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 REPLY BRIEF

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INTRODUCTION

Respondent Rita Glenn (hereinafter "Plaintiff") asks this Court to ignore the arguments raised by Appellant Fisher Controls International LLC ("Fisher") and the trial court's errors and attempts to support her arguments with an inaccurate description of the facts and evidence. The Court should reverse and grant judgment notwithstanding the verdict ("JNOV") or, in the alternative, a new trial. Failing that, the Court should reverse the trial court's improper setoff and allocation rulings. Finally, regardless of the Court's rulings on any other issues, the Court should reverse and vacate the trial court's sanctions order.[1]

ARGUMENT

I. The trial court's finding that the verdict was not inconsistent is an error of law.

The jury's strict liability and negligence verdicts were inconsistent, and the trial court was required to either have the jury correct the inconsistency before discharging the jury or grant a new trial. *Krepps by Krepps v. Ausen*, 324 S.C. 597, 610, 479 S.E.2d 290, 297 (Ct. App. 1996) ("[T]he court cannot lawfully accept an inconsistent or incomplete verdict."); *see also Stevens v. Allen*, 336 S.C. 439, 453, 520 S.E.2d 625, 632 (Ct. App. 1999) (same), *aff'd*, 342 S.C. 47, 536 S.E.2d

[1] Plaintiff's statement of facts is replete with inaccuracies. *See* (Resp. Br. 2–12). For example, Plaintiff claims Fisher "acknowledge[d]" in a report on air monitoring that an "exposure problem" existed when in fact the report stated that "[i]n the event" allowable exposure levels were exceeded, there would be a "follow-up visit" to eliminate the problem, then reported that the result was "Acceptable" and was just 3% of the allowable limit. (Resp. Br. 5; R. 3888). Similarly, Plaintiff mentions that there were 161 Fisher valves at Oconee, (Resp. Br. 3), and claims Mr. Glenn was exposed to asbestos packing from Fisher valves, (Resp. Br. 2), but cites testimony about packing work that did not state the packing was asbestos and fails to point out the undisputed fact that 88% of Fisher valves had non-asbestos packing, *see* (R. 710). Plaintiff made the same incorrect assertions in her post-trial briefing and proposed order that she makes in her brief, and Fisher refuted and corrected those assertions in its post-trial submissions. *See generally* (R. 3073–3102; R. 3126–44). Fisher therefore incorporates its prior factual arguments and does not address all of the incorrect assertions again in this reply brief.

663 (2000). The trial court committed an error of law by finding the verdicts were consistent and refusing to have the jury correct the verdicts.

Plaintiff advances the same erroneous analysis the trial court applied in its order. She relies on this Court's opinion in *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995), for the proposition that, in the abstract, strict liability and negligence claims are distinct because strict liability focuses on the product while negligence focuses on the conduct of the manufacturer or seller. (Resp. Br. 13). She quotes—but disregards—the limitation of this Court's holding to "*the present case*" and the Court's qualifying language that "it is possible *under certain circumstances* for a supplier of products to be held liable under a negligence theory even though the supplier is not strictly liable." *Bragg*, 319 S.C. at 541, 462 S.E.2d at 327 (emphases added); (Resp. Br. 13–14). Plaintiff also ignores the critical limitation that the South Carolina Supreme Court has placed on *Bragg*: "While we agree that strict liability and negligence are not mutually exclusive theories of recovery, we caution against a broad reading of *Bragg* in this regard. An analytical framework that turns solely on whether strict liability and negligence are mutually exclusive theories of recovery may miss the mark." *Branham v. Ford Motor Co.*, 390 S.C. 203, 211, 701 S.E.2d 5, 9 (2010).

The analytical framework Plaintiff uses to justify the trial court's ruling turns solely on the position that strict liability and negligence are not always mutually exclusive theories of recovery. Rather than properly analyze the specific circumstances of this case and explain how her strict liability and negligence claims differ (they do not), Plaintiff focuses on the jury instructions and a question the jury asked during its deliberations. (Resp. Br. 15–16). The jury instructions reveal there was no meaningful distinction between Plaintiff's strict liability and negligence claims. To the contrary, read as a whole, the jury instructions show the jury's verdict is inconsistent because

the strict liability verdict was necessarily based on an element common to the negligence claim. The trial court first instructed the jury that, for Plaintiff to prevail on her strict liability claim, she "must only prove the product was defective and unreasonably dangerous when it was placed in the stream of commerce," (R. 2354),[2] and charged the elements of strict liability:

> To recover under strict liability, the plaintiff must prove three things by the greater weight of the evidence: First, the product was in a defective condition unreasonably dangerous to the plaintiff; second, that at the time of the injury, the product was in essentially the same condition as when it left the defendant's hands; third, that the plaintiffs are injured by the product.

(R. 2355). The trial court further properly instructed the jury that under ***each*** theory of strict liability—design defect, failure to warn, and breach of warranty—the jury must determine whether the product is unreasonably dangerous to the user. (R. 2356) (design defect); (R. 2357) (failure to warn); (R. 2359) (breach of warranty). The trial court then properly instructed the jury that, "In an action based on *negligence*, the plaintiff must prove the product, as designed, was in a defective condition, unreasonably dangerous to the user when it left the control of the defendant and the defect caused his injuries." (R. 2366) (emphasis added). Thus, for both strict liability and negligence, Plaintiff was required to prove Fisher's product was unreasonably dangerous to the user. *Branham*, 390 S.C. at 210, 701 S.E.2d at 9.

Plaintiff argues the negligence instructions were "broader" than strict liability but fails to explain how the jury could find Fisher liable for negligence without creating an inconsistency in the jury's verdict in this case, and her generic statement that her negligence claim focuses on "conduct" does not repair the inconsistent verdicts. *See* (Resp. Br. 13–16). Fisher's "conduct" is relevant only if the product is unreasonably

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[2] *See also* S.C. Code Ann. § 15-73-10(2) (providing strict liability applies to an unreasonably dangerous product even if "[t]he seller has exercised all possible care in the preparation and sale of his product").

dangerous, then the level of care Fisher exercised is never analyzed. *Branham*, 390 S.C. at 210, 701 S.E.2d at 9 ("The fault-based element is of no moment where, as here, there is no showing in the first instance of a product in a defective condition unreasonably dangerous to the user."). Thus, the alleged "conduct"—the purported absence of due care—***is*** the additional fault element that need not be proven in a strict liability claim. It does not offer a separate or exclusive basis for liability. *See id.* at 212 n.5, 701 S.E.2d at 9 n.5 ("The converse of the situation before us is more easily understood, that is, where the negligence claim is dismissed and the strict liability survives, as questions of fact are presented as to elements common to both claims yet the plaintiff fails to present evidence of the absence of due care."). The remaining requirements are the same for both claims, and the jury's finding that Fisher is not strictly liable requires a defense verdict on the negligence claim regardless of Fisher's conduct. If a product is not unreasonably dangerous to the user—as the jury found on the strict liability claim—Fisher cannot be liable for its alleged conduct in failing to warn, failing to test, or any other alleged conduct. Accordingly, the trial court's finding that "*Bragg* . . . forecloses Fisher's argument" is an error of law. *See* (R. 39).

Plaintiff suggests Fisher's allegedly negligent conduct relates to asbestos-containing materials added to Fisher's valves post-sale. (Resp. Br. 15). Fisher cannot be liable for components it did not place into the stream of commerce, such as asbestos-containing flange gaskets and insulation that Duke purchased from third parties and added to Fisher valves,[3] and Plaintiff has not identified any alleged negligent conduct separate from the design, manufacture,

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[3] *See Baughman v. Gen. Motors Corp.*, 780 F.2d 1131, 1132–33 (4th Cir. 1986) ("Where . . . the defendant manufacturer did not incorporate the defective component part into its finished product and did not place the defective component into the stream of commerce, the rationale for imposing liability is no longer present. The manufacturer has not had an opportunity to test, evaluate, and inspect the component; it has derived no benefit from its sale; and it has not represented to the public that the component part is its own."); *O'Neil v. Crane Co.*, 266 P.3d 987, 991, 1005 (Cal. 2012); *Simonetta v. Viad Corp.*, 197 P.3d 127, 133–34 (Wash. 2008).

or sale of an allegedly defective product. Moreover, even assuming *arguendo* the addition of asbestos-containing components by Duke is a foreseeable material alteration to the Fisher valves, the jury's strict liability verdict is dispositive. *See Fleming v. Borden, Inc.*, 316 S.C. 452, 457, 450 S.E.2d 589, 592–93 (1994); *Kennedy v. Custom Ice Equip. Co.*, 271 S.C. 171, 176, 246 S.E.2d 176, 178 (1978) ("The test of whether a product is defective when sold is whether the product is unreasonably dangerous to the consumer or user *given the conditions and circumstances that will foreseeably attend the use of the product.*" (emphasis added)). The verdict in favor of Fisher on the strict liability claim is necessarily a finding that Plaintiff failed to prove an element common to both claims—that Fisher valves were unreasonably dangerous to the user.

Finally, the jury's deliberations do not entitle it to render an inconsistent verdict. The jury did not ask any questions about negligence; it asked only whether the elements of strict liability in general apply to each of the different strict liability theories. (R. 2388–90). Rather than explain how the jury's question rectifies the inconsistent strict liability and negligence verdicts, Plaintiff and the trial court state only that the question "indicated division" and the verdict was "the jury's prerogative." (Resp. Br. 16; R. 40). They suggest—without citing any supporting authority—that an appellate court lacks the power to reverse an inconsistent verdict because a jury has a right to render such a verdict. South Carolina law does not support this argument. *See Stevens*, 336 S.C. at 453, 520 S.E.2d at 632; *Krepps*, 324 S.C. at 610, 479 S.E.2d at 297. The trial court erred in entering judgment on the inconsistent verdict. Consequently, this Court must order a new trial.

II. Plaintiff's experts' opinions contradict the legal causation standard and are not based on the evidence in this case.

Plaintiff does not dispute the nature of her experts' opinions. In fact, she admits her experts opine that every exposure to asbestos causes mesothelioma: "Mesothelioma is caused by a person's cumulative asbestos exposure. . . . When there are exposures to multiple products, all the exposures

contribute to the cumulative dose." (Resp. Br. 9). Rather than address the conflict between the legal causation standard and her experts' opinions, she repeats the trial court's erroneous analysis and (1) states in conclusory fashion that a "cumulative exposure" opinion is different than an "any exposure" opinion, without explaining any differences; (2) claims her experts' opinions are reliable because the experts are qualified and relied on animal studies and "scientific literature"; (3) lists cases in which she claims courts from other jurisdictions admitted her experts' opinions; and (4) quotes Dr. Frank's answers to her hypotheticals without citing any evidentiary support for the testimony. (Resp. Br. 18–25).

Plaintiff's experts' opinions are unreliable and inadmissible because they ask the jury to decide the case using a standard that conflicts with the substantial-factor causation standard requirements, and Dr. Frank reached his opinions by making assumptions based on a distorted and incomplete analysis of the exposure evidence presented at trial.

Plaintiff fails to explain how the opinion that any exposure "above background" is a cause of Mr. Glenn's mesothelioma comports with the requirement that an exposure must be a substantial factor when considered in the context of *all* exposures. *Haskins v. 3M Co.*, No. 2:15-CV-02086-DCN, 2017 WL 3118017, at *6 (D.S.C. July 21, 2017);[4] *see also McIndoe v. Huntington Ingalls*

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[4] The trial court rejected an analysis of Judge David Norton of the U.S. District Court for the District of South Carolina in *Haskins* regarding expert testimony and relied on a "note in the Harvard Law Review" to support its rejection of Judge Norton's analysis. (R. 31) (relying on *Tort Law — Expert Testimony in Asbestos Litigation — District of South Carolina Holds the Every Exposure Theory Insufficient to Demonstrate Specific Causation Even if Legal Conclusions Are Scientifically Sound*, 131 HARV. L. REV. 658 (2017)). The "note" is an unsigned case summary written by second-year law students, and the Court should give it no weight. *See About*, HARV. L. REV. ("Most student writing takes the form of Notes, Recent Cases, and Recent Legislation. . . . Recent Cases and Recent Legislation are normally 8 pages and are written mainly by second-year students. Recent Cases are comments on recent decisions by courts other than the U.S. Supreme Court, such as state supreme courts, federal circuit courts, federal district courts, and foreign courts. . . . All student writing is unsigned."), https://harvardlawreview.org/about (last visited March 12, 2020). Moreover, the case summary argues, in circular fashion, that courts should

Inc., 817 F.3d 1170, 1177 (9th Cir. 2016). Instead, she argues that because the experts' opinions are purportedly based on basic scientific facts, the experts are free to present causation opinions that contradict the legal standard. (Resp. Br. 18–21). This theory ignores the requirement—adopted by the South Carolina Supreme Court for application in asbestos cases—that a plaintiff must prove exposure to *each* defendant's product was a substantial factor in causing the mesothelioma. *Henderson*, 373 S.C. at 185, 644 S.E.2d at 727; *see also 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."). The experts' opinions attempt to draw an improper, bright-line rule that all exposures above background are a proximate cause of mesothelioma, thus nullifying the requirements of the substantial factor test and collapsing the causation standard into the experts' opinion that every exposure causes mesothelioma. *See Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 677 (7th Cir. 2017); *McIndoe*, 817 F.3d at 1177; *Haskins*, 2017 WL 3118017, at *6.

Plaintiff's citation to Dr. Frank's opinion that "if this was Mr. Glenn's only exposure it would have been sufficient to cause his mesothelioma"—which Plaintiff's counsel acknowledged at trial was "not real life," (R. 1337)—exposes the flaw in Dr. Frank's opinions and Plaintiff's arguments. (Resp. Br. 24). An expert must analyze the Fisher exposures in light of *all* asbestos

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ignore the legal causation standard for asbestos cases adopted by the South Carolina Supreme Court in *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007), and, instead, allow plaintiffs to tell the jury it is "feasible" that a defendant caused the plaintiff's mesothelioma if there is any evidence of exposure to the defendant's product. 131 HARV. L. REV. at 665 ("The standard for good causation evidence need not be low — it merely needs to be feasible."). The case summary's suggestion is incompatible with South Carolina law.

exposures, not by imagining the Fisher exposures were the *only* asbestos exposures. *Haskins*, 2017 WL 3118017, at *6–8; *see also McIndoe*, 817 F.3d at 1177.

The purpose of the *Henderson* standard is not to set some minimal threshold—for example, "above background"—above which any exposure is deemed a substantial factor. *See Haskins*, 2017 WL 3118017, at *7 ("[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."); *see also Lindstrom*, 424 F.3d at 493. The purpose is to ensure that only those entities who played a *substantial* role in the development of mesothelioma are liable. *See Haskins*, 2017 WL 3118017, at *8 ("[A] robust concept of 'substantial causation' should account for the broader context in which a particular exposure occurs—including the defendant's relative contribution to the overall exposure, rather than an assessment of whether its contribution was sufficiently harmful in the abstract."). Plaintiff's experts' opinions are improper, and the trial court erred in failing to exclude the opinions.

Plaintiff also fails to tie Dr. Frank's opinions to the facts of this case. Plaintiff simply recites the hypotheticals she posed to Dr. Frank as "a summary of the exposure facts proven to the jury." (Resp. Br. 23–25). She cites no evidence supporting those hypotheticals. Instead, as she did while questioning Dr. Frank at trial, she weaves together general exposure evidence with some evidence related to Fisher in a manner that misleads the reader into believing all the evidence applies to Fisher. (Resp. Br. 2–3, 9–11, 23–25); *see also* (App. Br. 9–10, 20–21 & n.6). It does not.

Finally, Plaintiff fails to even address Fisher's argument that the expert opinions must be excluded under Rule 403 of the South Carolina Rules of Evidence. *See* (App. Br. 21–22). Rather

than explain to the jury which of Mr. Glenn's proven exposures were substantial factors in his development of mesothelioma, Plaintiff's experts testified that Mr. Glenn's mesothelioma was caused by all exposures above background. *See, e.g.*, (R. 431) ("Substantial exposure means one over background, the stuff that we all have, so it's a level above the background for an extended period of time."); (R. 491) ("Any exposure at levels above background would contribute by adding to that person's dose."); (R. 1303) ("I will recognize that different products can contribute different amounts to somebody getting a disease. But you can't leave any of them out."). The danger that Fisher will suffer unfair prejudice from the jury's consideration of opinions that conflict with the legal causation standard substantially outweighs the probative value of the opinions. *See* Rule 403, SCRE; (App. Br. 21–22 & n.7) (citing cases excluding the "every exposure" opinion under Rule 403). Accordingly, the trial court erred in admitting the opinions, and Fisher is entitled to judgment notwithstanding the verdict or, in the alternative, a new trial.

III. The trial court failed to instruct the jury in accordance with South Carolina law.

Plaintiff requests that this Court affirm the trial court's jury instructions on the erroneous grounds that the sophisticated intermediary doctrine is not the law in South Carolina, that Fisher failed to prove the elements of the sophisticated intermediary doctrine and intervening cause, and that the trial court was not required to properly explain the law to the jury in its punitive damages charges. Each of Plaintiff's arguments should be rejected.

A. The sophisticated intermediary doctrine is the law in South Carolina.

Plaintiff asserts the sophisticated intermediary doctrine is not the law in South Carolina. (Resp. Br. 26). Plaintiff is wrong. This Court affirmed a trial court's charging of the "sophisticated

user defense"[5] in *Bragg* and noted the defense, which was outlined in section 388 of the Restatement (Second) of Torts, "has been adopted by numerous jurisdictions." *Bragg*, 319 S.C. at 550, 462 S.E.2d at 332 (Ct. App. 1995); *see also, e.g.*, *Kennedy v. Mobay Corp.*, 579 A.2d 1191, 1197 (Md. Ct. Spec. App. 1990), *aff'd*, 601 A.2d 123 (Md. 1992) ("The legal premise underlying this defense, and indeed the defense itself, seems to have gained fairly wide acceptance . . . [I]t would appear, then, that some version of a 'sophisticated purchaser' defense is the norm in most jurisdictions." (citing cases from thirteen different jurisdictions)).

This Court again recognized the sophisticated user doctrine "is part of the products liability law of South Carolina" in 2013. *Lawing v. Trinity Mfg., Inc.*, 406 S.C. 13, 23, 462 S.E.2d 126, 131 (Ct. App. 2013) (*Lawing I*). Despite this Court's explicit adoption of the doctrine, the South Carolina Supreme Court stated in a 3-2 decision that no South Carolina appellate court had "explicitly adopted" the doctrine. *Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 226, 781 S.E.2d 548, 557 (2015) (*Lawing II*). Two dissenting justices explained this Court had "clearly recognized" the doctrine in *Bragg*. *Lawing II*, 415 S.C. at 229, 781 S.E.2d at 559 (Kittredge, J., concurring in part and dissenting in part) ("The doctrine was clearly recognized in *Bragg* . . . ."); *id.* at 231, 781 S.E.2d at 560 (Pleicones, J., dissenting) ("I agree with Justice Kittredge that the Court of Appeals properly decided the 'sophisticated user' issue, and that the doctrine has been part of South Carolina's jurisprudence since 1995.").

The majority's statement is not binding on this Court. The basis for the Supreme Court's decision in *Lawing II* was that the facts of that case did not implicate the sophisticated intermediary

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[5] The sophisticated user defense and the sophisticated intermediary doctrine, although bearing slightly different names, are the same doctrine. Fisher believes the "sophisticated intermediary doctrine" is the more appropriate name to avoid confusion between the intermediary (the employer) and the user (the plaintiff-employee).

doctrine, regardless of whether the doctrine is the law in South Carolina. 415 S.C. at 227, 781 S.E.2d at 557 ("[T]he threshold question in determining whether the trial judge erred in charging the sophisticated user defense to the jury is whether the law was implicated by the evidence in this case. We find that it was not, and therefore hold that the trial court erred in charging the sophisticated user defense."). The statement that South Carolina courts have not adopted the sophisticated intermediary doctrine was not "necessarily involved in the case," and therefore was "not the court's decision." *See Nash v. Tindall Corp.*, 375 S.C. 36, 40–41, 650 S.E.2d 81, 83 (Ct. App. 2007) ("Dicta or, as it is also known, dictum 'is a statement on a matter not necessarily involved in the case, and is not binding as authority. Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court's decision.'" (quoting 21 C.J.S. *Courts* § 227 (2006))). Thus, the sophisticated intermediary doctrine has been the law in South Carolina since 1995.

B. The evidence created a question of fact regarding whether the sophisticated intermediary doctrine or an intervening cause precludes Fisher's liability.

Plaintiff argues that the sophisticated intermediary doctrine applies only if a defendant included a warning label on its products and that Fisher failed to prove the requirements of the sophisticated intermediary doctrine or the existence of an intervening cause. (Resp. Br. 26–29). Fisher explained the error in the trial court's "labeling" ruling in its primary brief. (App. Br. 26–27). The evidence at trial created a question of fact as to whether the sophisticated intermediary doctrine and intervening causation apply, and the trial court therefore erred in refusing to charge the doctrines to the jury.

Fisher's burden to establish its right to a sophisticated intermediary or intervening cause charge is low. It need only present any evidence from which a reasonable jury could find the defenses apply. If the evidence creates a question of fact whether the affirmative defenses apply,

the trial court is required to charge the defenses to the jury. *See Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000) ("It is error for the trial court to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge."); *see also Harris v. Univ. of S.C.*, 391 S.C. 518, 524–25, 706 S.E.2d 45, 48 (Ct. App. 2011) (finding a trial court properly charged the law regarding both invitees and licensees because the plaintiff's status at the time of the injury was a question of fact for the jury).

The evidence supports both sophisticated intermediary and intervening cause charges. Based on the evidence presented at trial, a reasonable jury could find the following facts:

- As an employer, Duke is obligated to manage all asbestos exposure. (R. 1446) (testimony of Fisher's industrial hygiene expert, John Spencer).
- All workers must follow Duke's site regulations. (R. 951–952) (testimony of Plaintiff's expert Charlie Ay).
- In 1977, Duke established and communicated a policy requiring its employees to place caution labels—or warnings—on all products containing asbestos. (R. 3392).
- The policy applied to Oconee Nuclear Station, where Mr. Glenn worked. (R. 1725–26) (testimony of Mr. Glenn's coworker, Donald Rogers).
- Duke instructed its employees which work practices to follow, and Fisher did not direct any work practices. (R. 1206–07) (testimony of Mr. Glenn's coworker, Dale Jolly).

Thus, a reasonable jury could find that Duke directed its employees' work practices and was responsible for warning and protecting its employees, that Duke was aware or should have been aware of the alleged hazards of working on asbestos-containing gaskets,[6] that Fisher reasonably

[6] Plaintiff asserts that Duke did not know gaskets could be hazardous "because" Fisher represented that gaskets were safe. (Resp. Br. 5, 27). The record contains no evidence of this alleged cause-and-effect relationship. Regardless, Plaintiff's contention is a question of fact that must be decided by the jury, not the trial court.

relied on Duke to warn and protect its employees, and that Fisher is therefore not liable for Plaintiff's damages. *Webb v. Special Elec. Co.*, 370 P.3d 1022, 1034–35 (2016).

Plaintiff and the trial court disregard this evidence, but the weight and credibility of the evidence is not for them to decide. *Byrd v. McLeod Physician Assocs. II*, 427 S.C. 407, 417–18, 831 S.E.2d 152, 157 (Ct. App. 2019) ("[N]either an appellate court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." (quoting *Bass v. S.C. Dep't of Soc. Servs.*, 414 S.C. 558, 570, 780 S.E.2d 252, 258 (2015))). The trial court's inquiry is limited to determining whether any evidence exists to support Fisher's defense. The evidence exists. The trial court therefore had a duty to charge the sophisticated intermediary doctrine to the jury and allow the jury to weigh the evidence. *See Clark*, 339 S.C. at 390, 529 S.E.2d at 539. The trial court abused its discretion by denying Fisher's request to charge the sophisticated intermediary doctrine, and Fisher is therefore entitled to a new trial.

The trial court committed a similar error in refusing to charge the jury on intervening cause. In fact, Plaintiff highlights the key error in the trial court's ruling: although the trial court correctly recognized foreseeability is a jury question, it improperly weighed the evidence itself, found the intervening causes were foreseeable, and refused to submit the question to the jury. (R. 2607–08) ("I think the linchpin is foreseeability, and the plaintiff is correct. The intervening causes we're talking about, whether it be Duke or some other intervening cause, were completely foreseeable. *The jury could certainly find that on the basis of the evidence viewed in the light most favorable to the nonmoving party*." (emphasis added)); *see also Steele v. Rogers*, 306 S.C. 546, 551, 413 S.E.2d 329, 332 (Ct. App. 1992) ("Ordinarily, foreseeability is a question of fact to be decided by the jury.").

The record contains evidence of potential intervening causes. *See* (App. Br. 27–28 & n.10) (citing evidence of intervening causes). The foreseeability of those potential causes must be determined by the jury. *Steele*, 306 S.C. at 551, 413 S.E.2d at 332; *see also Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) ("Only in rare or exceptional cases may the issue of proximate cause be decided as a matter of law." (quoting *Baily v. Segars*, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct. App. 2001))). Rather than allow the jury to determine foreseeability, the trial court weighed the evidence itself and made an improper factual finding. Plaintiff now asks this Court to do the same. The Court should reject Plaintiff's request.

Finally, Plaintiff's argument that another entity's breach of duty cannot relieve Fisher of its duty focuses on the wrong element of a products liability claim. *See* (Resp. Br. 28). An intervening cause is not part of the duty analysis; it is part of the proximate cause analysis. *See Stone v. Bethea*, 251 S.C. 157, 162, 161 S.E.2d 171, 173 (1968) ("When the negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause."). Even if Fisher owed a duty to Plaintiff and breached that duty, it is not liable if its breach was not the proximate cause of Plaintiff's injuries because an intervening cause broke the causal chain. *Id.*; *see also Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 467, 494 S.E.2d 835, 844 (Ct. App. 1997). The trial court incorrectly deprived Fisher of this defense entirely. The Court should reverse the trial court and award Fisher a new trial.

C. The trial court breached its duty to instruct the jury that South Carolina law prohibits an award of punitive damages for a breach of warranty claim.

Plaintiff does not dispute that she is not entitled to recover punitive damages for her breach of warranty claim. *See* (Resp. Br. 30). Instead, she takes the position that the trial court was not

required to instruct the jury that it could not award punitive damages for a breach of warranty. (*Id.*). This Court should reject Plaintiff's arguments and reverse the punitive damages award.

Trial courts have a duty to charge "the current and correct law of South Carolina." *McCourt By & Through McCourt v. Abernathy*, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995); *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 Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 104, 727 S.E.2d 407, 414 (2012). It is undisputed that South Carolina law prohibits an award of punitive damages for a breach of warranty. *Rhodes v. McDonald*, 345 S.C. 500, 504–05, 548 S.E.2d 220, 222 (Ct. App. 2001). The trial court was therefore required to instruct the jury that it could not award punitive damages for Plaintiff's breach of warranty claim. *Fairchild*, 398 S.C. at 104, 727 S.E.2d at 414 ("[A] trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence."). Its failure to do so entitles Fisher to a new trial. *Id.* ("'Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error.' 'Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error.'" (citation omitted)).

Plaintiff alternatively asks this Court to find the trial court's error harmless because the case also involved a negligence claim, and Plaintiff and the trial court therefore assumed the result would be the same even if the trial court properly instructed the jury. (Resp. Br. 30); *see also* (R. 45) (stating, without any support, that "the jury did not base punitive damages on its breach of warranty finding"). Plaintiff's argument is unfounded speculation, and the trial court erred in reaching a baseless assumption that the jury awarded punitive damages solely on Plaintiff's negligence claim. A misleading charge is harmless only if the charge as a whole properly conveys

the law to the jury or allows the jury to understand the law and issues involved. *McCourt*, 318 S.C. at 306, 457 S.E.2d at 606; *see also, e.g.*, *Cole v. Raut*, 378 S.C. 398, 406, 663 S.E.2d 30, 34 (2008) ("[T]he trial court clarified any potential confusion resulting from the erroneous charge by definitively establishing that the jury should find for the Coles if Kyle's injuries resulted from Dr. Raut's negligence."). The trial court's failure to charge a critical principle is not rendered harmless by the mere possibility that the jury would have reached the same result if the trial court had given proper instructions. Fisher is entitled to a new trial.

IV. The trial court erroneously denied Fisher's rights to a full and fair apportionment of fault and to a complete setoff.

A. Fisher is entitled to have the jury apportion fault to all defendants or potential tortfeasors.

Plaintiff raises numerous arguments in an attempt to justify the trial court's improper decision to restrict the jury's apportionment of fault to the nonsettled defendants remaining at trial. Each of Plaintiff's arguments fails. The trial court erred in refusing to allow a full apportionment of fault, and Fisher is therefore entitled to a new trial.

i. Section 15-38-15(F) does not prohibit Fisher's requested apportionment of fault.

Plaintiff argues South Carolina Code section 15-38-15(F) is dispositive of Fisher's apportionment of fault argument because the jury found Fisher's conduct willful, wanton, or reckless. (Resp. Br. 31). Section 15-38-15(F) does not prohibit a full apportionment of fault.

Subsection (F) eliminates the rule that a defendant who is less than 50% at fault is liable only for its percentage of fault. *See* S.C. Code Ann. § 15-38-15(A) ("A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact."); S.C. Code Ann. § 15-38-15(F) ("This section does not apply to a defendant whose conduct is determined to be wilful, wanton,

reckless, grossly negligent, or intentional or conduct involving the use, sale, or possession of alcohol or the illegal or illicit use, sale, or possession of drugs."). A willful and wanton defendant who is less than 50% at fault remains jointly and severally liable. However, subsection (F) does not—and cannot—affect which entities go on the verdict form in the first place. That decision must be made before the jury finds any defendant willful, wanton, or reckless, and the inclusion of other defendants on the verdict form may affect the jury's determination. Plaintiff's proposed interpretation would require a trial judge to predict the future. This Court should not adopt such an unreasonable interpretation.

Moreover, Fisher's constitutional arguments remain, regardless of whether subsection (F) applies. This Court should accept Fisher's constitutional arguments and reverse the trial court.

ii. Plaintiff's remaining arguments fail to justify the trial court's failure to require a full and fair apportionment of fault.

Plaintiff's remaining arguments do not support an artificial restriction on the jury's ability to apportion fault among all potential tortfeasors. Plaintiff focuses first on the word "defendants" in section 15-38-15 and argues the use of "defendants" in the statute precludes Fisher's requested apportionment of fault. (Resp. Br. 31–35). However, Fisher requested that a settled ***defendant*** be included on the verdict form, and all defendants in this case were potential tortfeasors. *See* (R. 2882). Every entity named in the complaint opposite plaintiff was a "defendant"—and thus a party—in this case, and nothing in the statute requires a defendant to remain an active litigant at the time the case is submitted to the jury. *See* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a "defendant" as "[a] person sued in a civil proceeding" and a "party" as "[o]ne by or against whom a lawsuit is brought"); S.C. Code Ann. § 15-38-15. Moreover, stipulations of dismissal for several defendants were not filed until after the trial concluded. *See, e.g.*, (R. 3332). Consequently, even

if the statute limits apportionment to "active" defendants, any defendant not formally dismissed remained a defendant at the time of the verdict and should have been included on the verdict form.[7]

Second, Plaintiff blurs the distinction between fault and liability in her argument that she has a substantial right to choose her defendants. *See* (Resp. Br. 37–38). Adding a settled defendant or nonparty to the verdict form for apportionment of fault has no effect on Plaintiff's right to choose her defendants. Although a plaintiff may choose which person or entity she sues, she does not have a substantial right to choose which person or entity is at fault for her injuries.[8] The purpose of the statute is to relieve a defendant who is less than 50% at fault from joint and several liability. S.C. Code Ann. § 15-38-15(A). Artificially limiting the jury's consideration of fault to a small number of defendants or tortfeasors conflicts with that purpose by *increasing* the likelihood that a defendant will be subjected to joint and several liability. Moreover, Plaintiff in fact "chose" all settled defendants as defendants.

Third, the Court cannot consider the legislative history of the statute because the statute is not ambiguous. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. 'What a legislature says in the text of a statute is considered the best evidence of the legislative

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[7] Plaintiff's reliance on *Smith v. Tiffany* is misplaced; the settled person in *Tiffany* was never a party or defendant. *See* (App. Br. 30–31) (distinguishing *Tiffany*); *Smith v. Tiffany*, 419 S.C. 548, 553–54, 799 S.E.2d 479, 482 (2017) (explaining Mizell settled and entered a covenant not to execute before a plaintiff filed the lawsuit).

[8] Plaintiff's argument that a full apportionment of fault undermines the truth-seeking function of the court should be given no weight. The suggestion that artificially limiting the jury's consideration to a single defendant, rather than all entities potentially responsible, somehow *undermines* the truth-seeking function of the court is absurd. If the court and the parties desire to seek the truth, the jury must consider all entities which potentially caused the harm.

intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.'" (quoting *In re Vincent J.*, 333 S.C. 233, 233, 509 S.E.2d 261, 262 (1998) and Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992))). It may consider only the plain language of the statute. *Id.*

Fourth, subsection (D) simply reaffirms the empty chair defense. *See* S.C. Code Ann. § 15-38-15(D). It does not support Plaintiff's assertion that apportionment of fault to nonparties is permissible only if it preexisted the statute. *See id.*

Fifth, Plaintiff asserts that a full and fair apportionment of fault would discourage settlement and prevent her from recovering her full damages. (Resp. Br. 39–40). Plaintiff acknowledges the propriety of the empty-chair defense, which allows a defendant to shift the blame for a plaintiff's damages to a settled defendant, (Resp. Br. 36), yet she argues that apportionment of fault to a settled defendant would somehow discourage her from settling with the defendant in the first place, (Resp. Br. 39). A full apportionment of fault would not meaningfully alter the conduct of trial or a plaintiff's proof; it would merely effectuate the General Assembly's intent to limit joint and several liability. *See* S.C. Code Ann. § 15-38-15. Moreover, Plaintiff's argument that the combined effect of a full apportionment and setoff will prevent her from recovering her full damages is an incorrect statement of public policy. The General Assembly provided for both apportionment of fault and setoff in section 15-38-15. S.C. Code Ann. § 15-38-15; *see also* S.C. Code Ann. § 15-38-50. When the General Assembly enacts a statute, it declares the public policy of South Carolina, and a court cannot reject a legislative enactment on public policy grounds. *See McNeil v. S.C. Dep't of Corr.*, 404 S.C. 186, 191, 743 S.E.2d 843, 846 (Ct. App. 2013) ("The primary source of the declaration of the public policy of the state is the General

Assembly; the courts assume this prerogative only in the absence of legislative declaration." (quoting *Citizens' Bank v. Heyward*, 135 S.C. 190, 133 S.E. 709, 713 (1925))).

Finally, Plaintiff argues section 15-38-15 is not unconstitutional because a rational basis for her interpretation of the statute exists. Plaintiff misunderstands Fisher's argument. (Resp. Br. 40–41). Fisher has not argued the statute is facially unconstitutional. Rather, the trial court's *interpretation* of the statute to preclude apportionment of fault to settled defendants or other potential tortfeasors is unconstitutional. (App. Br. 34) ("*The trial court's interpretation* renders the [South Carolina Contribution Among Tortfeasors Act] unconstitutional because it deprives Fisher of its rights to due process, equal protection, and trial by jury." (emphasis added)). By prohibiting a full and fair apportionment of fault, the trial court's actions deprived Fisher of its constitutional rights. *See* (App. Br. 32–34) (explaining how the trial court's interpretation deprived Fisher of its rights to due process and equal protection and its right to have a jury determine all triable issues). Consequently, Fisher is entitled to a new trial.

B. The trial court improperly denied Fisher's statutory and equitable right to setoff.

Plaintiff fails to address the key setoff issue: she cannot unilaterally allocate settlement funds to avoid or minimize Fisher's setoff. Plaintiff describes the settlements in her brief as if the parties to the settlements agreed to the allocation, *see* (Resp. Br. 41), but she *admitted* to the trial court that the allocation was not part of the agreements, (R. 2627) ("The releases don't contain any allocation."). She fails to cite a single case or statute supporting the trial court's approval of a unilateral, self-serving allocation of settlement proceeds. Instead, she ignores the issue, continues the trial court's improper reliance on cases approving a plaintiff's and defendant's *agreed-upon* allocation, and fails to explain how those cases apply here. No South Carolina appellate court has approved a unilateral allocation. Plaintiff cannot evade a setoff by unilaterally allocating

settlements in a self-serving manner. *See Dionese v. City of W. Palm Beach*, 500 So. 2d 1347, 1349 (Fla. 1987); *Knox v. Los Angeles Cty.*, 167 Cal. Rptr. 463, 469 (Cal. Ct. App. 1980).

Plaintiff relies on *Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015), for her declaration that she has an unlimited entitlement to unilaterally allocate settlement proceeds in any manner she sees fit to serve her own interests. (Resp. Br. 43–46). Although parties entering into a settlement agreement may agree to allocate funds in a manner that advances their interests, *see Riley*, 414 S.C. at 196, 777 S.E.2d at 831 ("[W]e believe it was error to disturb *the settling parties' agreed-upon allocation* solely because the apportionment may have been advantageous to the Estate." (emphasis added)), Plaintiff does not gain an unlimited right to allocate settlement funds in her self-interest after entering into a general settlement agreement that does not include any allocation. Moreover, Plaintiff's interests do not include obtaining a double recovery. The purpose of a setoff is to implement South Carolina public policy by *preventing* a double recovery. *See Smith v. Widener*, 397 S.C. 468, 471, 724 S.E.2d 188, 190 (Ct. App. 2012); S.C. Code Ann. § 15-38-50. Plaintiff's interests must yield to South Carolina law and public policy. She is not entitled to evade the statutory setoff requirements. This Court should reverse and set off the settlement funds against the total compensatory damages award.[9] *See Dionese*, 500 So. 2d at 1350.

V. The trial court erred in issuing sanctions against Fisher.

The trial court erred in granting sanctions against Fisher. Contrary to Plaintiff's characterization that the trial court was "'very troubled' by Fisher's conduct," (Resp. Br. 48), the

[9] Plaintiff also offers no justification for allocating $0 to her loss of consortium claim and fails to clarify whether she settled and released that claim. *See* (R. 3105) ("[T]he settlements received by Plaintiff included compensation only for wrongful death and survival . . . ."); (R. 2622, 2626) (explaining, "For the loss of consortium, there is no allocation to that pretrial," but stating Plaintiff "release[d] all claims against the individual defendants"); (R. 50) ("The settlements received by Plaintiff included compensation only for wrongful death and survival."); (R. 51) ("There is no setoff for loss of consortium, as that claim was not settled pre-trial by any defendants.").

trial court found the tissue digestion dispute was not a product of any improper conduct or discovery abuse by Fisher or its counsel. The trial court expressly stated that it understood the importance of the tissue digestion evidence, that the dispute was a misunderstanding, and that it did not find any bad faith. *See* (R. 169–72) (stating, after listening to counsel for other defendants explain the importance of the tissue digestion and the impact the issue could have on all defendants left in the trial, "I understand. I am very troubled about this, and I realize what impact Dr. Oury's testimony has. . . . It's evident to me that there was a miscommunication about this big time and no meeting of the minds about this matter. . . . I'm not assigning any bad faith to anybody in connection with this, but I do not see on this record an indication that agreement was reached about this matter."). Because it found the parties did not reach a complete agreement regarding the tissue digestion study and the tissue "was not divided as to provide a mirror image of half of the tissue to the Plaintiff," however, it excluded the tissue digestion and related testimony and entered a written order explaining its ruling and reasoning. *See* (R. 7); *see also* (R. 56) ("This Court ruled that the tissue digestion was inadmissible because it was completed in the absence of an agreement between the parties . . . .").

The parties complied with the trial court's evidentiary ruling at trial. Near the end of trial, Fisher sought to preserve its right to appellate review of the evidentiary ruling by proffering a sworn statement from Dr. Oury so an appellate court may review the substance of the testimony Dr. Oury would have offered if the trial court had not excluded the tissue digestion evidence. *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."). Despite having entered a written order explaining its evidentiary

ruling and reasoning, the trial court attempted to retroactively alter its view of the tissue digestion dispute due to Fisher's proffer. The trial court also incorrectly deemed the sworn statement to be a deposition on the ground that it was a question-and-answer session recorded by a court reporter.

Neither Plaintiff nor the trial court cite any rule or order violated by Fisher or identify any impropriety by Fisher or its counsel. Although Fisher maintains it complied with the standing order, the penalty imposed by the trial court for Fisher's alleged violation of the standing order was exclusion of the tissue digestion evidence. Further, Fisher did not take the deposition quashed by the trial court in its January 7, 2019 ex parte order, *see* (R. 3), and Plaintiff's and the trial court's repeated references to Dr. Oury's "deposition" are a red herring. No matter how many times they call it a "deposition," the nature of the sworn statement remains the same: Fisher recorded Dr. Oury's opinions, which were substantively identical to the opinions contained in his December 18, 2018 report, in a question-and-answer format for the sole purpose of making an offer of proof at trial to preserve the tissue digestion issue for appellate review. (R. 2792, 3334–64). Moreover, the recording of the sworn statement is irrelevant to the issues decided by the trial court at the pretrial hearing—whether the parties reached an agreement as to the tissue digestion and, if so, whether Fisher complied with the terms of the agreement.[10] Finally, Fisher did not violate any rule or order by disclosing the sworn statement as a proffer near the end of trial. Fisher never attempted to use the testimony against Plaintiff at trial, and Plaintiff does not argue that she suffered any prejudice from the taking or proffering of the sworn statement. Plaintiff's and the

[10] Plaintiff misrepresents the trial court's findings—that Fisher destroyed tissue without an agreement and in violation of the trial court's standing order—as "undisputed" and accuses Fisher of changing its position on appeal. (Resp. Br. 47). Fisher disputes Plaintiff's arguments and maintains that it had an agreement with Plaintiff to divide the tissue evenly and perform the tissue digestion, and it acted in compliance with the agreement. *See* (App. Br. 43) ("Fisher maintains the parties reached an agreement to divide the tissue and perform the study . . . .").

trial court's "surprise" that Fisher proffered Dr. Oury's opinions does not justify the trial court's improper recharacterization of its prior ruling, and the trial court's decision to issue sanctions in the absence of any rule or order violation is an abuse of discretion. *See* Rule 37(b), SCRCP.

Plaintiff also claims "Plaintiff's terms" were that the tissue must be equally divided by an independent laboratory. As Fisher explained in its primary brief, the parties reached an agreement on December 11, 2018, to have the tissue divided evenly. (App. Br. 7); (R. 2832–33). After the agreement, a member of Plaintiff's counsel's team who had not previously participated in the negotiations attempted to add another term to the already-existing agreement requiring the tissue to be divided by a neutral third party. (R. 2832). Fisher never accepted the proposed modification, and the term never became part of the parties' agreement. *See Lee v. Univ. of S.C.*, 407 S.C. 512, 518, 757 S.E.2d 394, 398 (2014).

Finally, Plaintiff claims Fisher used a "biased laboratory" and failed to evenly divide the tissue. (Resp. Br. 47); *see also* (R. 122–23, 2735). However, Plaintiff never presented any evidence of RJ Lee's alleged bias. Neither the trial court nor this Court can find that RJ Lee is a biased laboratory based solely on Plaintiff's counsel's unsupported accusations. Similarly, the only evidence in the record as to whether the tissue was evenly divided is the affidavit of Drew Van Orden, which Fisher presented to the trial court, stating that the lab properly divided the tissue. *See* (R. 2853–54). The trial court's sanctions order is therefore unsupported by any evidence and must be vacated. *See City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000).

CONCLUSION

This Court should reverse the trial court's rulings and grant Fisher JNOV on the ground that Plaintiff failed to present admissible proximate cause evidence or, in the alternative, award

Fisher a new trial. If the Court declines to grant JNOV or order a new trial, it should direct the trial court to set off Plaintiff's total settlements against the total compensatory damages award. Finally, the Court should reverse and vacate the sanctions order.

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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 Reply Brief complies with Rule 211(b), SCACR.

(signature page attached)

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May 12, 2020