THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court Of Common Pleas

The Honorable Doyet A. Early III, Circuit Court Judge

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SC Court of Appeals

Case No: 2008-CP-05-235
Appellate Case No.: 2012-207489
Opinion No. 5195

Laura Riley as the Personal Representative
of the Estate of Benjamin Riley ....Respondent,

v.

Ford Motor Company ....Appellant.

APPELLANT'S PETITION FOR REHEARING AND SUPPORTING MEMORANDUM

Appellant Ford Motor Company ("Ford") hereby petitions the Court for rehearing, pursuant to South Carolina Appellate Court Rule 221. The opinion of the Court (Opinion 5195) was filed February 5, 2014. That opinion: (1) affirmed the trial court's denial of Ford's motion for judgment notwithstanding the verdict (JNOV); (2) reversed the grant of the Estate's motion for new trial *nisi additur* and reinstated the jury's verdict of $300,000; and (3) reversed the denial of Ford's motion for setoff and awarded a setoff against the verdict in the amount of $20,000. Ford petitions this Court for rehearing on the affirmance of the trial court's denial of Ford's JNOV motion and the award of a $20,000 setoff against the verdict.

ARGUMENT

Ford seeks rehearing because this Court overlooked and misconstrued both the record and controlling law.

I. The Court's Opinion Misapprehends That the Estate Offered "Some Evidence Beyond the Product's Failure Itself" as Evidence of a Defect.

First, the Court's opinion misapprehends that the Estate offered "some evidence beyond the product's failure itself" as evidence of a defect. (Op. pp. 8-9). The Court's analysis gives credence to the circular logic of Estate expert Andrew Gilberg, who concluded that Ford's rod linkage system was defective because "it fails without even stressing the latch." (Op. p. 9). This opinion amounts to pointing to the failure, and then stating that the design was bad because it should not allow the failure. The opinion was not that Ford's design used an improper material, incorporated a rod of the wrong size, or placed the rod in the wrong position. No identifiable reason was provided that would render Ford's design defective and differentiate it from the nine out of every ten vehicles on the road at that time that also employed rod-linkage systems, including vehicles manufactured by Ford's competitors.[1] Gilberg admitted that he knew of no statistical studies showing that Ford PN96 doors are more likely to come open in collisions than doors on any other vehicle, (R. p. 283, lines 20-25), and no evidence was presented to show that the PN96 model had an unreasonably higher rate of collision door openings or injuries when compared with other vehicles.

Instead, Gilberg relied on failure: Ford's design was defective because the latch activated in Riley's truck and the latch system did not protect against that failure. (R. p.

[1] In fact, Gilberg *endorsed* Ford's use of a compression rod rather than the tension rod used by most other manufacturers at the time, which he thought was an improvement, not a defect. (R. p. 269, lines 15-22; p. 285, line 25-p. 286, line 7).

181, lines 6-14 ("I believe that the door in Riley's truck was defective. I believe it came open without damage to the latch. That shouldn't have happened."); R. p. 275, lines 7-8 (It "fail[ed] without even stressing [it]."")). The Court's opinion echoes Gilberg's error: "The defect that caused the failure was a door-latch system *that did not protect* against foreshortening, and *allowed the door to open* when it should not have . . . ." (Op. p. 9) (emphasis added). What is missing is evidence of how this particular rod system was not adequately protected from foreshortening.

Whether couched as the "capacity to fail," a "sensitivity to crush," or the "failure to protect," it is just failure by another name. "[T]he mere fact that a product malfunctions does not . . . establish that the product was defective." *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 543, 462 S.E.2d 321, 328 (Ct. App. 1995). "South Carolina does not follow the doctrine of *res ipsa loquitur*," and the fact that an accident occurred is not enough to establish a negligence products liability claim. *Watson v. Ford Motor Co.*, 389 S.C. 434, 452-53, 699 S.E.2d 169, 179 (2010). The danger of equivocating failure with a defect is clear: no identifiable design flaw sets apart Ford's rod-linkage design from the rod-linkage design used in 90% of cars on the road at that time.

The Estate's own expert admitted that there is "nothing inherently wrong with rods," and he refused to vilify the rod-linkage design. (R. p. 276, line 14). Yet, the Court's opinion does exactly that: "[t]he defect . . . was a door-latch system that . . . allowed the door to open when it should not have . . . ." (Op. p. 9). This is the same tautological loop in which Gilberg engaged: the door opened because of a defective latch design, and the defective design is the latch's ability to fail. (R. p. 250, line 22-p. 251, line 5) ("[A] small amount of longitudinal crush endwise in the door caused it to come open."). The resulting inconsistency of this approach is apparent in the Court's opinion.

The Court held that the use of "a compression rod-linkage system . . . 'sensitive to longitudinal crush'" is a design defect *immediately after acknowledging* Gilberg's concession that "the mere use of the rod-linkage system itself" is not a design defect. (Op. p. 9).

The Court also misapprehends the impact of *Graves* in this case. Contrary to the Court's suggestion, *Graves* is not "readily distinguishable." (Op. p. 9). In *Graves*, exclusion of the plaintiffs' experts left them with only lay testimony of the product's failure, while in this case the Estate has offered expert testimony of the product's failure. This is a distinction without a difference because under *no circumstances* is evidence of failure – whether from a lay witness or an expert – enough to satisfy the required showing that the product is defective:

> It is well-established that one cannot draw an inference of a defect from the mere fact a product failed. *Sunvillas Homeowners Ass'n v. Square D Co.*, 301 S.C. 330, 333, 391 S.E.2d 868, 870 (Ct.App.1990). Accordingly, the plaintiff must offer some evidence beyond the product's failure itself to prove that it is unreasonably dangerous. *Thus, while the Graves do have witnesses who testified that the alarm did not sound, that alone is not sufficient.*
>
> . . .
>
> [T]he Graves are still left with no expert opinions regarding any defects in the monitor.

Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 80-81, 735 S.E.2d 650, 658-59 (2012), *reh'g denied* (Dec. 12, 2012) (emphasis added). The Court's opinion in this case overlooks this language by suggesting that exclusion of the computer experts in *Graves* "le[ft] the plaintiff with no evidence whatsoever as to how, or even whether, the product malfunctioned" and thus no proof of "failure." (Op. p. 9). *Graves* makes clear that the

issue was not that plaintiffs lacked proof of failure, but rather that *mere* proof of failure was insufficient to meet their burden.

For these reasons, and for the reasons set forth in Ford's appellate briefs on this point, rehearing is warranted. The Court's conclusion that the defect *is* a "door-latch system that did not protect against foreshortening" runs afoul of well-established South Carolina law requiring a plaintiff to "offer some evidence beyond the product's failure itself to prove that it is unreasonably dangerous." *Graves*, 401 S.C. at 80, 735 S.E.2d at 659. The Court's opinion only perpetuates the Estate's legally insufficient argument that susceptibility to failure evidences a design defect.

II. The Court's Opinion Overlooks the Estate's Inability to Show How the Cable Linkage Design Would Have Prevented the Product from Being Unreasonably Dangerous.

The Court's parsing out of the Estate's burden to identify a design "flaw" (also referred to as a design "feature") as distinct from the Estate's ultimate burden to show a design "defect" is a semantic exercise that distorts the analysis outlined in *Branham* and echoed in *Graves*. (*See* Op. pp. 7-8) ("[The requirement] that the plaintiff must 'point to a design flaw in the product' . . . relates to the plaintiff's burden of proving a reasonable alternative design, not the requirement of proving the existence of a design defect."). The South Carolina Supreme Court has pronounced that the "only way" for the Estate to prove that injury resulted from an unreasonably dangerous, defective product is to "point to a design flaw" and then "show how [its] alternative design would have prevented the product from being unreasonably dangerous." *Branham v. Ford Motor Co.*, 390 S.C. 203, 225, 701 S.E.2d 5, 16 (2010). The defect and the flaw are inextricably intertwined, as the Estate always bears the burden to show that Ford's product was "in a defective condition unreasonably dangerous to the user." *Graves*, 401 S.C. at 79, 735 S.E.2d at

658. "Academically, it may be argued that all products are defective because they can be made more safe. However, it does not automatically follow that the products are deemed 'unreasonably dangerous.'" *Claytor v. General Motors Corp.*, 277 S.C. 259, 265, 286 S.E.2d 129, 132 (1982).

The analysis centers on whether "'omission of the alternative design renders the product not reasonably safe.'" *Branham*, 390 S.C. at 224, 701 S.E.2d at 16 (quoting Restatement (Third) of Torts: Products Liability § 2(b) (1998)). Whether referred to as a flaw, a feature, or a defect, the law is clear: it is not enough for the Estate to point to a failure in Riley's vehicle and then point to an alternative design that would have prevented that particular failure. Such a myopic view overlooks *Branham*'s mandate that the omission of the alternative design must not only prevent the failure, but also render the product *not reasonably safe*. Indeed, in *Graves*, the Court noted that the plaintiff presented evidence of an alternative reasonable design, 401 S.C. at 79 n.11, 735 S.E.2d at 658 n. 11, but still found that: "Without the testimony of their experts . . . the Graves have no direct evidence of whether the [product] was unreasonably dangerous because there is no identification of a specific design flaw." *Graves*, 401 S.C. at 79, 735 S.E.2d at 658. When a specific design flaw is not identified first and the plaintiff is permitted to point only to a product's susceptibility to failure, then the requirement of an alternative design exists in a vacuum.

That is exactly what occurred here. The Estate pointed to Ford's use of the cable linkage system as an "alternative design" even though its own expert refused to agree that the cable system would have prevented the product from being unreasonably dangerous. Gilberg's attention was fixed on the failure, and he would only opine that the cable system would have prevented the failure *in this crash*:

Q. Alright, sir. We have talked about this 1996 door from Ford with the [cable linkage] door latch system. Do you have an opinion that that door latch system and door is well designed and non-defective?

A. No. No, I don't do that, but I will say that had that latch system been in Sheriff Riley's door it wouldn't have come open in this collision.

Q. In this one collision?

A. Yes.

Q. But you're unwilling to say that the design as a whole is a good design for all reasonably foreseeable crashes?

A. I am unwilling to say that. That's correct, yea.

(R. p. 273, lines 13-25). Gilberg continued throughout his testimony to emphasize that the cable system would have prevented the door from opening "in this crash," (*e.g.*, R. p. 266, line 25-p. 267, line 3), and he recognized that cable-actuated systems are not impervious to failure either, as "every engineering component has failure modes." (R. p. 274, lines 7-16). The Court's rendition of Gilberg's testimony as an overwhelming endorsement of the "safer" and "clearly more crashworthy" cable system (Op. p. 5) overlooks Gilberg's refusal to endorse the cable system, or any other system for that matter, as an alternative feasible design for the door latch system employed. Gilberg's refusal to testify the cable system was reasonably safe for all foreseeable crashes means the vehicle would remain unreasonably dangerous, even with the cable-linkage design. Thus, the Court incorrectly concluded the evidence was sufficient by holding "the law of crashworthiness does not require the Estate to prove its alternative design would have prevented the door from opening in *every* foreseeable collision." (*Id.* p. 8) (emphasis in original).

The sharp contrast between Gilberg's testimony and the fastidious testimony of the plaintiff's expert in *Branham* illustrates the point. In *Branham*, the plaintiff's design expert presented the MacPherson suspension system as the design that Ford should have implemented over the (allegedly defective) Twin I-Beam; he believed that the MacPherson system addressed identified design flaws in the Twin I-Beam by lowering the center of gravity and raising the stability index, resulting in a lower rollover propensity. *Branham*, 390 S.C. at 213-17, 701 S.E.2d at 10-12. Gilberg, on the other hand, neither criticized the selection of the rod system nor recommended the cable system as an alternative feasible design. Gilberg never used the characteristics of the cable system to pinpoint the defect in this rod system nor did he use the cable system to explain why this rod system was defective. Instead, Gilberg relied on his conclusion for his analysis: the cable system would not have allowed the latch to open in this particular accident and therefore the rod system was defective because the latch failed.

Despite testimony from the Estate's own expert that there was nothing "inherently wrong" with Ford's decision to use rods, the Court permitted the Estate to "m[e]et the requirements of *Branham* by presenting evidence of Ford's own alternative design for a door-latch system." (Op. p. 4). This decision impermissibly relieved the Estate of its burden to show not only that it was possible to use the cable-linkage system, but also that its use addressed a design flaw and prevented the product from being unreasonably dangerous. Numerous factors influence a manufacturer's decision to alter a design, and a change does not signal that one design is safer or even more desirable than the other. If that were the case, every design change would render the previous generation defective and unreasonably dangerous. Gilberg found nothing inherently wrong with the use of rods in a latch system, and it was error for the Court to allow the Estate to rely on Ford's

own use of the cable-linkage system to meet its burdens under *Branham*. For this additional reason, and for the reasons set forth in Ford's appellate briefs on this point, rehearing is warranted.

III. The Court's Opinion Misapprehends That the Record Contains Evidence of Conscious Pain and Suffering under the Threshold Required by South Carolina Law.

Finally, the Court's opinion misapprehends the threshold for sufficient evidence of conscious pain and suffering set forth in *Rutland v. South Carolina Department of Transportation*, 400 S.C. 209, 734 S.E.2d 142 (2012), and preceding case law. Although the facts of this case parallel the facts in *Rutland*, they inexplicably yielded a different result.

It is clear that the quality of the proffered "evidence" of conscious pain and suffering in this case was comparable to the evidence in *Rutland*—a disputed eyewitness account of a "gasping sound" in the vicinity of Riley's body in this case, (R. p. 112, lines 11-22; R. Appx. p. 1531, lines 11-22), and a disputed bystander account in *Rutland* that the decedent had a pulse, *Rutland*, 400 S.C. at 215, 734 S.E.2d at 145. After considering this evidence in *Rutland*, the Supreme Court pronounced that "even assuming [the decedent] had a pulse, that fact alone is not evidence of conscious pain and suffering." *Id.* Similarly, in *Camp v. Petroleum Carrier Corporation*, 204 S.C. 133, 28 S.E.2d 683 (1944), the Supreme Court held that "no evidence from which a reasonable inference can be drawn that [the decedent] was conscious of any pain and suffering in the interval between his injury and death" even though "[a] witness . . . testified that while standing on the outside of the wrecked automobile helping [another passenger] out of the car, he heard a man groaning on the inside of the car . . . ." *Camp*, 204 S.C. 133, 28 S.E.2d at

685. Despite the parameters set by *Rutland* and *Camp*, the Court held in this case that "a gasping sound . . . [is] some evidence to support a survival action." (Op. p. 11).[2]

That finding misapprehended the threshold required and cannot be reconciled with *Rutland* and *Camp*. The incongruity of this result is even more apparent because the Estate had the chance in this case to present its best evidence of conscious pain and suffering to the jury before the survival claim was withdrawn, (R. p. 342, line 23-p. 343, line 2), unlike in *Rutland* where a survival claim was never filed. *Rutland*, 400 S.C. at 212-13, 734 S.E.2d at 143. Despite every opportunity to set forth its best evidence, the Estate's proffer of conscious pain and suffering still fell short of the threshold required by South Carolina law.

The Court's misapplication of law to fact resulted in an erroneous finding that the Estate presented any evidence of conscious pain and suffering. Because the evidence was insufficient under South Carolina law to support a survival claim, the Court erred by allocating settlement proceeds *in any amount* to that claim.

CONCLUSION

For all of the reasons set forth herein, and for the reasons set forth in its appellate briefs, Appellant Ford Motor Company respectfully submits that it is entitled to rehearing and reconsideration of the Court's opinion and so moves.

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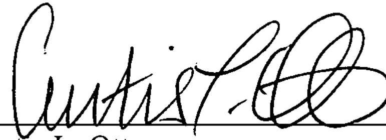
[2] The circumstances of the accident in *Rutland*—the decedent "was killed when the car in which she was riding rolled over and fell on top of her after she was partially ejected," *Rutland*, 400 S.C. at 211, 734 S.E.2d at 143—are also analogous to the rollover and ejection in this case. Although the Court in *Rutland* determined that the decedent "would have had little if any time to contemplate her demise" under these circumstances, *Rutland*, 400 S.C. at 211, 215, 734 S.E.2d at 143, 145, the Court presumed in this case that Riley had sufficient time because "the Estate's theory against Ford necessarily depends on Riley being alive after the initial collision . . . ." (Op. p. 11).



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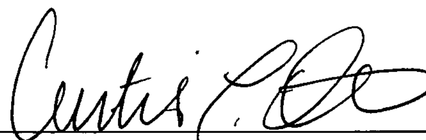
CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that the Petition for Rehearing complies with South Carolina Appellate Court Rule 267 and the August 13, 2007 Order of the South Carolina Supreme Court.



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PROOF OF SERVICE

I, Sandy Moore, the undersigned employee of Gallivan, White & Boyd, P.A., attorneys for the Appellant, do hereby certify that I have served a copy of the foregoing **Appellant's Petition for Rehearing and Supporting Memorandum and Certificate of Compliance**, in connection with the above-referenced case by mailing a copy of the same on February 20, 2014, by United States Mail, postage prepaid, to the following address:

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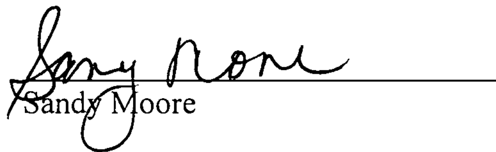

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