THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Timothy M. Cain, United States District Judge

Appellate Case No. 2016-001437

Reid Harold Donze.....Plaintiff,

v.

General Motors, LLC.....Defendant.

PLAINTIFF'S BRIEF

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CERTIFIED QUESTIONS

1. Does comparative negligence in causing an accident apply in a crashworthiness case when the plaintiff alleges claims of strict liability and breach of warranty and is seeking damages relating only to the plaintiff's enhanced injuries?

2. Does South Carolina's public policy bar against impaired drivers recovering damages apply in a crashworthiness case when the plaintiff alleges claims of strict liability and breach of warranty?

STATEMENT OF THE CASE[1]

This products liability action involves a claim for enhanced injuries suffered by Plaintiff Reid Harold Donze ("Donze") following a motor vehicle collision in Greenville County on November 11, 2012.

At the time of the collision, Allen Brazell ("Brazell") was the driver of a 1987 Chevrolet pickup truck (the "Truck") in which Donze was a passenger. At the intersection of U.S. Highway 25 and S.C. Highway 11, Brazell attempted to make a left turn in front of a Ford truck. The Ford struck the Truck on the driver's side. As a result of the collision, the Truck burst into flames, causing severe, permanent second- and third-degree burns to 80% of Donze's body.[2]

Defendant General Motors, LLC ("GM") designed, manufactured, and sold the Truck. Donze claims GM's placement of the Truck's fuel tank outside of the frames rails – at the point of impact in the collision – constitutes a design defect that made the tank vulnerable to forces in foreseeable collisions, thereby rendering the Truck uncrashworthy. Donze alleges the explosion,

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[1] Plaintiff assumes the Court has available to it the District Court's file in this matter. If not, he requests that the Court consider those portions of the case file referenced herein, to the extent they are necessary to supplement matters set forth in the District Court's Order of Certification.

[2] Donze's injuries from the initial impact (as opposed to the fire) were limited to a fractured rib and a fractured hip bone.

the fire, and his burn injuries were caused by this defect. He does not seek recovery for injuries caused by the initial impact but limits his claims to enhanced injuries caused by the fire.

On August 8, 2013, Donze commenced this crashworthiness action against GM in the United States District Court for the District of South Carolina asserting theories of negligence, strict liability, and breach of warranty. He thereafter dismissed his negligence claim and is pursuing this action based only on the remaining statutory causes of action.

GM denies the Truck is defective. It asserts defenses of comparative negligence[3] and an alleged public policy bar to recovery. Specifically, GM claims Brazell's alleged fault in causing the initial collision should bar Donze's recovery as a matter of law or should be submitted to the jury as evidence of Donze's alleged comparative fault.[4]

GM filed a motion for summary judgment in District Court arguing comparative negligence should reduce or bar Donze's recovery and Brazell's alleged impairment should bar Donze's recovery as a matter of public policy. Specifically, GM argued Donze and Brazell smoked synthetic marijuana (also known as "spice") before the accident and Donze allowed Brazell to drive the Truck while impaired by spice.

Donze opposed the motion. He denied he and Brazell smoked spice on the day of the accident or were impaired at the time. The evidence is minimal on this topic but, as the District Court agreed, genuinely disputed. For example, Donze initially testified in his deposition that he

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[3] While, conceptually, the defense may include conduct such as product misuse, Donze's use of the term "comparative negligence" in this brief is limited to fault in causing an accident. As such, it is consistent with both the factual allegations of GM's defense and the manner in which the certified question is worded.

[4] GM alleges (but Donze denies) that Brazell and Donze were engaged in a joint enterprise such that Brazell's alleged fault is attributable to Donze. The District Court found there are genuine factual issues material to this issue. (MSJ Hrg. Tr., p. 50). The resolution of the joint enterprise allegation is beyond the scope of the questions before this Court.

and Brazell smoked spice with Kenny Pruestel and Jessenia Slagle the morning before the collision. However, he later testified via deposition that he did not know whether that actually happened.[5] Pruestel and Slagle submitted affidavits stating they were not with Brazell or Donze on November 11, 2012, but last saw them the day before. Donze also asserted additional reasons to dispute the factual basis for GM's fault-based defenses. (*See generally* Donze's Memorandum in Opposition to GM's Motion for Summary Judgment, pp. 4-6, 30-34).

The District Judge denied summary judgment, finding there were "genuine issues of material fact with respect to whether or not Mr. Donze and Mr. Brazell smoked spice on the day of the accident or whether that took place on another day, and whether or not Mr. Brazell's ability to drive was impaired at the time of the accident." (MSJ Hrg. Tr., p. 50).

The District Judge also questioned whether South Carolina would recognize GM's comparative negligence and public policy bar defenses in this crashworthiness action, which led to his decision to seek certification of the questions now before this Court.

ARGUMENT

I. COMPARATIVE NEGLIGENCE IS INAPPLICABLE TO A CRASHWORTHINESS CASE WHEN THE PLAINTIFF ALLEGES CLAIMS FOR STRICT LIABILITY AND BREACH OF WARRANTY.

The Court may answer the first certified question solely by relying on long-standing and established South Carolina statutory law and judicial decisions stating that the defense of comparative negligence does not apply to causes of action for strict liability and breach of warranty. A contrary conclusion will cause unnecessary and drastic changes in South Carolina products liability law and would be an improper judicial alteration of statutory law.

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[5] Due to his severe, life-threatening injuries and post-traumatic stress disorder, Donze does not accurately remember many of the events leading up to the collision.

A. Existing Law Provides Controlling Precedent to Answer the Certified Question.

"[U]nder South Carolina law, the doctrine of comparative negligence is only applicable to cases alleging negligence as a cause of action." *Ritter & Assocs. v. Buchanan Volkswagen,* 405 S.C. 643, 651, 748 S.E.2d 801, 805 (Ct. App. 2013), *citing Berberich v. Jack*, 392 S.C. 278, 286, 709 S.E.2d 607, 611 (2011). There is no negligence cause of action in this case. Therefore, comparative negligence is inapplicable.

1. Breach of Warranty Cause of Action.

Donze asserts a cause of action for breach of the implied warranty of merchantability under S.C. CODE ANN. § 36-2-314 (1976, as amended). South Carolina courts have long recognized the actionability of a products liability claim for personal injuries under this statute. *See, e.g., Springfield v. Williams Plumbing Supply Co.,* 249 S.C. 130, 153 S.E.2d 184 (1967).

Similarly, for over 40 years, South Carolina courts have acknowledged that, with the exception of product misuse or abuse, a plaintiff's fault is not a defense to a breach of warranty claim under this statute. In *Imperial Die Casting Co. v. Covil Insulation Co.*, 264 S.C. 604, 216 S.E.2d 532 (1975), this Court held "contributory negligence is not a defense to breach of warranty." *Id.* at 609, 216 S.E.2d at 534. In its reasoning, the Court cited with approval the lower court's order stating:

> Negligence on the part of the buyer would not operate as a defense to the breach of warranty. If the manufacturer chooses to extend the scope of his liability by certifying certain qualities as existent, the negligent acts of the buyer, bringing about the revelation that the qualities do not exist, would not defeat recovery.

Id. (internal quotation marks omitted); *accord Wallace v. Owens-Illinois, Inc.,* 300 S.C. 518, 523, 389 S.E.2d 155, 158 (Ct. App. 1989) ("In South Carolina, contributory negligence is an affirmative defense to an action for negligence. It has no application to an action based on breach of warranty ....").

2. Strict Liability Cause of Action.

Donze's strict liability claim is based upon the *Restatement (Second) of Torts* § 402A ("§ 402A"), which is codified at S.C. CODE ANN. § 15-73-10, *et seq.* (1976, as amended). That act makes the seller of a defective and unreasonably dangerous product strictly liable for personal injuries the product causes to a user or consumer "although ... [t]he seller has exercised all possible care in the preparation and sale of his product." § 15-73-10(2)(a).

Both strict liability and negligence causes of action share common elements of proof that (1) the plaintiff was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) the product at the time of the injury was in essentially the same condition as when it left the defendant's hands. *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995). In fact, these elements are all that is required to prove strict liability.[6]

However, unlike statutory causes of action for strict liability or breach of warranty, "[a] negligence theory imposes the *additional* burden on a plaintiff of demonstrating the defendant (seller or manufacturer) failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to *fault*." *Branham v. Ford Motor Co.*, 390 S.C. 203, 210, 701 S.E.2d 5, 9 (2010) (internal quotation marks omitted) (emphasis added). As this Court explained, "the negligence claim must have a fault-based element, which is not required for a strict liability claim." *Id.* at 211, 701 S.E.2d at 9; *see also Bragg,* 319 S.C. at 539, 462 S.E.2d at 326 ("[U]nder a negligence theory, the plaintiff bears the additional burden of demonstrating the defendant (seller or manufacturer)

[6] A breach of warranty action has the same elements but also requires proof of the existence of an express or implied warranty, breach of the warranty, and damages proximately caused by the breach. S.C. CODE ANN. § 36-2-314, cmt. 13 (1976, as amended). Significantly, though, it does not require proof of fault.

failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault.")

Conversely, negligence or fault is simply not a consideration in a strict liability action. "Adoption of this [strict liability] theory, based upon a *no-negligence concept of liability*, effected a profound change in the law of this State." *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 536, 393 S.E.2d 162, 163 (1989) (emphasis added).[7] This Court has referred to Section 15-73-10 as "the '*no fault*' 'strict liability' setting of the modern products case." *Fleming v. Borden*, 316 S.C. 452, 457, 450 S.E.2d 589, 593 (1994) (emphasis added). "[I]t is necessary to underscore the [Legislature's] deliberate choice of strict liability in a specific version – that of the Restatement. *Implicit in this choice is a rejection of hybrid versions combining elements of warranty or negligence.*" *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 649, 300 S.E.2d 735, 736 (1983) (emphasis added).

Federal courts interpreting South Carolina law have also consistently held that negligence principles have no place in a strict liability action.

> Under the theory of strict liability, the exercise of due care by the defendant will not relieve him of liability. Thus, the *plaintiff need not prove that the defendant was negligent*, only that the product was defective and unreasonably dangerous when it was placed in the stream of commerce. Because the plaintiff need not show negligence, the focus of the trier of fact is upon the product itself, not the conduct of the manufacturer.

Reed v. Tiffin Motor Homes, 697 F.2d 1192, 1195-96 (4th Cir. 1982) (discussing S.C. CODE ANN. § 15-73-10) (emphasis added); *accord Talkington v. Atria Reclamelucifers Fabrieken BV (Cricket BV)*, 152 F.3d 254, 263 (4th Cir. 1998) ("In most design-defect cases, the proof under

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[7] *See also* John E. Montgomery and David G. Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. Rev. 803, 808 (1976) ("The most striking aspect of the [strict liability] doctrine is that liability is imposed without regard to whether the seller was in any way at fault or, conversely, whether he exercised the greatest possible care.").

the two theories [strict liability and negligence] will dovetail, or as is more often the case, strict liability will be easier to prove because *there is no required finding of fault.*") (emphasis added); *Snyder v. SCE&G*, 2016 U.S. Dist. LEXIS 54032, *23 (D.S.C. 2016) ("Strict liability is the imposition of liability on a party without a finding of fault."), *citing Snow v. City of Columbia*, 305 S.C. 544, 551-52, 409 S.E.2d 797, 800 (Ct. App. 1991).

When the General Assembly adopted strict products liability in South Carolina in 1974, S.C. CODE ANN. § 15-73-10, *et seq.* (1976, as amended), it "adopted almost verbatim the rule enunciated in Restatement 402A and the 'Comments' to Section 402A as its legislative intent." *Schall*, 278 S.C. at 648, 300 S.E.2d at 736. *See also* S.C. CODE ANN. § 15-73-30 (1976, as amended).

Courts construing South Carolina's strict liability act have repeatedly referred to and relied upon the comments to § 402A. *See, e.g., Marshall v. Lowe's Home Ctrs.*, 2016 U.S. Dist. LEXIS 105317, *68 n. 27 (D.S.C. 2016) ("By statute, South Carolina has adopted verbatim section 402A of the *Restatement (Second) of Torts* and incorporated by reference the comments to section 402A."); *Sparkman v. A.W. Chesterton Co.*, C/A No. 2:12-cv-02957-DCN, 2014 U.S. Dist. LEXIS 177560, *16 n. 1 (D.S.C. 2014); *Miles v. DESA Heating LLC*, No. 4:10-00521-JMC; 2012 U.S. Dist. LEXIS 45433, *17 (D.S.C. 2012); *Sauls v. Wyeth Pharms.*, 846 F. Supp.2d 499, 502 n. 2 (D.S.C. 2012).

Most recently, in *Lawing v. Univar, USA,* 415 S.C. 209, 223-25, 781 S.E.2d 548, 555-56 (2015), this Court discussed several comments to § 402A and relied upon one of them to resolve the novel issue of whether the plaintiff was a "user" of a product within the scope of § 402A.

In this case, comment n to § 402A is dispositive. It states that comparative negligence is not applicable to strict liability. "Since the liability with which this Section [402A] deals is *not*

based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies.[8] *Contributory negligence of the plaintiff is not a defense* when such negligence consists merely in the failure to discover the defect in the product, or to guard against the possibility of its existence." § 402A cmt. n. (emphasis added).[9]

Professor David G. Owen – to whose products liability commentary this Court and the Court of Appeals have often cited[10] – has noted that South Carolina, unlike all other jurisdictions, adopted comment n statutorily. David G. Owen, *Products Liability: User Misconduct Defenses*, 52 S.C.L. Rev. 1, 21 n. 135 (2000). In other words, comment n is part and parcel of South Carolina's strict liability act.

Relying upon comment n, as well as this Court's prior decision in *Imperial Die Casting Co. v. Covil Insulation Co.*, 264 S.C. 604, 216 S.E.2d 532 (1975), the South Carolina Court of Appeals rejected the argument that a plaintiff's negligence is a defense to strict liability under

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[8] *Restatement (Second) of Torts* § 524, which relates to strict liability for abnormally hazardous activity, provides:

> Contributory Negligence
>
> (1) Except as stated in Subsection (2), the contributory negligence of the plaintiff is not a defense to the strict liability of one who carries on an abnormally dangerous activity.
>
> (2) The plaintiff's contributory negligence in knowingly and unreasonably subjecting himself to the risk of harm from the activity is a defense to the strict liability.

Consistent with the reasoning and results from cases cited above, comment a to § 524 confirms the rationale that because "[s]trict liability ... is not founded on [a defendant's] negligence, the ordinary contributory negligence of the plaintiff is not a defense."

[9] *See also* Montgomery & Owen, *Reflections*, *supra* note 7, at 829 ("[A]nother distinction of vital importance [between strict liability and negligence] is the unavailability of the defense of contributory negligence in strict tort actions in most jurisdictions." (*citing* § 402A, cmt. n.)).

[10] *See, e.g., Lawing v. Univar, USA,* 415 S.C. 209, 223, 781 S.E.2d 548, 555 (2015); *Branham v. Ford Motor Co.*, 390 S.C. 203, 210, 701 S.E.2d 5, 9 (2010); *Riley v. Ford Motor Co.,* 408 S.C. 1, 10, 757 S.E.2d 422, 427 (Ct. App. 2014), *rev'd on other grounds* 414 S.C. 185, 777 S.E.2d 824 (2015); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 538, 462 S.E.2d 321, 325-26 (Ct. App. 1995).

S.C. CODE ANN. § 15-73-10 (1976, as amended), stating: "In South Carolina, contributory negligence is an affirmative defense to an action for negligence. It has no application to an action based on breach of warranty or liability for a defective product." *Wallace v. Owens-Illinois, Inc.,* 300 S.C. at 523, 389 S.E.2d at 158.[11]

3. Crashworthiness Claims.

Comparative negligence is not applicable in a crashworthiness case, regardless of the cause of action upon which it is based. "Under the crashworthiness doctrine, liability is imposed not for defects that cause collisions but for defects that cause injuries after collisions occur." *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 452 (4th Cir. 2001), *citing Mickle v. Blackmon*, 252 S.C. 202, 230, 166 S.E.2d 173, 185 (1969) (recognizing the crashworthiness doctrine in South Carolina); *accord Riley v. Ford Motor Co.,* 408 S.C. 1, 14, 757 S.E.2d 422, 429-30 (Ct. App. 2014) (citing *Jimenez* with approval and noting: "In this crashworthiness action, the Estate has no claim against Ford for Riley's injuries resulting solely from the initial impact with Carter. Rather, the Estate's claim against Ford is limited to the enhanced injuries – in this case, Riley's death – that resulted from the alleged negligent design of the door-latch system that allowed Riley to be ejected."), *rev'd on other grounds* 414 S.C. 185, 777 S.E.2d 824 (2015).

In this case, Donze seeks damages only for his enhanced injuries caused by the fuel tank that burst into flames. He does not assert that any defect in the Truck caused the initial collision, nor does he seek damages for his broken rib and hip that were caused by the initial collision.

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[11] Although *Wallace* is a Court of Appeals opinion, this Court has cited it favorably. *See Roddey v. Wal-Mart Stores East,* 415 S.C. 580, 591, 784 SE 2d 670, 676 (2016); *Davenport v. Cotton Hope Plantation Horizontal Property Regime,* 333 S.C. 71, 85, 508 S.E.2d 565, 573 (1998). Further, this aspect of the *Wallace* holding has been repeatedly applied as the law of this State in products liability cases in the lower courts over the past 27 years and no South Carolina appellate decision has suggested otherwise.

When a plaintiff seeks damages for enhanced injuries caused solely by a second injury-producing event with the vehicle, rather than for injuries related to the initial collision, there is no reason to compare negligence. For example, under the facts of this case, although GM seeks to introduce evidence of Donze's alleged imputed negligence in causing the initial collision, this is not comparable to GM's responsibility for causing a subsequent and separate event – the fire.

The Fourth Circuit Court of Appeals addressed this issue in *Jimenez*. There, the estate of a deceased six-year-old brought a crashworthiness action against DaimlerChrysler when the child was thrown from a minivan after its liftgate opened when the child's mother "drove through a red light and was struck in the left rear by an oncoming car." *Id.* at 443. The defendant appealed from an adverse verdict, arguing the trial court erred in excluding evidence of the mother's negligence in running the red light. *Id.* at 446. The Fourth Circuit held "we cannot say that the district court erred in concluding that in light of the crashworthiness principle, the cause of the original accident was not relevant to proving a claim for enhanced injury." *Id.* at 453.

Inherent in the crashworthiness doctrine is the foreseeability of the negligent conduct of a driver that results in an initial collision. *See Mickle*, 252 S.C. at 231, 166 S.E. at 185-86 (noting the "duty to exercise care to furnish reasonable protection to collision victims in the statistical certainty that there would be such victims among the users of the cars produced and in the clear foreseeability of harm to such victims if care were not exercised").

In *Branham v. Ford Motor Co.*, this Court explained that principle as follows:

> A car manufacturer must design and produce vehicles that are not in a defective condition unreasonably dangerous to the user. Cars are designed with utility and safety in mind, and careless driving is a foreseeable reality. The general nature of the alleged negligent driving on the part of Hale was (or should have been) part of the evaluative process that culminated in the ultimate decision of Ford to design, manufacture and market the Bronco II to the driving public. Ford had a duty to design and manufacture the Bronco II as a reasonably safe vehicle.

Branham, 390 S.C. at 233, 701 S.E.2d at 21.

Under South Carolina law, a manufacturer has a duty to minimize the injurious effects of foreseeable collisions, regardless of their causes. As a result, comparative negligence in causing an initial collision is not and never has been a defense in a crashworthiness case in this State.

4. Summary of Controlling Precedent.

The Court can and should answer the first certified question by simply following established South Carolina law regarding the unavailability of comparative negligence as a defense to claims for breach of warranty, strict liability, and crashworthiness.

B. Even if the Court Declines to Find Existing Law is Settled and Controlling, it Should Nevertheless Refuse to Extend a Fault-Based Defense to a Crashworthiness Action Based on Statutory Causes of Action for Breach of Warranty and Strict Liability.

1. There is No Good Reason to Change Existing Precedent and Practice.

a. Breach of Warranty and Strict Liability Causes of Action are not Based on Fault; the Addition of a Fault-Based Analysis Would Have the Effect of Changing These Claims to Negligence Claims.

A decision that allows the use of a comparative negligence as a defense to a strict liability action will effectively eliminate the breach of warranty and strict liability causes of action under South Carolina law. Such a ruling would introduce fault into the analysis of each cause of action and force plaintiffs to show an additional element of proof (defendants' fault) not previously required.[12] This would result in a fundamental, judicial change to statutory South Carolina law. *See Gasque v. Heublein, Inc.*, 281 S.C. 278, 282, 315 S.E.2d 556, 558 (Ct. App. 1984) (noting "obvious differences between the two theories [of strict liability and negligence], i.e., the different quantum of proof required and the fact that one's origins are statutory while the others are at common law").

[12] This is because the idea is not only doctrinally inconsistent with and contrary to prior South Carolina precedent on the topic but – in the absence of litigating the defendant's negligence – would also create this practical problem: if a jury is not determining a defendant's fault, to what would it compare a plaintiff's negligence if a comparative negligence defense were permitted?

"The doctrine of strict products liability in tort was created to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Purvis v. Consolidated Energy Products Co.*, 674 F.2d 217, 219 (4th Cir. 1982) (internal quotation marks omitted), *citing Restatement (Second) of Torts*, § 402A, cmt. c. "By shifting certain product-related losses from consumers and users to manufacturers, the doctrine both promotes fairness and provides manufacturers with a disincentive to market unreasonably dangerous products." *Purvis*, 674 F.2d at 219.

The Legislature's adoption of strict liability was an innovation that provided plaintiffs with greater protection by not requiring them to prove a products liability defendant's negligence in order to recover for injuries caused by a defective product. This innovation would be discarded if the Court were to change the law fundamentally, contrary to the policies recited above, and now require a negligence analysis as part of a strict liability cause of action.

Also, because strict liability exists in areas of the law other than products liability, *see generally Ravan v. Greenville County,* 315 S.C. 447, 460-61, 434 S.E.2d 296, 304-05 (Ct. App. 1993), permitting comparative negligence as a defense to a strict products liability action has the potential for creating unintended effects beyond the present context. For instance, South Carolina recognizes strict liability for domestic animal attacks via "the dog bite statute." S.C. CODE ANN. § 47-3-110 (1976, as amended). It also applies strict liability "without allegation and proof of negligence" to abnormally dangerous activities such as the use of explosives. *Wallace v. A.H. Guion & Co.,* 237 S.C. 349, 355, 117 S.E.2d 359, 361 (1960). Comparative negligence is not a defense to these actions. *See Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 366, 673 S.E.2d 423, 427 (2009) ("Our Legislature has spoken clearly in section 47-3-110 that, as

concerns a dog owner's liability, *negligence principles in general and fault in particular have no place*." (emphasis added)); F. Patrick Hubbard, *et al.*, THE SOUTH CAROLINA LAW OF TORTS § 3.B.4 (2014) (stating a plaintiff's negligence is not a defense to strict liability for abnormally dangerous activities). A new ruling that permits the use of a comparative negligence defense – and thereby interjects the concept of fault – to strict products liability could also similarly change the law applicable to dog bite and abnormally dangerous activity strict liability law, thereby undermining the policies that strict liability in these areas of the law seeks to promote.

In the same vein, a ruling in GM's favor also has the potential for changing other aspects of South Carolina strict products liability law. This Court has previously ruled that punitive damages are not recoverable in a strict liability action. *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 537, 393 S.E.2d 162, 163 (1989). This is because there is no proof of fault on the part of the defendant upon which to base such an award. *Compare Scott v. Fruehauf Corp.*, 302 S.C. 364, 370, 396 S.E.2d 354, 357 (1990) (permitting the recovery of punitive damages where the jury found the defendant liable for both strict liability *and* negligence as punitive damages require proof of a failure to exercise due care). If comparative negligence is available to a defendant as an affirmative defense to a strict liability action, thereby requiring a plaintiff to prove the defendant's fault, then the Court would have to reconsider whether a plaintiff may be permitted to recover punitive damages for strict liability.

GM argued to the District Court (and will likely argue to this Court) that comparative fault applies to all torts. Under its broad reasoning, a decision applying comparative negligence to strict liability could be interpreted to apply the defense to other torts such as defamation, invasion of privacy, or even intentional torts such as false imprisonment or intentional infliction of emotional distress. But such a change would also be contrary to existing precedent relating to

those causes of action. *See Berberich*, 392 S.C. at 293 n.3, 709 S.E.2d at 615 n.3 (2011) (stating specifically that intentional conduct may not be compared to conduct amounting to negligence in any form). The only comparable conduct is "each party's relative *fault* in causing the plaintiff's injury." *Id.* at 293, 709 S.E.2d at 615 (emphasis added). This illustrates the basis for confining comparative negligence to the cause of action to which it is intended to apply – negligence.

b. No Other Change in the Law Warrants Extension of Comparative Negligence to Breach of Warranty and Strict Liability Causes of Action.

Based upon its arguments in District Court, Donze anticipates GM will argue that one or more of the following recent events in tort law warrants revisiting the application of the comparative negligence defense in breach of warranty and strict liability cases: (1) the abolition of contributory negligence and concomitant adoption of comparative negligence in *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991); (2) the 2005 amendments to the South Carolina Contribution Among Tortfeasors Act, S.C. CODE ANN. §§ 15-38-10, *et seq.* (1976, as amended); and (3) this Court's decision in *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010). However, none of these changed the available defenses to breach of warranty and strict liability causes of action.

The *Nelson* case involved a negligence claim arising from a vehicular collision. It was not a products liability, breach of warranty, strict liability, or crashworthiness action. It adopted comparative negligence so that "a plaintiff *in a negligence action* may recover damages if his or her negligence is not greater than that of the defendant." *Id.* at 245, 399 S.E.2d at 784 (emphasis added). In doing so, it adopted the Court of Appeals' discussion in *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984) regarding the "merits of comparative negligence." *Nelson*, 303 S.C. at 244, 399 S.E.2d at 784.

It is clear from the language of *Langley* that the court there only intended to change the law with respect to fault-based torts:

> The continued existence of the doctrine of contributory negligence as presently applied in South Carolina cannot be justified on any logical basis. It is contrary to the basic premise of our fault system to allow a defendant, who is at fault in causing an accident, to escape bearing any of its cost, while requiring a plaintiff, who is no more than equally at fault or even less at fault, to bear all of its cost.

Langley, 284 S.C. at 183, 325 S.E.2d at 562.

In short, there is nothing in *Nelson* or *Langley* that suggests this Court intended to introduce fault into the analysis of traditionally no-fault causes of action for breach of warranty and strict liability. Moreover, cases construing the holding in *Nelson* have confirmed that its adoption of comparative negligence is limited to causes of action for negligence and its relatives such as recklessness, willfulness, and wantonness. *See, e.g., Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011). Instead, and quite simply, the import of *Nelson* was to discard the harsh results of contributory negligence in favor of a more equitable defense.

Likewise, the South Carolina Contribution Among Tortfeasors Act did not make comparative negligence applicable to actions for strict liability and breach of warranty. Rather, that Act states that, when appropriate, a plaintiff's negligence is to be determined "under applicable rules concerning 'comparative negligence.'" S.C. CODE ANN. § 15-38-15(C)(2) (1976, amended). As a result, it retained the law as it existed concerning the inapplicability of comparative negligence to strict liability and breach of warranty actions.

In addition, based on the plain language of S.C. CODE ANN. § 15-38-15, comparative negligence does not apply to a strict liability or breach of warranty action. For Section 15-38-15 to apply, the plaintiff must allege the defendant is at "fault."[13] But strict liability and breach of

[13] Under South Carolina law, "comparative negligence" and "comparative fault" are equivalent terms. *Berberich v. Jack*, 392 S.C. 278, 291-92, 709 S.E.2d 607, 614 (2011).

warranty are "no-fault" actions. Because in a strict liability or breach of warranty action there is no allegation of fault on the part of the defendant, comparative negligence cannot apply.

Ultimately, this case presents one example of the many instances in which defendants have attempted to persuade the state and federal judiciary to adopt the *Restatement (Third) of Torts: Products Liability* (1998) since this Court's decision in *Branham v. Ford Motor Co.* However, this Court did not abrogate Section 15-73-30 in *Branham* nor did it adopt any part of the *Restatement (Third)* as the law of this State. Rather, the Court simply addressed the appropriate test to be applied in design defect cases and noted "the rule we announce today in design defect cases adheres to the approach the trial and appellate courts in this state have been following." *Branham*, 390 S.C. at 222, 701 S.E.2d at 15. To the extent the *Branham* court arguably considered a defendant's fault in discussing the *Restatement (Third)*, this was only in reference to the plaintiff's negligence cause of action, *see 5 Star, Inc. v. Ford Motor Co.*, 408 S.C. 362, 369, 759 S.E.2d 139, 142-43 (2014), but did not introduce a component of fault into breach of warranty or strict liability causes of action.

As the District Court in South Carolina previously noted in declining to apply a provision of the *Restatement (Third)* in a product liability action, "the South Carolina legislature has currently only adopted the Restatement (Second) of Torts by statute: S.C. CODE ANN. § 15-73-10, et seq. ... As such, this court finds that it would be inappropriate to legislate from the bench and impose a duty on the defendant which plaintiff agrees is not currently recognized under South Carolina law." *Campbell v. Gala Indus.*, 2006 WL 1073796, 13 (D.S.C. 2006).[14] Further, Section 16 of the *Restatement (Third)* is directly contrary to comment n to § 402A of the

[14] *See also Aldana v. RJ Reynolds Tobacco Co.*, 2008 U.S. Dist. LEXIS 34322, *8 (D.S.C. 2008) ("The Court has considered the plaintiff's explanation of the Restatement (Third) of Torts and law from other jurisdictions, and the Court concludes that such law is not persuasive because it is not the law of South Carolina.").

Restatement (Second) which, as discussed above, is the controlling statutory law of South Carolina. *See Lawing v. Univar, USA,* 415 S.C. 209, 211, 781 S.E.2d 548, 554 (2015) (a post-*Branham* decision by this Court that noted: "[T]he General Assembly expressly adopted the comments to section 402A of the Restatement of Torts (Second) . . . as the expression of legislative intent for that section.").[15]

In summary, there has been no change in South Carolina law that should prompt this Court to reexamine the long-standing precedent and practice of regarding strict liability and breach of warranty claims as no-fault causes of action to which the comparative negligence defense is inapplicable.

GM's anticipated assertion that many jurisdictions now apply comparative fault in a crashworthiness case is also unpersuasive. As this Court stated in reference to South Carolina's strict liability cause of action, "this Court is compelled to interpret the laws of the General Assembly in their plain meaning, whether or not the result places South Carolina in the minority among jurisdictions. Our State is one of a small number which initially adopted strict liability, *not by judicial decision*, but through legislative enactment." *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 537, 393 S.E.2d 162, 163 (1989) (emphasis in original). Additionally – and

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[15] South Carolina federal courts have consistently cited comments to § 402A as controlling and instructive since the issuance of *Branham. See Marshall v. Lowe's Home Ctrs.,* 2016 U.S. Dist. LEXIS 105317, *68 n.27 (D.S.C. 2016) ("By statute, South Carolina has adopted verbatim section 402A of the *Restatement (Second) of Torts* and incorporated by reference the comments to section 402A."); *Sparkman v. A.W. Chesterton Co.*, C/A No. 2:12-cv-02957-DCN, 2014 U.S. Dist. LEXIS 177560, 16 n.1 (D.S.C. 2014) (citing § 402A for strict liability law and stating "The South Carolina legislature has adopted the comments to 402A as legislative intent"); *Miles v. DESA Heating LLC*, No. 4:10-00521-JMC; 2012 U.S. Dist. LEXIS 45433, *10-11 (D.S.C. 2012) (citing to the comments in a discussion of warning defects); *Sauls v. Wyeth Pharms.,* 846 F. Supp.2d 499 (D.S.C. 2012) (citing the comments and stating section 402A "was expressly incorporated into the legislative intent of the South Carolina Defective Products Act, S.C. Code Ann. § 15-73-10, and South Carolina courts consistently have relied upon it and its commentary in the development of products liability case law").

importantly – South Carolina is unique in its adoption of comment n to § 402A as part of its strict liability statute. S.C. CODE ANN. § 17-73-30 (1976, as amended) (incorporating comment n by reference); *see also* Owen, *Products Liability: User Misconduct Defenses*, 52 S.C.L. Rev. at 21 n. 135. Consequently, the fact that other courts may have changed their states' products liability laws provides no real guidance to this Court regarding South Carolina's version of strict products liability.

2. Even if it Were Inclined to Alter These Statutory Causes of Action, the Court is Constitutionally Restricted from Doing So.

To accept GM's arguments, this Court would have to modify statutory law – under both the strict liability statute and the Uniform Commercial Code regarding warranties – either by altering their nature via the addition of fault-based concepts or by adding a doctrinally inconsistent defense that the Legislature chose not to adopt. If it did so, it would violate the separation of powers doctrine of the State Constitution.

It is the Legislature's exclusive province under our State Constitution to make the laws, which includes "the sole prerogative to make policy decisions; to exercise discretion as to what the law will be." *Hampton v. Haley,* 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013); *see also* S.C. Const. art. III, §§ 1 & 1.A. On the other hand, this Court's constitutionally mandated role is to interpret the laws enacted by the General Assembly.

The separation of powers doctrine provides that "[i]n the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of another." S.C. Const. art. I, § 8. This Court recently summarized its constitutional limits thusly:

> We may not under some thinly veiled guise of law assert judicial power to an action taken by another branch that lies within its exclusive constitutional authority.

Segars-Andrews v. Judicial Merit Selection Comm'n, 387 S.C. 109, 129-30, 691 S.E.2d 453, 464 (2010).

In discharging its proper function, the Court must be mindful that "[t]he primary rule of statutory construction is to ascertain and give effect to the intent of the Legislature." *Mid-State Auto Auction of Lexington v. Altman,* 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). This Court has repeatedly recognized that "if the law is to be changed, such change should come from the legislature." *Copeland v. Hous. Auth. of Spartanburg*, 282 S.C. 8, 9, 316 S.E.2d 408, 408 (1984).

In other words, the Court may not alter or supplement the language of a statute to substitute its policy determinations for those of the Legislature. In *Creech v. South Carolina Public Serv. Auth.,* 200 S.C. 127, 20 S.E.2d 645 (1942), the Court explained this necessary judicial restraint:

> [Courts] cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the Courts to construe, not to make, the laws. There is a marked distinction between liberal construction of statutes, by which courts, from the language used, the subject-matter, and the purposes of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced.

Id. at 146, 20 S.E.2d at 652.

This Court has previously acknowledged its constitutionally limited role specifically with respect to the strict liability statute, noting:

> Where the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute. If the [strict liability] Act is to be amended . . . this must be accomplished by the legislature, not the court.

Bray v. Marathon Corp., 356 S.C. 111, 117 n. 6, 588 S.E.2d 93, 96 n. 6 (2003) (citations omitted).

Similarly, the Court described its deferential role in construing the strict liability statute in *Barnwell v. Barber-Colman Co.,* 301 S.C. 534, 393 S.E.2d 162 (1989), wherein it stated:

> Strict liability in tort was not recognized in South Carolina prior to enactment of 1974 Act No. 1184. The Act incorporated almost verbatim the definition of strict liability from § 402A of the Restatement (Second) of Torts. Adoption of this theory, based upon a no-negligence concept of liability, effected a profound change in the law of this State.
> . . .
>
> [T]his Court is compelled to interpret the laws of the General Assembly in their plain meaning, whether or not the result places South Carolina in the minority among jurisdictions. Our State is one of a small number which initially adopted strict liability, *not by judicial decision*, but through legislative enactment.
> . . .
>
> Where the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute.

Id. at 536-37, 393 S.E.2d at 163 (citations omitted; emphasis in original).

In light of this required restraint, this Court has refused to apply the strict liability act to claims arising from occurrences predating enactment of that act, *Hatfield v. Atlas Enterprises,* 274 S.C. 247, 262 S.E.2d 900 (1980); to apply the act to an injury-causing product that entered the stream of commerce prior to its enactment, *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 300 S.E.2d 735 (1983); and to allow for the recovery of punitive damages in strict liability when the act does not so specify, *Barnwell v. Barber-Colman Co.,* 301 S.C. 534, 393 S.E.2d 162 (1989). Based on the same rationale, the United States District Court refused to apply the act in a commercial setting to a claim for loss resulting from product ineffectiveness. *Purvis v. Consolidated Energy Products Co.,* 674 F.2d 217 (4th Cir. 1982).

Of course, the same constitutional constraints apply to construction of breach of warranty claims under the Uniform Commercial Code. Thus, in *Stanley v. B.L. Montague Co.,* 299 S.C. 51, 56, 382 S.E.2d 246, 249 (Ct. App. 1989), the Court of Appeals refused to apply the defense of completion and acceptance to a claim for personal injuries caused by a defective product

because, among other reasons, it was inconsistent with the breach of warranty statute (as well as the strict liability statute). This Court discussed *Stanley* with approval in *Dorrell v. South Carolina Dept. of Transp.*, 361 S.C. 312, 605 S.E.2d 12 (2004), quoting the *Stanley* court's concern that application of the defense to statutory products liability claims "'would undermine the whole concept of products liability.'" *Dorrell,* 361 S.C. at 322, 605 S.E.2d at 17.

The only defense based on a plaintiff's conduct applicable in a strict liability action is assumption of the risk. § 402A, cmt. n.; S.C. CODE ANN. § 15-73-20. Under Section 15-73-20, assumption of the risk is a complete bar to recovery, not a matter of comparative negligence principles. *See Davenport v. Cotton Hope Plantation Horizontal Property Regime,* 333 S.C. 71, 85, 508 S.E.2d 565, 573 (1998) ("[T]he main reason for having the defense of assumption of risk is not to determine fault, but to prevent a person who knowingly and voluntarily incurs a risk of harm from holding another person liable."), *citing Wallace v. Owens-Illinois, Inc.,* 300 S.C. 518, 389 S.E.2d 155 (Ct. App. 1989). In short, the only defense authorized by the General Assembly is not comparative negligence.

No other statute makes a plaintiff's comparative negligence a defense to a strict liability claim; in fact, comment n to § 402A (adopted per Section 15-73-30) – as well as § 524 to which it refers – expressly provide that contributory negligence of the plaintiff is *not* a defense to a strict liability claim. In addition, there is no statutorily authorized defense of comparative negligence for a breach of warranty claim.

Given that the Legislature enacted no-fault statutory causes of action for strict liability and breach of warranty and decided not to permit comparative negligence as a defense to either in order to promote their underlying policies, this Court should not overstep its constitutional bounds and impose a contrary policy decision adopting the defense in this context.

The District Court's Order of Certification cites to the unpublished District Court order in *Quinton v. Toyota Motor Corp.*, 2013 WL 2470083 (D.S.C. 2013), which GM has relied upon to argue that evidence of a plaintiff's negligence in causing the initial collision is admissible in a crashworthiness case. Order of Certification, p. 4. The *Quinton* court's decision to admit such evidence was based largely on its belief that this Court's citation to one section of the *Restatement (Third) of Torts* in *Branham v. Ford Motor Co.*, 390 S.C. 203, 223-24, 701 S.E.2d 5, 16 (2010) indicates an approval of the entire *Restatement (Third)*.[16] *Quinton* erred in citing *Branham* as indicating courts are free to rely on the *Restatement (Third)* for all South Carolina product liability issues. If that were the case, then the effect of *Branham* would be to render inapplicable the *Restatement (Second)* and, thereby, unconstitutionally abrogate the strict liability statute as adopted by the Legislature. This could not be and clearly is not the result of *Branham*, particularly given this Court's citation to § 402A post-*Branham*.

3. Even if the Court Were to Adopt Comparative Negligence as a Defense to Breach of Warranty and Strict Liability Causes of Action, the Defense Should not be Applicable in Crashworthiness Cases.

Should the Court conclude – contrary to the above authorities and arguments – that there is no controlling precedent regarding application of comparative negligence to breach of warranty and strict liability claims, that the defense can be applied to those claims despite their no-fault underpinnings, that application of the defense to these statutory causes of action is consistent with their purposes, that the Court can constitutionally adopt a defense at odds with the express legislative intent behind the strict liability act, and that it should now permit products

[16] The District Judge's ruling in *Quinton* was also based on the fact the plaintiff was asserting a negligence claim. Notably, after the plaintiff voluntarily dismissed her negligence claim, *see Quinton v. Toyota Motor Corp.,* 2014 U.S. Dist. LEXIS 16063 at *2, n. 2 (D.S.C. 2014), the court did not charge the jury on comparative negligence with regard to the remaining strict liability claim. (USDC Case no. 1:10-cv-02187-JMC, ECF # 246, jury instructions).

liability defendants to argue a plaintiff's negligence in causing an accident – even when the plaintiff has not sued for negligence – it still should not allow it as a means for introducing evidence of accident-causing negligence in crashworthiness claims such as the present case.

As discussed above, crashworthiness cases are somewhat unique in that they are limited to claims for enhanced injuries and, by definition, do not include the possibility of recovery for damages caused by the initial accident.[17] As such, in a crashworthiness case, there is simply no risk that a plaintiff will recover for damages caused by his own negligence in causing an initial collision and, thus, no basis for applying comparative negligence.

The Legislature's 2005 amendments to the South Carolina Contribution Among Tortfeasors Act support this conclusion. The Act makes it clear that comparative negligence applies only to indivisible damages, which are not present in a crashworthiness case.

> In an action to recover damages *resulting from personal injury . . . resulting from tortious conduct, if indivisible damages* are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the *indivisible damages* as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of plaintiff.

S.C. CODE ANN. § 15-38-15(A) (Supp. 2014) (emphasis added).

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[17] As noted, crashworthiness cases are only somewhat unique in this regard. Professional malpractice cases – although based on negligence principles – are similar in that they often involve an initial accident or event that causes a plaintiff damages and a subsequent deviation from the professional standard of care that causes enhanced damages. In such cases, it could not be seriously argued that the plaintiff's fault which led to the initial accident or event gives the defendant in the malpractice action a defense based on comparative negligence.

For example, a plaintiff's negligent fall from a ladder that caused an orthopedic injury and led to an emergency room visit would not provide a defense to the emergency room doctor who deviated from the standard of care in failing to diagnose to identify a treatable arterial injury that, left untreated, caused an amputation or pulmonary embolus. Similarly, a plaintiff's alleged breach of contract that caused him to seek legal advice would not be a defense to his attorney who deviated from the standard of care in failing to assert a counterclaim and allowed the statute of limitations to run on that claim.

The very nature of a crashworthiness claim is that the damages from the initial collision and the second accident are divisible. Therefore, there is no basis to apply comparative negligence principles in crashworthiness cases.

C. Comparative Negligence is Not a Defense in this Case.

For the foregoing reasons, the Court should answer the first certified question in the negative.

II. SOUTH CAROLINA'S PUBLIC POLICY BAR AGAINST IMPAIRED DRIVERS RECOVERING DAMAGES DOES NOT APPLY IN A CRASHWORTHINESS CASE WHEN THE PLAINTIFF ALLEGES CLAIMS OF STRICT LIABILITY AND BREACH OF WARRANTY.

A. Introduction and summary of argument.

The so-called "public policy bar"[18] to recovery that South Carolina appellate courts have discussed only in dram shop negligence and negligent entrustment actions involving admittedly impaired plaintiffs[19] has no application in this crashworthiness action.

First, as discussed above, a plaintiff's alleged fault in causing a collision – whether characterized as sole negligence, comparative negligence, or a public policy bar – should never be considered a defense to a strict liability or breach of warranty case unless it is of the type of specific conduct the General Assembly has authorized as a defense. In addition, the present case

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[18] The District Court's Order of Certification interchangeably uses the terms "public policy bar," "absolute bar," and "outright bar" in describing the effects of the holdings in *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998) and *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003), the cases cited by GM in support of its contention that South Carolina recognizes a defense distinct from comparative negligence when a plaintiff is voluntarily intoxicated. Because the question certified by this Court uses the term "public policy bar," that is the term Donze employs in this brief although – for reasons discussed further herein – it is his position that the holdings of these cases did not create a new or distinct defense (or "bar") to liability. Donze's use of the term is not intended to waive his position on that issue.

[19] Consistent with the questions certified to this Court and GM's arguments on this alleged defense, Donze uses the term "impaired plaintiffs" to mean those who have voluntarily consumed alcohol or drugs to the point of impairment.

is not dependent on the plaintiff's admitted negligence as part of his burden of proof; to the contrary, intoxication is not an element of either statutory cause of action and Donze does not admit intoxication or impairment in any event. Finally, the rationale for adopting a public policy bar in the limited contexts of dram shop negligence and negligent entrustment actions is simply irrelevant to the legislative policies underlying strict liability and breach of warranty claims.

B. The case law bases for GM's argument.

GM relies upon *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998) and *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003) in its effort to have the Court create a public policy bar/defense to all tort actions brought by allegedly intoxicated persons. In its Order of Certification, the District Court erroneously summarized these cases' holdings as follows:

> In *Tobias*, the South Carolina Supreme Court recognized an absolute bar to a "'first party' cause[s] of action against [a] tavern owner by an intoxicated adult predicated on an alleged violation of [alcohol control statutes,]" and elaborating [sic] that "public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct." In *Lydia*, the plaintiff, who had driven a vehicle after becoming voluntarily intoxicated,. [sic] sustained injuries in a car accident and sued the person who loaned him the car under a theory of negligent entrustment. Relying on *Tobias*, the South Carolina Supreme Court held that South Carolina public policy precluded recovery for the plaintiff. Both cases expressly stated that the outright public policy bar and comparative fault are separate and independent defenses.

Order on Certification, p. 5 (citations omitted).

GM's position is incorrect and its analysis on this topic is flawed. Moreover, the District Court's summary of the holdings in these cases is inaccurate.

Tobias and *Lydia* were not products liability cases and are factually distinguishable from a crashworthiness action such as the present case. Both cases considered public policy in the context of whether to recognize first party causes of action under circumstances where this Court previously had not; but, in declining to do so, the Court did not create a new defense. Neither *Tobias* nor *Lydia* stated that the public policy bar was a defense, much less a defense separate

from comparative negligence; in fact, neither case uses the term "public policy bar" and the Court used the term "outright bar" only once, in *Lydia,* when it was describing its decision not to recognize a first party negligent entrustment cause of action. Finally, no court has applied the holdings of either of those cases to create a public policy bar as a defense to existing causes of action as urged by GM.

C. The cases cited by GM do not support its argument.

In both *Tobias* and *Lydia*, the plaintiffs sued in negligence and the defendants raised contributory or comparative negligence defenses. Both cases involved plaintiffs who were admittedly intoxicated; indeed, this fact was essential to each plaintiff's cause of action. The plaintiffs sought recovery from defendants whom they alleged should have protected them from hazards associated with their intoxication (*i.e.,* the risks of driving a motor vehicle while under the influence). In each case, this Court was asked to recognize a first party negligence cause of action where it had not previously done so.

1. *Tobias v. Sports Club, Inc.*

In *Tobias*, the Court considered "dram shop" statutes that prohibit the sale of alcohol to an intoxicated person. It acknowledged that the public policy behind those statutes gives rise to a third party negligence cause of action when a defendant breaches its statutory duties, yet held "our alcohol control statutes do not create a first party cause of action for an intoxicated adult patron." 332 S.C. at 93, 504 S.E.2d at 320. While it reached this conclusion in the context of discussing "public policy," it was not because it decided a first party cause of action existed but public policy created a defense to that cause of action based on a plaintiff's conduct. Rather, the *Tobias* Court's public policy analysis only related to the construction of alcohol control statutes and its conclusion that "public policy is not served" by finding that one "of the statutory

purposes was to protect the intoxicated person from their [sic] own incompetence and helplessness". *Id.* at 92, 504 S.E.2d at 319-20.

In sum, in *Tobias* the Court held that alcohol control statutes do not create a first party cause of action for dram shop negligence in South Carolina. And it did so without reaching or addressing the defense of the plaintiff's contributory fault.

2. *Lydia v. Horton.*

Lydia, although not a first party dram shop action, involved a similar first party negligent entrustment claim. There, the plaintiff alleged the defendant allowed the admittedly intoxicated plaintiff to drive defendant's car, resulting in a single-vehicle collision. 355 S.C. at 37, 583 S.E.2d at 751. As in *Tobias*, the crux of the plaintiff's claim was that the defendant failed to prevent him from encountering the hazards of driving while intoxicated. *Id.* at 42, 583 S.E.2d at 754 ("The essence of this case and the *Tobias* case are the same, for in both cases, the plaintiff, who was voluntarily intoxicated when the accident occurred, is attempting to deflect the responsibility that should be imposed upon himself towards another."). Also as in *Tobias*, the court acknowledged a public policy in favor of allowing third party negligent entrustment claims but declined to extend those policies to the "novel question of law" of "[w]hether South Carolina recognizes a first party negligent entrustment claim". *Id.* at 38-39, 583 S.E.2d at 751-52.

Specifically, the *Lydia* court considered public policy when it reviewed the rationale supporting third party negligent entrustment claims but concluded: "the policy considerations which support the legal theory of third party negligent entrustment are undermined by applying them to a first party cause of action." *Id.* at 38, 583 S.E.2d at 752. Thus, just as in *Tobias*, the Court refused to recognize a viable cause of action under the circumstances presented because public policy was not served by doing so. *Id.* at 42, 583 S.E.2d at 754 ("Just as this plaintiff

cannot bring a first party cause of action to challenge the discretionary conduct of the tavern owner, he cannot bring the same action to challenge the discretionary conduct of his entrustor.").

Because it found no first party cause of action exists under South Carolina law, the *Lydia* court's discussion of public policy was not a predicate for creating a new defense. This is perhaps best illustrated by the fact that, given the Court's ruling, it would not have allowed the plaintiff's claim to proceed even if the defendant had failed to plead and therefore waived all affirmative defenses based on the plaintiff's conduct.

While the *Lydia* court – unlike the *Tobias* court – discussed the plaintiff's negligence (admitted intoxication) as an additional basis for its ruling, it is clear that aspect of its holding was dependent on the facts before it and was not in the nature of a sweeping generalization to be applied to every tort case involving an allegedly impaired plaintiff. Rather, given the facts in the record, it simply affirmed the trial judge's conclusion that the plaintiff's negligence exceeded any negligence of the defendant. *Id.* at 40, 583 S.E.2d at 752-53. It concluded: "Lydia's ... negligence outweighed Horton's." *Id.* at 43, 583 S.E.2d at 754.

3. Subsequent Judicial Treatment of *Tobias* and *Lydia.*

Cases decided since *Tobias* and *Lydia* demonstrate the flaw in GM's argument that those cases created a new defense separate from comparative negligence.

Two years after deciding *Lydia*, this Court distinguished its holding there from a case involving an intoxicated plaintiff who sued a social host, clearly stating that the finding of comparative negligence in *Lydia* was dependent on the facts of that case. *Marcum v. Bowden,* Op. No. 26035, 2005 S.C. LEXIS 251, 2005 WL 2129176 (S.C. Sup. Ct. filed Aug. 29, 2005).[20]

[20] The Court later withdrew this opinion and substituted it with *Marcum v. Bowden,* 372 S.C. 452, 643 S.E.2d 85 (2007), in which it reached the same conclusion regarding the actionability of the plaintiff's claim but declined to apply its decision retroactively. Because its ultimate holding

Importantly, as in *Tobias* and *Lydia,* the first issue in *Marcum* was whether public policy supported a first party negligence cause of action in favor of an intoxicated plaintiff; then, only after recognizing such a cause of action, the Court addressed a defense based on the plaintiff's conduct. At that time, it analyzed a traditional comparative negligence defense as opposed to a new "public policy bar" as advocated by GM. In doing so, the Court explained that its discussion of *Lydia's* conduct was a comparative negligence discussion which was limited to its facts:

> In the instant case, the trial court found, as a matter of law, that Parks' comparative negligence outweighed the Bowdens' alleged negligence. He based this ruling on the facts that Parks was "voluntarily intoxicated" and that the Bowdens were not aware that Parks was underage. We disagree with these findings. A jury should decide the comparative negligence of the parties because there is conflicting evidence.
>
> We take this opportunity to distinguish our decision in *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003). In *Lydia*, we held an intoxicated adult plaintiff (Lydia) could not recover on a first-party negligent entrustment cause of action against another adult (Horton) who had allowed Lydia to drive his car. We stated Lydia's admission that he was "appreciably impaired" and that he lost control of the vehicle supported only one conclusion, that Lydia's negligence exceeded Horton's.
>
> The trial court relied on *Lydia* in the instant case and stated the only conclusion that can be drawn from the facts is that Parks' negligence exceeded that of the Bowdens due to Parks' admission he was intoxicated and that he later "got into his car and drove away in a highly intoxicated state."
>
> We find the instant case distinguishable from *Lydia*.

2005 S.C. LEXIS 251 at pp. 21-22 (some citations omitted); *accord Haley v. Brown*, 370 S.C. 240, 243 n. 3, 634 S.E.2d 62, 63 n. 3 (Ct. App. 2006) (stating that, in *Lydia*, "the court held, in a negligent entrustment action, the plaintiff's admission that he was intoxicated and lost control of a borrowed vehicle exceeded the owner's alleged negligence in loaning him the vehicle as a matter of law.").

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was prospective only, the Court did not need to address the comparative negligence defense in its substituted opinion.

The limited scope of the *Tobias* and *Lydia* decisions is perhaps best demonstrated by how South Carolina appellate courts have addressed defenses of comparative negligence based on alleged intoxication in the thirteen years since *Lydia* was decided. If GM were correct that intoxication creates a public policy bar to all tort causes of action, then South Carolina courts should have routinely dismissed negligence actions by allegedly intoxicated plaintiffs.

That has not occurred. On the contrary, there are several cases where South Carolina appellate courts could have disposed of a claim on this basis if there were a public policy bar; but they did not.

Perhaps most notably, in *Marcum v. Bowden,* 372 S.C. 452, 643 S.E.2d 85 (2007), this Court for the first time recognized a first party negligence cause of action against social hosts who serve alcohol to adults between the ages of 18 and 20. If there were a public policy bar to claims by these adults due to their intoxication, the Court – which cited *Tobias* for other reasons – could easily have cited *Tobias* and/or *Lydia* to reject the actionability of such a claim. The fact it did not (but in fact sanctioned such a claim) proves this court did not view its holdings in those earlier cases as creating a public policy bar, even to a first party negligence claim against an alcohol provider.[21]

Also significant is *Priester v. Cromer*, 401 S.C. 38, 736 S.E.2d 249 (2012), a crashworthiness action arising from a single-vehicle collision where the driver and passenger were intoxicated via alcohol and there was evidence they had used drugs. There, this Court held that the plaintiff's state law products liability claims were preempted by federal law, an issue it would not have needed to address if there were a public policy bar as urged by GM.

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[21] Coincidentally, both Donze and Brazell were in this age group at the time of the subject collision. Thus, under *Marcum,* one could question whether the alleged public policy bar would apply to them even if it were a separate defense.

Similarly, in *Stephens v. CSX Transp.,* 415 S.C. 182, 781 S.E.2d 534 (2015), *Lee v. Bunch,* 373 S.C. 654, 647 S.E.2d 197 (2007), *Kennedy v. Griffin,* 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2004), and *Johnson v. Horry County Solid Waste Auth.,* 389 S.C. 528, 698 S.E.2d 835 (Ct. App. 2010), this Court and the Court of Appeals addressed the effects of alleged drug or alcohol use evidence on the defense of comparative negligence in motor vehicle collision claims. This would have been unnecessary if there were a public policy bar to such claims. *Cf. also Cothran v. Brown,* 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (where the defendant – who was admittedly under the influence of alcohol at the time of a collision – was allowed to litigate his claim of plaintiff's comparative negligence, a defense that should not have been permitted if there were a public policy bar).

Other jurisdictions have also interpreted *Lydia's* consideration of the plaintiff's admitted intoxication either as a factor in determining whether to recognize a new cause of action for first party negligent entrustment or as comparative negligence rather than as a basis for the creation of a new defense based on public policy. *See, e.g., Armenta v. A.S. Horner, Inc.,* 356 P.3d 17, 24 (N.M. App. 2015); *Martell v. Driscoll,* 297 Kan. 524, 535-40, 302 P.2d 375, 383-85 (2013); *Hans v. Royer,* 384 S.W.3d 330, 336 (Mo. App. 2012); *Bailey v. State Farm Mut. Auto. Ins. Co.,* 881 N.E.2d 996, 1002 (Ind. App. 2008). Significantly, research by Donze's counsel has failed to identify a single case from any jurisdiction construing the *Lydia* holding as creating a defense (*i.e.,* "public policy bar") distinct from comparative negligence to be applied to an admittedly intoxicated plaintiff.

Equally – if not more – noteworthy is the fact that research has revealed no case adopting the *Lydia* holding outside the context of negligent entrustment cases.

To the contrary, the Supreme Court of Utah, after discussing *Lydia*, declined to find public policy barred a first-party cause of action for negligent entrustment of a firearm to an intoxicated decedent, who then accidentally shot herself. *Herland v. Izatt,* 345 P.3d 661, 671 (Utah 2015). Rather, it ruled the defendant could assert the decedent's comparative negligence (not a distinct defense based on public policy), the existence and degree of which would be left to the finder of fact. In doing so, it expressly rejected the holding in *Lydia* "that the comparative fault rule completely bars first-party recovery as a matter of law because in their reasoning an intoxicated plaintiff will never be less than fifty percent at fault for injuries he or she causes." *Id.* at 672. Instead, the *Herland* court held that "although there are competing social policies that favor and disfavor first-party recovery by an intoxicated individual, nothing bars first-party recovery as a matter of law." *Id.*

4. The holdings in *Tobias* and *Lydia* do not apply to Donze's claim.

As should be apparent from the above discussion, the present case is readily distinguishable from *Tobias* and *Lydia.*

Here, Donze does not admit his or Brazell's impairment; plus, the evidence supporting GM's claim of impairment is flimsy at best.[22]

This case does not involve a common law negligence cause of action previously unrecognized in this State. Instead, it involves established statutory causes of action for which

[22] The limited and highly disputed evidence of alleged drug use by Brazell and Donze not only distinguishes Donze's products liability claims from the admitted intoxication in *Tobias* and *Lydia.* It also highlights a number of practical problems the Court would face if it were to create a new public policy defense to crashworthiness cases: At what level of drug or alcohol consumption would a plaintiff be barred from recovery; or, stated differently, is it enough for a defendant to show a plaintiff simply consumed drugs or alcohol or must it also prove the plaintiff was impaired? If a defendant were required to prove the plaintiff was impaired, how would impairment be measured? Must the plaintiff's drug or alcohol consumption have some causal relation to the initial collision and/or to the injury from the defective product? And, if causation were required, to what degree? Finally, would these issues be decided by a judge or jury?

the Legislature has provided specific defenses. There are no alcohol control statutes – or similar statutes controlling the sale of synthetic marijuana – at play here. Thus, there is no reason for the Court to attempt to divine a legislative public policy that applies both to GM's conduct and to Brazell's and Donze's alleged conduct. There can be no argument that public policy denies a claim for crashworthiness under strict liability and breach of warranty causes of action; instead, the Legislature has, by adopting these causes of action, established a public policy favoring recovery by those injured by defective and uncrashworthy products except in specific, limited situations involving plaintiff conduct related to the product defect at issue.[23]

The basis for Donze's claim is not an "attempt[] to deflect the responsibility that should be imposed upon himself towards another", *Lydia*, 355 S.C. at 42, 583 S.E.2d at 754; to the contrary, his claim is limited to enhanced injuries resulting solely from the defective GM vehicle. He seeks no recovery for the initial collision, regardless of whether he or Brazell is allegedly blameworthy for that collision.[24] GM – not Donze – had the responsibility to design and to

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[23] If GM's argument were the law in strict liability and breach of warranty actions, allegedly intoxicated victims would be denied the right to recover under these statutes whereas otherwise negligent victims would be entitled to recover. For example, a sober driver who fails to stop for a red traffic signal would not be barred under GM's proposed public policy bar but his passenger who had consumed a few beers and taken the reasonable step of having someone else drive him home would be barred from recovery. Such a distinction would not only defy common sense but would also be constitutionally questionable under an equal protection analysis. *See, e.g., Marley v. Kirby*, 271 S.C. 122, 245 S.E.2d 604 (1978) (statute allowing some negligent plaintiffs to recover in negligence but denying recovery to other negligent plaintiffs was unconstitutional); *Ramey v. Ramey,* 273 S.C. 680, 258 S.E.2d 883 (1979) (statute allowing some vehicle passengers a negligence recovery but disallowing other passengers the same recovery was unconstitutional).

[24] The public policy behind the alcohol control statutes discussed in *Tobias* "[was] not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct." 332 S.C. at 92, 504 S.E.2d at 319-20. That policy is, of course, consistent with limiting recovery by a crashworthiness plaintiff to damages for enhanced injuries which result from the defectively designed vehicle. Donze seeks no more than that in the present action. Moreover, the Legislature has made policy decisions to deny recovery in products liability cases in other situations such as assumption of the risk by unreasonably using a known defective product, *see, e.g.,* S.C. CODE ANN. § 15-73-20 (1976, as amended), but not in this context.

manufacture a crashworthy vehicle. Moreover, the hazard of a vehicle exploding upon impact due to a defectively designed fuel tank is not a risk created by Brazell's or Donze's alleged impairment.

In sum, there is no public policy bar to recovery by impaired plaintiffs in all tort actions. This is not a case where Donze is seeking to hold someone liable for his own conduct in causing his injuries but he instead seeks recovery only for enhanced injuries caused by the defective fuel system in the GM truck. The public policy considerations set forth in *Tobias* and *Lydia* are clear and are based on the premise that one cannot hold another liable for failing to prevent injuries which he admits were caused by his voluntary intoxication.

Based on the foregoing, the Court should answer the second certified question in the negative.

CONCLUSION

This Court should answer the certified questions "No." Neither comparative negligence nor the public policy bar against impaired drivers recovering damages applies to a crashworthiness case asserting strict liability and breach of warranty causes of action.

Respectfully submitted,

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September 21, 2016
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Timothy M. Cain, United States District Judge

Appellate Case No. 2016-001437

Reid Harold Donze ..... Plaintiff,

v.

General Motors, LLC ..... Defendant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Brief complies with Rule 211(b), SCACR.

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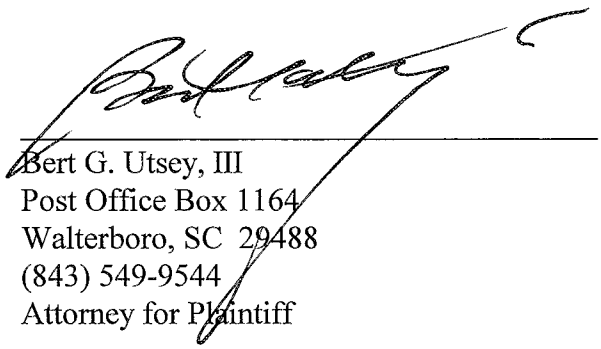

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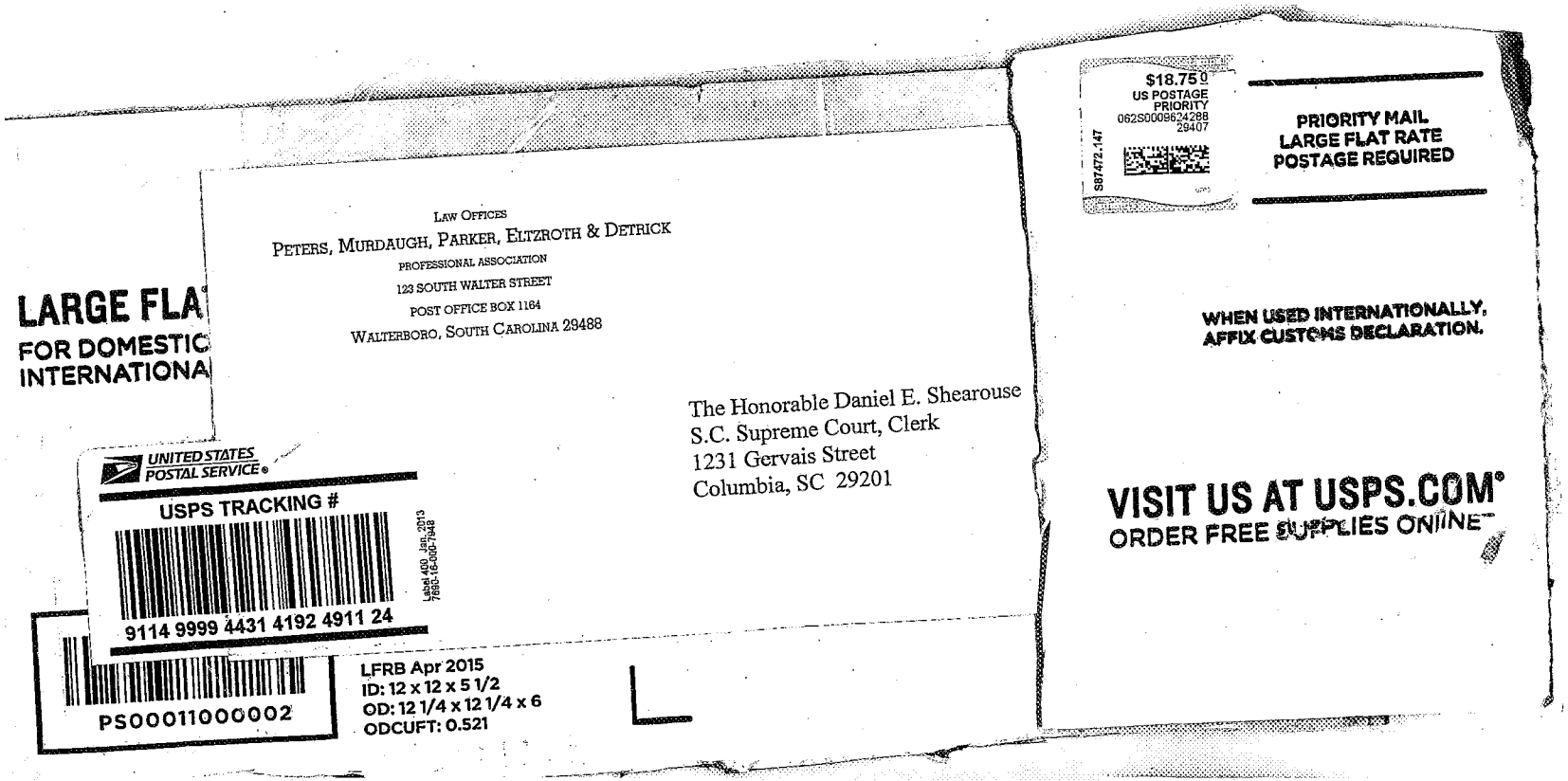

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