to pay $1,720,000 in compensatory damages. (R. 50–51).

[3] Although the trial court, at Plaintiff's request, had previously entered an order approving Plaintiff's allocation in October 2017 (more than a year prior to trial), Fisher was not notified that this order was entered. (R. 3247–48).

V. Plaintiff's Motion for Sanctions

After trial, Plaintiff moved for sanctions based on Fisher's proffer of Dr. Oury's sworn statement. (R. 2916). Plaintiff argued Fisher violated the order quashing Dr. Oury's deposition and claimed she was prejudiced because she did not know Fisher had recorded the already-excluded statement for appellate preservation purposes. (R. 2920). After a hearing, the trial court orally granted Plaintiff's motion. (R. 2658–63). Plaintiff then submitted a proposed order granting sanctions and a proposed order addressing Fisher's post-trial motions. (R. 3146, 3238). The proposed order addressing Fisher's post-trial motions purported to retroactively change the grounds on which the trial court excluded the evidence. Specifically, despite the trial court's prior ruling excluding the tissue digestion evidence because the parties lacked an agreement and its prior finding that the parties did not act in bad faith, the proposed order stated the bases for excluding the evidence were Fisher's purported 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," because the evidence was cumulative, and because Dr. Oury "found but dismissed a tremolite asbestos fiber." (R. 3175–76). The trial court entered the proposed orders over Fisher's objections. (R. 13, 54).

ARGUMENT

I. The trial court erred in failing to have the jury correct the inconsistent negligence and strict liability verdicts.

Fisher is entitled to a new trial because the jury returned an inconsistent verdict and the trial court failed to instruct the jury to correct the inconsistency before discharging the jury. The jury's finding in favor of Fisher on Plaintiff's strict liability claim and in favor of Plaintiff on her negligence claim is inconsistent as a matter of law because the elements of Plaintiff's strict liability

claim are subsumed within her negligence claim. (R. 2422, 3234–35). Fisher properly preserved the issue by raising the inconsistency to the trial court before the jury was discharged, *see, e.g.*, *Combs v. Hahn*, 516 S.E.2d 506, 509–10 (W. Va. 1999), but the trial court rejected Fisher's argument and found the verdict was consistent: "[E]ach of these causes of action stands on its own, and I don't see any inconsistency with finding a verdict on negligence and not finding a verdict on - - or finding a verdict on either of the other two." (R. 2422–23). The trial court's failure to instruct the jury to correct the inconsistency entitles Fisher to a new trial.

To recover under any products liability theory, a plaintiff is required to prove three elements: (1) that he was injured by the product; (2) that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant; and (3) that the injury occurred because the product was in a defective condition unreasonably dangerous to the user. *Branham v. Ford Motor Co.*, 390 S.C. 203, 210, 701 S.E.2d 5, 8 (2010). A strict liability claim requires a plaintiff to prove only those three elements. *See Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539–40, 462 S.E.2d 321, 326 (Ct. App. 1995). A negligence claim requires a plaintiff to prove the same three strict liability elements *plus* an additional element of fault. *See Branham*, 390 S.C. at 210, 701 S.E.2d at 8.[4] If a plaintiff fails to show "in the first instance" that a product is "in a defective condition unreasonably dangerous to the user," then the "fault-based element is of no moment." *Branham*, 390 S.C. at 210, 701 S.E.2d at 9.

Plaintiff alleged Fisher was *negligent* based on a defective design of Fisher's products, Fisher's failure to warn of dangers allegedly associated with its products, and Fisher's failure to

[4] *See also Witt v. Norfe, Inc.*, 725 F.2d 1277, 1279 (11th Cir. 1984); *Werner v. Upjohn Co.*, 628 F.2d 848, 860 (4th Cir. 1980); *Halvorson v. Am. Hoist & Derrick Co.*, 240 N.W.2d 303, 307 (Minn. 1976), *abrogated on other grounds by Holm v. Sponco Mfg., Inc.*, 324 N.W.2d 207 (Minn. 1982); *Trejo v. Johnson & Johnson*, 220 Cal. Rptr. 3d 127, 140 (Ct. App. 2017).

test its products. (R. 69–70). Plaintiff's *strict liability* claim, however, was based solely on the allegation that Fisher's products "were in a defective condition unreasonably dangerous to the user." (R. 71). Because Plaintiff was required to prove Fisher's products were in a defective condition unreasonably dangerous to the user for any theory of products liability, the elements of her strict liability claim were subsumed within the elements of her negligence claim. The jury's finding in favor of Fisher on Plaintiff's strict liability claim is a finding that Fisher's product was *not* in a defective condition unreasonably dangerous to the user. No other possible construction of the jury's strict liability finding exists.

The trial court's finding conflicts with the Supreme Court's opinion in *Branham*. In *Branham*, the trial court dismissed a strict liability claim "on the ground that the [product at issue] was not as a matter of law in a defective condition unreasonably dangerous to the user at the time of manufacture." 390 S.C. at 210, 701 S.E.2d at 8. Although the plaintiff also asserted a negligence claim based on a failure to test the product, the Supreme Court held the finding that the product was not defective precluded any products liability negligence claim as a matter of law. *Id.* at 210, 701 S.E.2d at 8. Moreover, the Supreme Court cautioned that the holding in *Bragg v. Hi-Ranger* that "strict liability and negligence are not mutually exclusive theories of liability" should not be read broadly. *Id.* at 211, 701 S.E.2d at 9.

Here, after erroneously finding the verdict was not inconsistent at trial, the trial court issued an erroneous written order denying Fisher a new trial based on *Bragg*. (R. 39–40). The trial court found Fisher did not show "that the jury's finding on strict liability was due to the absence of an element shared by the companion negligence claim in this case." (R. 40). The trial court did exactly what the Supreme Court cautioned against in *Branham*—it found that strict liability and negligence claims are not mutually exclusive and denied Fisher's motion for a new trial without analyzing

whether the claims in this case depended on a common element. (R. 39–40). They did. A jury cannot find Fisher is not liable on a strict liability theory—thus, necessarily finding Fisher's products were not defective—while simultaneously finding Fisher liable under a different theory that *also requires* a finding that the products *were defective*. The trial court erred by failing to have the jury correct the inconsistency, and Fisher is therefore entitled to a new trial. *See Camden v. Hilton*, 360 S.C. 164, 173–74, 600 S.E.2d 88, 92–93 (Ct. App. 2004) ("The authority of a circuit court judge to correct, modify, or interfere with the verdict of a jury in a case properly triable by jury is embraced in and limited to the power to grant new trials.").

II. The trial court erred in failing to exclude Plaintiff's experts' unreliable "every exposure" opinion.

The trial court erred in admitting Plaintiff's experts' opinions that "each and every exposure" to asbestos causes mesothelioma. The exclusion of Plaintiff's expert testimony eliminates the necessary evidence of proximate cause to prove Plaintiff's claims and entitles Fisher to judgment as a matter of law. In the alternative, the trial court's evidentiary error in admitting improper expert testimony at least entitles Fisher to a new trial.

Although the admission or exclusion of expert testimony is within the trial court's discretion, an appellate court will reverse the trial court's decision if the trial court abused its discretion. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25–26, 609 S.E.2d 506, 509 (2005). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Id.* at 26, 609 S.E.2d at 509. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Id.*

A. An asbestos plaintiff must prove the decedent's exposure to asbestos from a specific defendant's products was a substantial cause of his mesothelioma.

A products liability plaintiff must prove 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 plaintiff must prove the decedent's asbestos exposure attributable to a particular defendant constitutes substantial causation by satisfying the "frequency, regularity, and proximity" test. *Henderson v. Allied-Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007) ("To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the Plaintiffs actually worked." (quoting *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986)); *see also Scapa Dryer Fabrics, Inc. v. Saville*, 16 A.3d 159, 163 (Md. 2011) ("[T]he 'frequency, regularity, proximity' test . . . is the common law evidentiary standard used for establishing substantial-factor causation . . . .").

Substantial factor causation requires more than proof a decedent 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."); *McIndoe v.*

Huntington Ingalls Inc., 817 F.3d 1170, 1177 (9th Cir. 2016). Thus, although short exposures may satisfy the standard if they are the only exposures, a plaintiff cannot satisfy her burden by merely showing "above background" exposure to a particular product if significant evidence of other exposures exists. *See id.*; *see also, e.g.*, *Lindstrom v. A-C Prod. Liab. Tr.*, 424 F.3d 488, 493 (6th Cir. 2005), *abrogated on other grounds by Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (2019) ("The requirement . . . is that the plaintiff make a showing with respect to *each* defendant that the defendant's product was a substantial factor in plaintiff's injury.").

B. Plaintiff's experts' opinions that Mr. Glenn's alleged exposure to asbestos from Fisher products was a substantial factor in his development of mesothelioma are unreliable and inadmissible.

Plaintiff presented proximate causation testimony from two medical causation experts: Dr. Brody and Dr. Frank. Both experts testified that every asbestos exposure contributes to a person's cumulative dose that causes mesothelioma and, therefore, all exposures are the cause of his mesothelioma. *See* (R. 452–53, 490–91, 1336–39). These opinions are inadmissible because they are unreliable and inconsistent with Plaintiff's burden of proof as a matter of law.

Rule 702 of the South Carolina Rules of Evidence governs the admissibility of expert testimony: "If 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." Before allowing expert testimony under Rule 702, a trial court must determine whether the substance of the testimony is reliable. *See Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012); *Watson v. Ford Motor Co.*, 389 S.C. 434, 446–47, 699 S.E.2d 169, 175–76 (2010). If an expert's testimony is scientific, the trial court must analyze four factors to determine its reliability: (1) the publications and peer view 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. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). Moreover, all evidence is also subject to a Rule 403 balancing test. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .").

Plaintiff's experts' opinions are unreliable and inadmissible under Rule 702, Rule 403, and *Council*, and the trial court therefore erred in admitting the opinions. Dr. Frank and Dr. Brody both testified that all asbestos exposures above background make up a person's cumulative dose, and the cumulative dose is a substantial factor in causing mesothelioma. (R. 452–53, 490–91, 1297, 1303–05, 1362). At Plaintiff's request, Dr. Frank assumed "years" of "regular or routine" and—"in terms of proximity"—"close" exposure ("from elbow to elbow, to ten feet") to Fisher valves and opined that the exposure was a substantial factor in causing Mr. Glenn's mesothelioma. (R. 1336–37). Dr. Frank then assumed, at Plaintiff's request (while conceding the assumption was "not real life"), that those exposures were Mr. Glenn's only exposures and opined that the exposures caused Mr. Glenn's mesothelioma. (R. 1336). These opinions are unreliable and should have been deemed inadmissible.

First, the "every exposure" or "cumulative exposure" theory is unreliable because it does not satisfy any of the *Council* factors. *See Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 846 (E.D.N.C. 2015) (rejecting the "each and every exposure" theory as unreliable because it "cannot be tested, has not been published in peer-reviewed works, and has no known error rate"); *Smith v. Ford Motor Co.*, No. 2:08-CV-630, 2013 WL 214378, at *5 (D. Utah Jan. 18, 2013) ("[A]n expert's 'any exposure theory is, at most, scientifically-grounded speculation: an untested and

potentially untestable hypothesis.'" (quoting *Butler v. Union Carbide Corp.*, 712 S.E.2d 537, 552 (Ga. Ct. App. 2011))). The theory is inadmissible on this ground alone.

Second, regardless of whether the "cumulative dose" theory is a valid scientific fact, as the trial court found, (R. 28–29), it is legally improper because it evades the required legal standard of proof and invites the jury to find causation based on an improper standard. *See Haskins*, 2017 WL 3118017, at *6 (finding the "each exposure" or "cumulative exposure" theory "evaluate[s] causation in a manner that is inconsistent with the appropriate legal standard"); *McIndoe*, 817 F.3d at 1177; *Smith v. Ford Motor Co.*, 2013 WL 214378, at *4. Moreover, the experts' opinions must be based on the specific facts of *this* case, *Krik v. Crane Co.*, 76 F. Supp. 3d 747, 753 (N.D. Ill. 2014), and whether a decedent's asbestos exposures to a certain manufacturer's product are a substantial cause of his mesothelioma must be evaluated in light of the decedent's other exposures, *see McIndoe*, 817 F.3d at 1177; *Haskins*, 2017 WL 3118017, at *8. This analysis necessarily requires Plaintiff's experts to draw distinctions between Mr. Glenn's dose of asbestos from Fisher products and his overall dose. *See id.* Plaintiff's experts failed to draw these distinctions or engage in any such analysis. To the contrary, the experts testified that if an exposure is "above background," it is causal.

For example, Dr. Frank's testimony that, in isolation, Mr. Glenn's exposure to Fisher valves is a substantial cause undermines the legal standard by allowing Plaintiff to assert that any exposure that *might* cause mesothelioma is a substantial factor. (R. 1362). Rather than establishing the facts of Mr. Glenn's injuries, Dr. Frank begins with a legal conclusion that the cumulative dose was a substantial factor and extends that legal conclusion to each exposure allegedly making up Mr. Glenn's cumulative dose. He rules all exposures "in" solely because they cannot be ruled "out." *See Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 677 (7th Cir. 2017) (excluding Dr. Frank's

cumulative exposure testimony because it "does not rely upon any particular dose or exposure to asbestos, but rather [concludes that] all exposures contribute to a cumulative dose," which "improperly shifts the burden to the defendants to disprove causation and nullifies the requirements of the 'substantial factor' test"); *Smith v. Ford Motor Co.*, 2013 WL 214378, at *5.[5] The testimony fails to account for the true evidence of Mr. Glenn's exposures to asbestos. Plaintiff's experts did not contrast the evidence that the Fisher exposures happened less frequently and accounted for only a small proportion of Mr. Glenn's numerous exposures in their determination that the Fisher exposures constituted a substantial factor in Mr. Glenn's disease.[6] The opinions create the type of unbounded liability rejected by the Supreme Court in *Henderson*. *McIndoe*, 817 F.3d at 1177; *Lindstrom*, 424 F.3d at 493.

The trial court also erred in declining to exclude the opinions under Rule 403 because the probative value of the opinions is substantially outweighed by the danger of unfair prejudice to Fisher. *See* Rule 403, SCRE. The opinions invite the jury to short-circuit any meaningful deliberations as to specific causation and find Fisher liable because every exposure causes mesothelioma. *See Yates*, 113 F. Supp. 3d at 850 (excluding opinions similar to Dr. Frank's and explaining "given the potential persuasiveness of expert testimony, proffered evidence that has a greater potential to mislead than to enlighten should be excluded"); *Smith v. Ford Motor Co.*, 2013 WL 214378, at *6 (holding a plaintiff's expert's "no safe level/every exposure" theory was

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[5] *See also Krik*, 76 F. Supp. 3d at 752–53 ("The primary basis for the 'Any Exposure' theory seems to be that [the plaintiff's] experts cannot rule out that a single dose of asbestos causes injury. From this, they conclude that any and all exposure to asbestos is necessarily harmful. *This is not an acceptable approach for a causation expert to take.*" (emphasis added)).

[6] *See, e.g.*, (R. 890–91) (testifying Mr. Glenn would have been near Fisher valves only two to three times per month, and some of those occasions did not involve gasket or packing work); (R. 1075–76, 1090) (testifying insulation was the primary source of dust); (R. 1708–32) (testifying about potential exposures to "hundreds" of other products).

inadmissible under Rule 403 and noting "the growing number of published opinions from other courts that have reached a similar result: that the every exposure theory as offered as a basis for legal liability is inadmissible speculation that is devoid of responsible scientific support").[7] Therefore, the trial court erred in allowing this unreliable and inadmissible testimony.

In *Haskins*, a South Carolina federal district court excluded expert opinions similar to the opinions in this case. 2017 WL 3118017, at *5–6. The court found the opinions "require[d] very little analysis" because they "evaluate causation in a manner that is inconsistent with the appropriate legal standard." *Id.* at *6. Therefore, the court found the opinions were "essentially irrelevant, and any probative value they may have is easily outweighed by their tendency to confuse or mislead the jury" under Rule 403. *Id.* The court also excluded the opinions because they were "not based on a meaningful, defendant-specific analysis of intensity, frequency, and regularity of [the plaintiffs'] exposures to defendant's products," and therefore could not be used to support a finding of causation. *Id.* at *8 & n.11.

Like the opinions in *Haskins*, Plaintiff's experts' opinions were not based on a meaningful analysis of causation specific to Fisher. These opinions were inconsistent with the appropriate legal standard and useless to the jury. Instead, they served merely to confuse or mislead the jury. Without the opinions, Plaintiff lacked evidence of specific causation, and Fisher is entitled to JNOV or, in the alternative, a new trial.[8]

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[7] *See also Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196 (W.D. Wis. 2016); *Comardelle v. Pa. Gen. Ins. Co.*, 76 F. Supp. 3d 628, 634 (E.D. La. 2015); *Sclafani v. Air & Liquid Sys Corp.*, 14 F. Supp. 3d 1351, 1356 (C.D. Cal. 2014); *Anderson v. Ford Motor Co.*, 950 F. Supp. 2d 1217, 1225 (D. Utah 2013); *Bell v. Foster Wheeler Energy Corp.*, No. CV 15-6394, 2016 WL 5847124, at *3 (E.D. La. Oct. 6, 2016).

[8] To the extent the trial court admitted the opinions on the ground that they have been admitted in other cases or are supported by expert testimony in other cases, the trial court's decision was

III. The trial court erred in failing to charge the jury on the sophisticated intermediary doctrine, intervening cause, and the unavailability of punitive damages for a breach of warranty claim.

The trial court erred in refusing to charge the jury on the sophisticated intermediary doctrine and intervening cause, and in refusing to charge the jury during the punitive damages phase that it cannot award punitive damages for a breach of warranty claim.

A trial court must charge the current and correct law of South Carolina. *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 362, 725 S.E.2d 112, 120 (Ct. App. 2012); *see also McCourt v. Abernathy*, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995). In reviewing the propriety of jury charges, an appellate court "considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial." *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013). "A jury charge is correct if, when read as a whole, the charge adequately covers the law." *Id.* at 90–91, 747 S.E.2d at 448. "An erroneous jury charge will not result in a verdict being reversed unless the charge prejudiced the appellant's case." *Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 520, 629 S.E.2d 675, 678 (Ct. App. 2006). The trial court's failure to charge the current and correct law prevented Fisher from maintaining its defenses to Plaintiff's claims, and Fisher is therefore entitled to a new trial.

A. The trial court erred in refusing to charge the jury on the sophisticated intermediary doctrine and intervening cause.

Fisher submitted proposed jury charges during trial and requested that the trial court charge the jury on the sophisticated intermediary doctrine and intervening cause. *See* (R. 3213–14) (Charge #16); *see also* (R. 3223–24) (Charge #27). The trial court denied Fisher's request and did not charge either doctrine.

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erroneous. *See Krik*, 76 F. Supp. 3d at 753 ("[T]he Court must base its opinion on the facts and testimony presented in *this* case, rather than on the testimony of experts in other cases.").

This Court adopted the sophisticated intermediary doctrine in 1995. *Bragg*, 319 S.C. at 550, 462 S.E.2d at 332 (affirming a trial court's decision to charge the "sophisticated user defense"). The sophisticated intermediary doctrine is based on the principle that a manufacturer "should be permitted to rely on downstream suppliers to provide the warning." *Webb v. Special Elec. Co.*, 370 P.3d 1022, 1034 (Cal. 2016). The sophisticated intermediary doctrine allows a seller to "discharge its duty to warn end users about known or knowable risks in the use of its product" if it (1) "provides adequate warnings to the product's immediate purchaser, or sells to a sophisticated purchaser that it knows is aware or should be aware of the specific danger," and (2) "reasonably relies on the purchaser to convey appropriate warnings to downstream users who will encounter the product." *Id.* A manufacturer is not required to warn the intermediary if the intermediary is "so knowledgeable about the material supplied that it knew or should have known about the particular danger." *Id.* at 1035.

The trial court rejected Fisher's request to charge the sophisticated intermediary doctrine at trial because it found a lack of evidence that Fisher warned Duke of the hazards of asbestos associated with Fisher's products. (R. 1760). The trial court denied Fisher's subsequent new trial motion solely on the ground that "[a] product manufacturer cannot raise the sophisticated intermediary defense without first showing that it placed a warning label on its products," and it found Fisher did not label its valves with a warning about the hazards of asbestos-containing gaskets. (R. 16-17, 43, 2514–15, 2595).

The trial court erred in finding during trial that Fisher must prove it warned Duke before it is entitled to a sophisticated intermediary charge. (R. 1760). A seller of a product is not required to warn the purchaser if it "sells to a sophisticated purchaser that it knows is aware or should be

aware of the specific danger." *Webb*, 370 P.3d at 1034. Duke is indisputably a sophisticated entity.[9] The sophisticated intermediary doctrine thus presents two jury questions: (1) whether Duke was aware *or should have been aware* of the alleged dangers posed by asbestos-containing gaskets and insulation, and (2) if Duke was aware or should have been aware of the dangers, whether it was reasonable for Fisher to rely on Duke to warn downstream users—specifically, Mr. Glenn and his coworkers. *Webb*, 370 P.3d at 1034–35.

The record contains sufficient evidence to require a jury to decide both questions. A jury could find that Duke was aware of the dangers of asbestos-containing insulation and should have been aware of the alleged dangers of asbestos-containing gaskets. For example, the evidence shows 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. 3385, 3386); (R. 3387) (announcing in 1971 that Duke's safety supervisors "will be discussing the Occupational Safety and Health Act in their regular safety meetings" and that it was "very important that every employee attend one of these sessions"); (R. 1082–83) (testimony of James Freeman admitting Duke made its employees aware of OSHA regulations in the early- or mid-1970s); (R. 849, 852–53, 3367) (referring to a Duke document titled "Safe Working Practices When Working With Asbestos," which "provide[s] guidance to Duke Power employees who are exposed to asbestos when performing maintenance work in the steam generating stations" and required Duke employees to place "[c]aution labels . . . on all raw materials, mixtures, scrap, waste, debris and other products containing asbestos"); *see also* (R. 3882, 7172). The evidence also showed that

[9] *See, e.g.*, (R. 1060) (Testimony of Crosby Valve, LLC's corporate representative) ("Q. Were there any customers more sophisticated out there than customers who were building nuclear power plants? A. No. No.").

Duke employed industrial hygienists and safety engineers to oversee its work practices. (R. 952–53). Further, Duke directed the work of its employees. (R. 1106–07) (agreeing Duke "directed all part[s]" of its employees' work, and valve companies did not direct the employees' work "in any way, shape, or form").

Accordingly, Duke qualifies as a sophisticated buyer "so knowledgeable about the material supplied that it knew or should have known about the particular danger" alleged by Plaintiff, and a jury could find Fisher was not required to warn Duke. *Webb*, 370 P.3d at 1035. A jury could also find, based on the same facts, that it was reasonable for Fisher to rely on Duke to warn its employees. *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 279, 465 S.E.2d 84, 86 (1995) ("[T]he question of reasonableness is generally a question for the jury . . . ."); *see also Webb*, 370 P.3d at 1037 ("In general, 'every person has a right to presume that every other person will perform his duty and obey the law.'" (citation omitted)). Therefore, the trial court erred by refusing to charge the sophisticated intermediary doctrine to the jury.

The trial court's finding that some evidence of labeling is required to apply the sophisticated intermediary doctrine is an error of law based on an incorrect reading of *Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 781 S.E.2d 548 (2015). (R. 16, 43). In *Lawing*, the issue was whether bags of a flammable chemical were properly labeled so employees of a plant could identify the material as flammable. *Id.* at 227, 781 S.E.2d at 548. Because the bags were not labeled with a warning about their flammability, two employees were injured when they performed work with an oxyacetylene torch near the bags. *Id.* at 214–16, 781 S.E.2d at 551–52. The Supreme Court held the proper focus *under those facts* was the *labeling* on the bags of chemical, not the *use* of the chemical in the plant. *Id.* at 227, 781 S.E.2d at 558. The court explained, "there is a critical distinction between an intermediary's knowledge of the dangerous qualities and nature of a

product, and the ability of the third party user to identify and recognize that product on its face. When considering only [the employer's] use of [the chemical] in its manufacturing process, it follows that [the employer] is a 'sophisticated user.'" *Id.* at 227–28, 781 S.E.2d at 558. When labeling is the underlying issue, however, the intermediary's knowledge of the dangers of the product does not affect the supplier's duty to label the product in a manner that would allow an end user to identify it as hazardous "because the knowledge of [the product's] inherent qualities [is] useless to a person who comes into contact with the [product] but cannot identify it." *Id.* Thus, in *Lawing*, the employer's knowledge of the dangers of the chemical was irrelevant. Instead, the critical issue was whether the product's labeling allowed employees to recognize the chemical as a product that should be moved out of range of the oxyacetylene torch.

The question posed by Plaintiff throughout this case is not whether Duke employees could identify asbestos-containing gaskets as asbestos-containing gaskets, but whether they knew grinding those gaskets could release asbestos fibers into the air and potentially cause cancer. *See* (R. 211–16). Thus, the ability of Mr. Glenn and his coworkers to identify gaskets and insulation as asbestos-containing was not at issue. The issue was Duke's *use* of asbestos-containing products. *Lawing* does not apply to this case, and the trial court's erroneous application of *Lawing* entitles Fisher to a new trial. The sophisticated intermediary doctrine is directly implicated by the facts of this case, and the trial court erred in refusing to charge the doctrine.

For the same reasons, the trial court erred in refusing to give an intervening cause charge on the ground that the potential intervening causes were foreseeable to Fisher. (R. 3223–24, 2607–08); *see also Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) (explaining an intervening cause that could not have been reasonably foreseen or anticipated breaks the causal chain and exculpates an allegedly negligent actor from liability). The record contains sufficient

evidence of intervening causes to charge the jury on the doctrine—particularly evidence of Duke's conduct and failure to adequately warn or protect its employees and evidence that Mr. Glenn was exposed to asbestos from dozens of other manufacturers' products, including insulation. *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 467, 494 S.E.2d 835, 844–45 (Ct. App. 1997) (finding the question whether an intervening cause was foreseeable "was properly directed to the jury"); (R. 1084–85, 1088) (testimony of James Freeman acknowledging the presence of "[m]iles and miles of insulated pipe," that Mr. Glenn worked around insulators replacing asbestos-containing insulation, and that he knew the insulation contained asbestos); (R. 1731–32) (testimony of Donald Rogers describing exposure to dry materials used by insulators).[10]

The trial court's refusal to properly charge the jury on South Carolina law allowed the jury to find in favor of Plaintiff and award damages on an improper basis. By refusing to charge the sophisticated intermediary doctrine and intervening cause on the ground that the evidence would not support the charges, the trial court effectively granted a directed verdict in favor of Plaintiff on two of Fisher's defenses. The evidence at trial at least created jury questions regarding whether it was reasonable for Fisher to rely on Duke to warn its employees and whether the actions of Duke or other manufacturers were intervening causes that relieved Fisher of liability. The trial court improperly invaded the province of the jury and weighed the evidence itself in determining not to charge the jury on these doctrines. Therefore, Fisher is entitled to a new trial.

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[10] *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).

B. The trial court erred in refusing to instruct the jury that it cannot award punitive damages for Plaintiff's breach of implied warranty claim.

A plaintiff cannot recover punitive damages for a breach of warranty claim under South Carolina law. *Rhodes v. McDonald*, 345 S.C. 500, 504–05, 548 S.E.2d 220, 222 (Ct. App. 2001). During the punitive damages phase, Fisher requested the trial court instruct the jury that it cannot award punitive damages for a breach of implied warranty claim. (R. 2449–50, 2454). Despite this principle, the trial court did not give Fisher's requested instruction.[11]

Fisher moved for a new trial based on the trial court's error in failing to instruct the jury on this settled principle of South Carolina law. (R. 2454, 2469–74). In denying Fisher's motion, the trial court speculated that "the jury did not base punitive damages on its breach of warranty finding." (R. 45). The trial court also erroneously found that no authority supports Fisher's argument and rejected Fisher's reliance on *Rhodes* on two grounds: (1) *Rhodes* "did not involve a negligence action" and (2) *Rhodes* "did not hold that juries should be instructed regarding the causes of action that give rise to a claim for punitive damages." (*Id.* at 33). The trial court erred in denying Fisher's motion for a new trial.

There is no exception to the rule prohibiting punitive damages for a breach of warranty claim where a plaintiff also asserts a negligence claim, and the trial court's finding that "the jury did not base punitive damages on its breach of warranty finding" is speculation. Had the trial court given the requested instruction, the parties and this Court would know with certainty that the jury

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[11] Fisher also moved for a directed verdict on the ground that punitive damages are not available for a breach of warranty claim, but the trial court denied Fisher's motion. (R. 2914). In *Rhodes*, the Court of Appeals reversed an award of punitive damages on the ground that the trial court erred by denying a directed verdict as to punitive damages on this very ground. 345 S.C. at 503–05, 548 S.E.2d at 221–23. The trial court thus had two opportunities to prevent the jury from awarding punitive damages for a breach of warranty—it could have granted a directed verdict or properly instructed the jury. It availed itself of neither opportunity—at Plaintiff's behest. Fisher is now entitled to a new trial as a result.

awarded punitive damages only for Fisher's negligence. Because the trial court refused to give the instruction, however, the jury may have considered both causes of action.

Moreover, the trial court's suggestion that *Rhodes* did not hold juries must be instructed regarding the causes of action that give rise to a claim for punitive damages is incorrect and ignores the law that punitive damages are unavailable for a breach of warranty claim. *See* (R. 45). The parties and the trial court cannot assume the jury knew this specific legal principle and analyzed only Fisher's negligence in awarding punitive damages. The only way to prevent the jury from awarding punitive damages for the breach of warranty claim was for the trial court to instruct the jury that the law prohibits it. *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 104, 727 S.E.2d 407, 414 (2012) ("It is the court's duty to instruct the jury on the law, and the jury ought not to be left to cut a way through the woods with no compass to guide it."). The trial court's failure to comply with its duty to instruct the jury on the law entitles Fisher to a new trial.

IV. The trial court erred in denying Fisher's request to have the jury apportion fault to other potential tortfeasors and in denying Fisher's right to a complete setoff.

A. The trial court erred in denying Fisher's right to a full and fair apportionment of fault.

Fisher is entitled to a new trial because the trial court failed to allow the jury to apportion fault to potential tortfeasors other than the three defendants remaining at the end of trial pursuant to the South Carolina Contribution Among Tortfeasors Act ("the Act"). *See* S.C. Code Ann. § 15-38-15. The trial court denied Fisher's request on the ground that allowing the jury to apportion fault conflicted with the Supreme Court's ruling in *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017). (R. 1812–13). Although the Supreme Court addressed two discrete questions relating to apportionment of fault under the Act in *Tiffany* and a companion case, *Machin v. Carus Corporation*, 419 S.C. 527, 799 S.E.2d 468 (2017), it has not examined the arguments raised by

Fisher in this case. The trial court erred in misinterpreting and relying on *Tiffany* to deny Fisher a full and fair apportionment of fault, and Fisher is therefore entitled to a new trial.

i. *Tiffany* and *Machin* do not address the circumstances presented in this case.

The Act provides a process by which the trial court or the jury must apportion fault between defendants and "potential tortfeasors":

> (C) The jury, or the court if there is no jury, shall:
>
> (1) specify the amount of damages;
>
> (2) determine the percentage of fault, if any, of plaintiff and the amount of recoverable damages under applicable rules concerning "comparative negligence"; and
>
> (3) upon a motion by at least one defendant, where there is a verdict under items (1) and (2) above for damages against two or more defendants for the same indivisible injury, death, or damage to property, specify in a separate verdict under the procedures described at subitem (b) below the percentage of liability that proximately caused the indivisible injury, death, damage to property, or economic loss from tortious conduct, as determined by item (1) above, that is attributable to each defendant whose actions are a proximate cause of the indivisible injury, death, or damage to property. In determining the percentage attributable to each defendant, any fault of the plaintiff, as determined by item (2) above, will be included so that the total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent. In calculating the percentage of fault attributable to each defendant, inclusion of any percentage of fault of the plaintiff (as determined in item (2) above) shall not reduce the amount of plaintiff's recoverable damages (as determined under item (2) above).
>
> . . .
>
> (D) A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.

S.C. Code Ann. § 15-38-15(C)–(D).

In *Tiffany*, the Supreme Court found a named defendant could not *join* or *implead* "an allegedly culpable non-party who is immune from contribution" *as a third-party defendant* under

Rule 19 solely for purposes of apportionment of fault under subsection (C). 419 S.C. at 572, 799 S.E.2d at 492 (Pleicones, J., dissenting). Although the court used broad language at times, it disposed of only a specific question regarding joinder for purposes of apportionment. Any statements in the opinion beyond this narrow holding were dicta. *See Nash v. Tindall Corp.*, 375 S.C. 36, 40, 650 S.E.2d 81, 83 (Ct. App. 2007). In *Machin*, the Supreme Court found the plaintiff's non-party *employer* with *workers' compensation immunity* could not be included on the verdict form for purposes of apportionment of fault. 419 S.C. at 546, 799 S.E.2d at 478.

Neither *Tiffany* nor *Machin* addressed the question whether a non-party or dismissed-party potential tortfeasor that does not have workers' compensation immunity—like the dozens of defendants who settled or were dismissed from this case prior to and during trial—may be placed on a verdict form for purposes of apportionment. The dismissed defendants in this case are potential tortfeasors, as Plaintiff alleged in the complaint. *See generally* (R. 62–78). Moreover, although Plaintiff did not name Mr. Glenn's employer, Duke, as a defendant because it has workers' compensation immunity, the complaint alleged—and the evidence at trial showed—that Mr. Glenn was exposed to asbestos-containing products while performing work for Duke at Duke facilities. (R. 68).[12] Thus, Plaintiff's decision to sue and later dismiss those other potential tortfeasors should not prevent the jury from considering their liability in a fair and just apportionment of fault. Because *Tiffany* and *Machin* do not prohibit including other potential tortfeasors for apportionment of fault, the trial court erred in refusing to include them on the verdict form. While the Act uses the word "party," the entities sued were each a "party" to the action at

[12] (R. 770–78, 799–801, 808–11, 890–92, 1075–76, 1090–91, 1199–1201, 1678–82, 1691–94, 1701–07, 1716–19, 1729–31) (testimony of fact witnesses describing asbestos exposure from numerous other types of equipment, manufactured by numerous different manufacturers, and exposure to asbestos-containing insulation at Duke facilities).

one time. They thus should have been included on the verdict form, and neither of the specific rulings in *Tiffany* or *Machin* require otherwise.

ii. Neither *Tiffany* nor *Machin* addressed South Carolina's constitutional guarantees of due process, equal protection, and the right to a jury trial.

Although the Supreme Court held the Act does not provide for inclusion of an employer with workers' compensation immunity, it explicitly did not examine whether the failure to include such an entity would deprive a defendant of its constitutional rights. *Tiffany*, 419 S.C. at 558 n.3, 799 S.E.2d at 484 n.3. The questions presented in *Tiffany* and *Machin* were framed purely as statutory interpretation questions, and these constitutional arguments were not raised to the court. *Id.* Although the *Tiffany* majority noted that the appellant attempted to raise a due process argument, it found the argument unpreserved. Thus, it did not "consider Appellants' argument that the trial court erred in finding their due process rights were not violated by the inability to join [the non-party] or include him on the verdict form for purposes of allocation." *Id.* By not allowing the jury to consider other potential tortfeasors or Mr. Glenn's employer in the apportionment of fault, the trial court deprived Fisher of its rights to due process, equal protection, and a jury trial.

The trial court's ruling that Fisher could not include all persons and entities whose actions contributed to Plaintiff's harm deprived Fisher of substantive due process because it created a significant risk that Fisher would be deprived of a property interest—its money, via a damages award—arbitrarily and capriciously. *See Worsley Cos. v. Town of Mt. Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000) (explaining a party's due process rights are violated if "he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law"); S.C. CONST. art. I, § 3. The apportionment provided by the Act, as interpreted by the Supreme Court in *Tiffany*, can create a "false positive," subjecting a defendant to joint and several liability where it had only a small role in the harm simply because there is no mechanism for apportionment to the

primary bad actor. If a defendant is unable to obtain a complete apportionment to all parties whose actions contributed to the harm, the result is an "irrational allocation of fault" "not based on actual fault, but rather, solely based on the forced artificial calculation of 100% apportionment without the seemingly most culpable party." *Id.* Such a result unfairly exposed Fisher to joint and several liability where its actual fault was likely less than 50%. *See id.* Similarly, the Act deprives Fisher of its equal protection rights by placing it at a disadvantage solely because it exercised its right to a jury trial and declined to settle. *See* S.C. CONST. art. I, § 3. Fisher was therefore subjected to joint and several liability solely by virtue of the fact that apportionment could not be made to the primary bad actors. This result defies common sense, as it punishes the defendants who may have the strongest reasons and incentives to fight the case to a conclusion.

Finally, the trial court's ruling deprived Fisher of its constitutional right to have a jury determine all triable issues. *See* S.C. CONST. art. I, § 14. By precluding a full apportionment to all entities that joined in the harm, the trial court artificially limited the jury's ability to make a true apportionment of fault. *See Tiffany*, 419 S.C. at 573, 799 S.E.2d at 492 (Pleicones, J., dissenting).

The trial court's interpretation renders the Act unconstitutional because it deprives Fisher of its rights to due process, equal protection, and trial by jury. Courts must interpret a statute in a manner that comports with the constitution if they can reasonably do so. *Curtis v. State*, 345 S.C. 557, 569–70, 549 S.E.2d 591, 597 (2001) ("A possible constitutional construction must prevail over an unconstitutional interpretation." (citation omitted)). The trial court's interpretation of the Act breaches this well-settled principle of statutory interpretation and is therefore erroneous. Fisher was entitled to the inclusion of other potential tortfeasors, including Duke, on the verdict form for a full and just apportionment of fault.

iii. Public policy supports a complete apportionment of fault.

In both *Tiffany* and *Machin*, the Supreme Court acknowledged the existence of important public policy considerations. In *Tiffany*, the court explained that "achieving a more fair apportionment of damages among joint tortfeasors was one of the policy goals underlying the legislature's enactment of the Act." 419 S.C. at 556, 799 S.E.2d at 483–84. In *Machin*, the court acknowledged the defendant's "compelling policy argument" that "because South Carolina abolished joint and several liability in 2005, allocation of a percentage of fault to the non-party employer is necessary to ensure that a defendant, if held liable, will be required to pay only damages commensurate with its degree of fault." 419 S.C. at 544, 799 S.E.2d at 477. The Supreme Court also noted in *Tiffany* it had not yet considered the constitutional issues presented here. 419 S.C. at 558 n.3, 799 S.E.2d at 484 n.3. This Court should. The trial court deprived Fisher of its constitutional rights by restricting the apportionment of fault to the defendants remaining at the end of trial, and Fisher is thus entitled to a new trial.

B. The trial court compounded its error by improperly denying Fisher's right to setoff.

Despite specifically noting Fisher's right to setoff as a factor in its denial of a complete apportionment of fault, (R. 41), the trial court applied Plaintiff's unilateral and self-serving allocation of settlement funds and denied Fisher a complete setoff, (R. 49–51). The trial court thus permitted Plaintiff to collect $4,525,000 ($2,805,000 in settlement proceeds and $1,720,000 from Fisher) despite the jury finding that Plaintiff was entitled to only $3,000,000 in compensatory damages. Plaintiff has thus received a windfall, in violation of South Carolina law and policy.

i. Fisher is entitled by operation of law to a complete setoff of the settlement funds Plaintiff received from other defendants.

"A non-settling defendant is 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). The right to setoff is both statutory and equitable in nature. S.C. Code Ann. § 15-38-50; *Welch v. Epstein*, 342 S.C. 279, 312–13, 536 S.E.2d 408, 425 (Ct. App. 2000) ("The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties"). The statute provides:

> When a release or a covenant not to sue or not to enforce judgment 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 does not discharge any of the other tortfeasors from liability for the injury . . . unless its terms so provide, ***but 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 (emphasis added).

The trial court has no discretion in applying the setoff. Rather, "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" and therefore "the circuit court *must* award a setoff." *Smith v. Widener*, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct. App. 2012) (emphasis added); *see also Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999) (explaining the statute "grants the [C]ourt no discretion in determining the equities involved in applying a setoff once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors"); *Tiffany*, 419 S.C. at 557, 799 S.E.2d at 484 (noting "the General Assembly took steps to protect nonsettling defendants by codifying . . . the right to offset the value of any settlement received prior to the verdict—a right which arises by operation of law and is not within the discretion of the courts").

The purpose of a setoff is to prevent a double recovery for the same injury, because it is "almost universally held that there can be only one satisfaction for an injury or wrong." *Widener*, 397 S.C. at 471–72, 724 S.E.2d at 190; *Rutland*, 400 S.C. at 216, 734 S.E.2d at 145. This principle applies in full force here, because although Plaintiff asserted a wrongful death and survival claim,

South Carolina law is clear that those claims seek damages for a single injury. *Ellis*, 335 S.C. at 113, 515 S.E.2d at 272 ("Injury, as used in [section 15-38-50], is broad enough to include all damages, including those attributable to both survival and wrongful death causes of action which resulted from the joint negligence of the various responsible parties."); *see also Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 209–10, 662 S.E.2d 444, 451 (Ct. App. 2008) (holding the trial court correctly set off a settlement from one defendant against a jury award against another, despite the plaintiff's arguments that "the settlement with [the settling defendant] was based on different causes of action than those it prevailed on against [the non-settling defendant] and the injury caused by [the non-settling defendant] was not the same as that caused by [the settling defendant]" because the claims against the co-defendants "arose out of the same factual scenario"). By enacting section 15-38-50, the General Assembly reinforced the policy that a plaintiff is not entitled to a double recovery.

ii. The court must reallocate Plaintiff's settlement funds to accomplish the purpose of the settlement statute and to prevent a double recovery.

The trial court erred by refusing to set off the $2,805,000 Plaintiff received in settlements against the $3,000,000 jury verdict against Fisher. (R. 49–51). Fisher is entitled to set off the total amount of settlement proceeds by operation of law because Plaintiff and the settling defendants did not agree to any particular allocation of those proceeds, but rather Plaintiff unilaterally and self-servingly applied 90% of those proceeds to the wrongful death claim, 10% to the survival claim, and 0% to the loss of consortium claim. *See* (R. 2627). Although settling parties may allocate settlement proceeds, "the . . . allocation must yield to fairness and justice." *Welch*, 342 S.C. at 313–14, 536 S.E.2d at 426. As the South Carolina Supreme Court explained, "[c]ompensatory damages are intended to make the plaintiff whole, not to punish the tortfeasor,"

and therefore "[w]here reallocation of damages furthers that policy, we do not believe the result is inequitable." *Rutland*, 400 S.C. at 217, 734 S.E.2d at 146.

The trial court here improperly refused to reallocate the settlement proceeds to avoid a double recovery for Plaintiff, (R. 49–51), based on a mistaken reliance on cases in which the settling parties explicitly *agreed* to allocate settlement funds in a particular manner. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 189, 777 S.E.2d 824, 827 (2015) ("Petitioner settled with [a defendant] for $25,000, *agreeing to allocate* $20,000 to the survival claim and $5,000 to the wrongful death claim." (emphasis added)); *Rutland*, 400 S.C. at 212, 734 S.E.2d at 143 ("Rutland received a total of $305,000 in settlement monies, which Rutland and [the settling defendant] *agreed to allocate*" (emphasis added)).[13] No South Carolina appellate court has approved a plaintiff's *unilateral* allocation of settlement proceeds or prohibited reallocation under circumstances similar to this case, where Plaintiff will receive one and a half times her compensatory damages.

Courts in other jurisdictions applying setoff statutes similar to section 15-38-50 have held that where a settlement agreement fails to allocate proceeds among separate and distinct causes of action, the total amount of the settlement must be set off from the entire verdict. *Dionese v. City of W. Palm Beach*, 500 So. 2d 1347, 1349 (Fla. 1987) (applying Fla. Stat. Ann. § 768.31(5)); *see also Knox v. Los Angeles Cty.*, 167 Cal. Rptr. 463, 469 (Cal. Ct. App. 1980) (applying Cal. Civ. Proc. Code § 877 and holding, absent good faith allocation of settlement consideration between causes of action in which joint tortfeasor status was alleged, defendants were entitled to setoff of entire settlement figures); *Anderson v. Ewing*, 768 So. 2d 1161, 1164 (Fla. Dist. Ct. App. 2000)

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[13] *See also Ward v. Epting*, 290 S.C. 547, 559, 351 S.E.2d 867, 874 (Ct. App. 1986) (approving a lopsided allocation in a case where the plaintiff and settling defendant included the allocation in their agreement).

(finding plaintiffs cannot unilaterally allocate settlement proceeds to avoid a full setoff). These cases are consistent with South Carolina law and policy.

In *Dionese*, two plaintiffs—a husband and wife—sued various defendants for the wife's personal injuries and the husband's loss of consortium arising from a motor vehicle accident. 500 So. 2d at 1348. The plaintiffs settled with the at-fault driver and his insurer, but the settlement agreement did not allocate the money between the two plaintiffs. *Id.* at 1348, 1349. The plaintiffs then proceeded to trial and obtained a verdict against a non-settling defendant. *Id.* at 1348. When the non-settling defendant moved to set off the settlement funds received by the plaintiffs, the plaintiffs "notified the court of a private unilateral agreement to apportion $10,000 of the $45,000 settlement proceeds to [the wife's] claim for personal injuries, and the remaining $35,000 to [the husband's] claim of loss of consortium." *Id.* The Florida Supreme Court held the plaintiffs' private, unilateral allocation of settlement proceeds should be ignored by a court in determining setoff. *Id.*

The court distinguished cases in which plaintiffs and defendants agree to a particular allocation. In cases where a "settlement agreement itself recognize[s] two separate and distinct causes of action and apportion[s] the proceeds accordingly," a non-settling defendant may be entitled to set off only the funds paid in settlement for a specific cause of action. *Id.* at 1349. Private, unilateral allocation agreements, however, "are contrary to all concepts of fairness" and "would often result in a windfall recovery" for the plaintiffs. *Id.* at 1350. Thus,

> The only proper method of ensuring against duplicate recoveries in an undifferentiated lump sum settlement situation is to set-off the total settlement funds against the total jury award. . . . The rights of both the settling and non-settling joint tort-feasors would be adversely affected if we were to allow plaintiffs to privately and unilaterally apportion the proceeds of a settlement agreement containing a general release.

Id.

The same analysis applies to this case. Plaintiff entered into general settlement agreements that did not allocate settlement funds and instead provided for "undifferentiated lump sum" payments. *See id.* Plaintiff then privately and unilaterally allocated the funds in a lopsided manner to minimize a setoff and recover more than 150% of the total amount of damages the jury determined she suffered. This allocation—and the trial court's denial of a complete setoff—undercuts the jury's role and duty to determine the total damages suffered by a plaintiff. The law does not give plaintiffs a right to unilaterally manipulate settlement allocations to minimize setoff and obtain a double recovery. Rather, to effectuate the policy against double recovery and give meaning to the language of section 15-38-50,[14] the trial court should have reallocated the settlement funds to allow a complete setoff against the total jury award, so that Plaintiff only recovers the $3,000,000 in compensatory damages that the jury determined would make her whole.

Plaintiff contends she released her loss of consortium claim but allocated no settlement funds for the release of the claim against the settling defendants. (R. 2622). Despite Plaintiff's contention, and despite not having reviewed the settlement agreements or releases themselves, the trial court then found Plaintiff did not *settle* her loss of consortium claim at all. (R. 51). If Plaintiff received no settlement funds in exchange for the release of her loss of consortium claim, then Plaintiff's release of the claim is void for lack of consideration, *see Bean v. S.C. Cent. R. Co.*, 392 S.C. 532, 557–58, 709 S.E.2d 99, 112 (Ct. App. 2011) ("A release is not supported by sufficient consideration unless something of value is received to which the creditor had no previous right."), and if she did not *settle*—or enter into a valid release of—the claim, that claim remained viable against *all* defendants and Fisher was entitled to have other defendants placed on the verdict form

[14] *See Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("[T]legislature intends to accomplish something by its choice of words, and would not do a futile thing.").

so the jury could fully apportion fault for Plaintiff's loss of consortium claim even under the trial court's interpretation of *Tiffany*. Moreover, if Plaintiff in fact settled and released her loss of consortium claim, then it was unreasonable to allocate 0% of her settlement proceeds to that claim. This inconsistency prejudiced Fisher because it was the foundation for the trial court's post-trial rulings. The trial court expressly denied Fisher's request for a full apportionment of fault on the ground that "[a]ny 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)[15] *and receive a setoff for settlement proceeds under Section 15-38-15(E).*" (R. 41) (emphasis added).

The trial court allowed Plaintiff to evade the requirements of South Carolina law and public policy, collect one and a half times her actual compensatory damages as a windfall recovery, and force Fisher to bear far more than its fair share of liability and damages. Fisher is entitled to a new trial in which the jury is permitted to make a full and fair apportionment of fault and a reallocation of settlement funds to provide a complete setoff.

V. The trial court erred in granting sanctions against Fisher based on Fisher's proffer of expert testimony and related evidence previously excluded by the trial court.

The trial court erred in granting sanctions against Fisher.

Prior to trial, pursuant to Plaintiff's motion, the trial court excluded the tissue digestion study performed by Dr. Oury and all testimony about tissue digestion studies in general[16] on the ground that "there was no agreement or meeting of the minds regarding the division of the tissue

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[15] The trial court further compounded multiple errors by refusing to charge the jury on intervening cause and depriving Fisher of its right to the "empty chair" defense. *See* Section III, *supra*.

[16] The tissue digestion study or "fiber burden analysis" is a process widely used throughout the United States and the world to determine an individual's occupational exposure to asbestos and its relationship to the alleged disease. *See generally Jack v. Asbestos Corp. Ltd.*, No. C17-0537JLR, 2017 WL 4838397, at *4 (W.D. Wash. Oct. 23, 2017) (describing benefits of tissue digestion and ordering autopsy to be performed on decedent).

or by whom the tissue would be divided." (R. 10). The tissue digestion study revealed that Mr. Glenn's lungs contained amosite asbestos fibers, which are commonly associated with insulation—not with Fisher products. (R. 483, 719, 2792, 2827). Thus, the tissue digestion evidence was highly probative as to which entities or products caused Mr. Glenn's mesothelioma, as the trial court acknowledged. (R. 2179, 2792, 2827). The admission of the evidence would not have unfairly prejudiced Plaintiff; the only danger to Plaintiff was that the jury would consider the scientific fact that Mr. Glenn's lungs contained no asbestos fibers attributable to Fisher products. To preserve its appellate rights as to the exclusion of the evidence, Fisher proffered a sworn statement from Dr. Oury near the end of trial. *See supra* pp. 5–8, 10.

Importantly, the trial court noted that the tissue digestion test had not been conducted pursuant to a court order, but instead pursuant to purported agreement. In pretrial proceedings, the trial court probed the evidence of the purported agreement, considering emails between the parties and the representations and sincere beliefs of counsel as officers of the court regarding them. (R. 117–77). Ultimately, the trial court held that there had been, in its opinion, no "meeting of the minds" with respect to all of the details of the tissue digestion protocol agreement terms, but the trial court specifically made clear at that time that there had been no "bad faith" attributable to counsel (meaning the trial court took the belief of trial counsel for Fisher that there had been an agreement as an honest misunderstanding instead). (R. 10, 172, 176–77).

Nevertheless, Plaintiff's counsel thereafter moved for sanctions, which the court granted after the trial. The trial court cited three events as the bases for imposing sanctions.[17] First, the

[17] In its order denying Fisher's motion for a new trial, the trial court retroactively altered its grounds for excluding the tissue digestion evidence. Specifically, the trial court stated 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

trial court imposed sanctions against Fisher for obtaining the tissue digestion study and "ignoring" the June 25, 2015 standing order applicable to asbestos litigation in South Carolina courts. (R. 59). The standing order provides that parties may not alter or destroy pathology materials "without agreement of all parties or a court order."[18] But Fisher did not ignore the standing order. To the contrary, it suspended its pursuit of a court order and instead attempted to reach an agreement based on Plaintiff's counsels' representation that they were "not necessarily opposed" to a tissue digestion study. (R. 2837). In determining whether to exclude the tissue digestion evidence, the trial court focused solely on whether the parties reached an agreement and whether Fisher's actions complied with the terms of the agreement. (R. 10). The trial court excluded the tissue digestion study and all testimony about tissue digestion studies in general on the ground that "there was no agreement or meeting of the minds regarding the division of the tissue or by whom the tissue would be divided." (R. 10). While Fisher maintains the parties reached an agreement to divide the tissue and perform the study, the tissue digestion issue was, *at the very worst*, a misunderstanding. Fisher acted in good faith as it has throughout this litigation, and the trial court did not cite a single instance of discovery abuse by Fisher—aside from the tissue digestion issue and the taking of Dr. Oury's sworn statement—in any case. *See* (R. 54–60). Moreover, as stated above, the trial court

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to Plaintiff and in contravention of this Court's direct order." (R. 41–42). The trial court also claimed it excluded the evidence due to Fisher's "blatant discovery violations," because the evidence was cumulative, and because Dr. Oury "found but dismissed a tremolite asbestos fiber." (R. 42–43). Yet, the record is clear from the hearing—the trial court excluded the evidence solely because it found the parties did not reach an agreement and Fisher did not divide the tissue according to Plaintiff's request. (R. 7–11, 117–77). In fact, even the trial court's sanctions order acknowledges the true basis for excluding the evidence: "This Court ruled that the tissue digestion was inadmissible because it was completed in the absence of an agreement between the parties . . . ." (R. 56).

[18] *See* Am. Ex. 6 to Oct. 13, 2010 Asbestos Master Discovery/Scheduling Order (filed June 25, 2015 in Greenville Cty.).

expressly stated at the time it excluded the tissue digestion evidence that it did not find any party acted in bad faith. (R. 172). Regardless, the trial court had already imposed a sanction based on its finding that the parties had no agreement—it excluded evidence crucial to Fisher's defense. Fisher's conduct certainly did not warrant a more severe sanction. Because the sanctions order is expressly based on Fisher allegedly "ignoring" the "standing order"—which it did not do and for which there is no evidence—the sanctions order must be reversed.

Second, the trial court found Fisher "wholly disregarded the Court's order prohibiting Dr. Timothy Oury's deposition" by taking a sworn statement from Dr. Oury. (R. 59). The taking of a sworn statement was not a violation of any order or rule and is not a basis for imposing sanctions. Fisher was entitled to communicate with its own expert to learn the details of the expert's opinions, and it was entitled to record those details in any manner it desired, including a question-and-answer session recorded by a court reporter. The deposition of Dr. Oury had been noticed to all counsel, but the trial court quashed that deposition. The deposition therefore did not occur, and the sworn statement was not a deposition.

A party is *required* to make an offer of proof to preserve a trial court's error in excluding evidence for appellate review. *See* Rule 103(a), SCRE ("Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context."). An offer of proof can take many forms, both formal and informal. *See State v. Krieger*, 422 P.3d 300, 305 (Or. Ct. App. 2018) ("The offer may be formal or informal. An offer of proof may occur outside the presence of the jury through an examination of the witness on the stand or it may occur in narrative form through a description by

counsel of the witness's intended testimony.").[19] Fisher recorded the sworn statement for the sole purpose of creating an offer of proof to preserve the issue for trial. (R. 3000). The trial court therefore erred in finding Fisher violated the order quashing Dr. Oury's deposition and imposing sanctions based on that finding.

Third, the trial court sanctioned Fisher because Fisher did not disclose the sworn statement until the end of trial and did not mention it at the January 9 pretrial hearing. (R. 59). However, the trial court did not identify any requirement that Fisher disclose the existence of the sworn statement. Sanctions may not be imposed in the absence of the violation of some order or rule. *See* Rule 37(b) SCRCP (providing for sanctions when a party or other person "fails to obey an order"). Nothing in Rule 37 or the cases relied upon by the trial court supports the imposition of sanctions. To the contrary, four of the five cases involved litigants who failed to respond to discovery directed to them and caused their opponents to experience delay or other forms of prejudice, thus falling within the ambit of Rule 37. *See Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014) (affirming sanctions where an appellant provided incomplete discovery responses and caused delay); *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 644, 579 S.E.2d 151, 154 (Ct. App. 2003) (discussing sanctions where a litigant failed to produce requested discovery about central issue in the case and prejudiced opponent as a matter of law by first producing records at trial and seeking to avoid effect of its failure to respond to requests for admission); *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 305, 529 S.E.2d 45, 56 (Ct. App. 2000) (discussing a

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[19] *See also, e.g.*, 1 MCCORMICK ON EVID. § 51 (7th ed.) ("The usual practice is for the proponent to explain to the judge what the witness would say if the witness were permitted to answer the question and what the expected answer is logically relevant to prove."); Christin J. Jones, *A Guide to the Offer of Proof*, AM. BAR ASS'N (Aug. 31, 2016) ("An offer of proof may come in a variety of forms: written statements, affidavits, summaries, or live question-and-answer presentations."), https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2016/summer2016-0816-a-guide-to-the-offer-of-proof.

litigant's repeated failure to produce requested records despite multiple orders requiring it to do so); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999) (affirming sanctions where the appellants failed to comply with four orders compelling discovery). In the fifth case relied upon by the trial court, this Court did not rule on the merits of a sanctions issue and, therefore, the case contains no holding relevant to this case. *See Arnal v. Arnal*, 363 S.C. 268, 297, 609 S.E.2d 821, 836 (Ct. App. 2005).

Regardless, Fisher had already disclosed the substance of Dr. Oury's testimony by producing his December 18, 2018 report *and* the detailed digestion report from RJ Lee. Dr. Oury's opinions in the sworn statement do not differ substantively from the reports, and the trial court failed to identify any aspect of the sworn statement that may have affected its rulings.

Finally, Plaintiff failed to show that she suffered any prejudice from the offer of proof, and the trial court did not identify any prejudice. The trial court merely "presumed prejudice" and reached the illogical conclusion that Plaintiff would have somehow altered her presentation of evidence to the jury had she known Fisher possessed a sworn statement that the trial court already excluded. (R. 59–60). To the extent the trial court found Plaintiff suffered prejudice because "the tissue was unequally divided and left the Plaintiff without sufficient tissue to conduct her own digestion," (R. 59), the finding is unsupported by any evidence. Plaintiff's counsel claimed her expert stated he had insufficient tissue to perform a digestion but presented no evidence to support her claim. (R. 124–28). In contrast, Fisher presented evidence that the tissue was divided evenly and that sufficient tissue remained for Plaintiff to perform a digestion. (R. 2853–54). The trial court erred in relying on hearsay statements from Plaintiff's counsel with no supporting evidence. Moreover, Plaintiff presented evidence of exposure to valves, pumps, and other types of equipment attributable to dozens of manufacturers, along with accompanying expert testimony, at trial. Thus,

the tissue digestion evidence imposed no unfair prejudice on Plaintiff. Instead, it would have allowed the jury to consider scientific facts relevant to Plaintiff's claims against Fisher.

Plaintiff obtained the exclusion of the tissue digestion evidence and declined to take Dr. Oury's deposition, then moved for sanctions when Fisher preserved the issue for appellate review. Fisher had an absolute right to preserve appellate issues; in fact, it would have been reversible error for the trial court to refuse Fisher's offer of proof. *See People v. Thompkins*, 690 N.E.2d 984, 988 (Ill. 1998) ("Trial courts are required to permit counsel to make offers of proof, and a refusal to permit an offer generally is error."). There is no basis for imposing sanctions against Fisher for protecting its rights. This Court should reverse and vacate the trial court's sanctions order.

CONCLUSION

This Court should reverse the trial court's rulings and grant Fisher JNOV or, in the alternative, a new trial. If the Court declines to grant JNOV or a new trial, the Court should reallocate Plaintiff's settlement funds to provide Fisher a complete setoff. Finally, the Court should reverse and vacate the trial court's sanctions order.

(signature page attached)

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Nicholas A. Charles

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Nicholas A. Charles
SC Bar No. 101693
E-Mail: nick.charles@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Fisher Controls International LLC

Columbia, South Carolina

May 12, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Appellate Case No. 2019-001600

Rita Joyce Glenn, Individually and as Personal Representative of the Estate of Thomas Harold Glenn, ... Respondent,

v.

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

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

(signature page attached)

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Nicholas A. Charles

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
E-Mail: matt.bogan@nelsonmullins.com
Nicholas A. Charles
SC Bar No. 101693
E-Mail: nick.charles@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

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