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

AMICUS CURIAE BRIEF OF THE PRODUCTS LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF DEFENDANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATUTES

INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 95 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983 PLAC has filed over 1075 briefs as amicus curiae in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.

PLAC's membership has a vested interest in confirming that the rules of apportionment in tort cases are uniformly applied to achieve fair and consistent verdicts and to avoid anomalous or excessive verdicts. Specific to this case, PLAC members have an interest in preventing Plaintiffs who engage in negligent, willful or even criminal conduct from manipulating the justice system by artful pleading

in order to avoid jury consideration of their own responsibility in causing their injuries. Similarly, PLAC has an interest in ensuring that South Carolina's modified comparative fault system is employed fairly, by enabling juries to weigh all proximate causes of an injury in apportioning fault among parties. Finally, PLAC's membership supports public policies that discourage the reckless and irresponsible use of products, such as South Carolina's public policy against rewarding intoxicated drivers.

QUESTIONS PRESENTED

The questions certified by the United States District Court for the District of South Carolina are these:

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?[1]

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?

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[1] PLAC agrees with General Motors that answering this question requires the Court to answer two subsidiary questions:

(a) Does comparative negligence apply at all to cases based upon breach of warranty or strict liability?

(b) If so, can comparative negligence in causing an accident be considered in a crashworthiness case when the plaintiff is seeking damages relating only to the plaintiff's enhanced injuries?

STATEMENT OF THE CASE

PLAC adopts the Statement of the Case as set forth by General Motors Corp. ("GM") in Defendant's Brief filed October 21, 2016.

INTRODUCTION

South Carolina's modified comparative fault system should allow juries to weigh all proximate causes of an injury in apportioning fault among parties. The majority view across the country recognizes that the fault of the party actually causing the wreck should be compared with the manufacturer's fault in assessing responsibility for Plaintiff's injuries. The Second Restatement does not bar application of comparative negligence to strict liability claims, including crashworthiness claims. This Court in *Branham v. Ford Motor Co.* determined that the risk-utility test is the proper test in a design defect case, despite the comment in the Second Restatement that favors the consumer expectations test. *Branham v. Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (2010). In doing so, the Court recognized that the Legislature has expressed "no intention to foreclose court consideration of developments in products liability law." *Id.*

The 2005 amendment to the Contribution Among Joint Tortfeasors Act, adding S.C. CODE ANN. § 15-38-15, reflects the South Carolina Legislature's intention that the courts compare all parties' fault in allocating liability. The enabling language of the Act adopting the apportionment statute reflects that the

Legislature did not intend to limit apportionment to negligence actions, but instead intended to compare all forms of party fault. The Court should recognize the Legislature's embrace of comparative fault for all personal injury claims, regardless of the nomenclature a Plaintiff uses for his claims in his Complaint.

Plaintiff's crashworthiness claim is, at its core, a claim that turns on the reasonableness of the manufacturer's choices, regardless of whether the cause is brought under strict liability, negligence, or breach of warranty. Because crashworthiness claims are grounded in these notions of reasonableness, application of comparative negligence to those claims is not a departure from settled South Carolina law.

As to the second certified question, South Carolina statutes and the common law have espoused a public policy that seeks to protect the public from the dangers created by impaired drivers. This Court has recognized that separate public policy considerations dictated that Plaintiffs who endanger themselves by driving impaired are not entitled to recover for their injuries from others who are potential tortfeasors. This Court has recognized that a driver's intoxication can combine with another proximate cause to effectuate harm. It determined that principles of public policy dictate that an intoxicated person cannot recover damages for harms caused, in any part, by his own poor choices to drive while intoxicated. This

policy should apply regardless of the nature of the claim advanced by the inebriated Plaintiff.

I. COMPARATIVE NEGLIGENCE SHOULD APPLY IN ALL CRASHWORTHINESS CLAIMS

Liability for product claims in South Carolina arises under theories of negligence, breach of warranty, or strict liability. *Bragg v. Hi-Ranger*, 319 S.C. 531, 538, 462 S.E.2d 321, 325 (Ct. App. 1995). No matter the theory espoused, proximate cause of the injuries is the touchstone for recovery. *Id.* Plaintiff must show that "(1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) that the product at the time of the accident was in essentially the same condition" as when it was manufactured. *Id.* at 539, 462 S.E.2d at 326. "However, under a negligence theory, the plaintiff bears the additional burden of demonstrating the defendant (seller or manufacturer) failed to exercise due care in some respect." *Id.* While strict liability claims do not require a finding of fault, a design defect product claim *does* require an inquiry into reasonableness of the design, just as a negligence claim on the same facts does. As this Court explained in *Branham v. Ford,* failure to prove the common element of "defective condition, unreasonably dangerous" in a design claim is fatal under any product liability theory. *Branham v. Ford Motor Co.*, 390 S.C. 203, 211–12, 701 S.E.2d 5, 9 (2010).

A. The Majority of States allow Comparative Fault in Crashworthiness Cases

The majority view across the country[2] recognizes that that the fault of the party actually causing a wreck should be compared with the manufacturer's fault in designing a defective product in assessing responsibility for a plaintiff's injuries. *E.g. Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 690 (Tenn. 1995) ("Courts in a majority of states that have considered the issue of whether comparative fault should apply in products liability actions based on strict liability in tort have decided that comparative fault should apply in such cases."); *Daly v.*

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[2] Restatement (Third) of Torts: Prod. Liab. § 17 cmt. a (1998) ("A strong majority of jurisdictions apply the comparative responsibility doctrine to products liability actions.") and §16 cmt. f ("A majority of courts . . . allows the introduction of plaintiff's conduct as comparative fault in a crashworthiness context.").

In at least twenty-five states, comparative fault principles apply to crashworthiness claims. *General Motors Corp. v. Farnsworth*, 965 P.2d 1209 (Ala. 1998); *Zuern v. Ford Motor Co.*, 937 P.2d 676 (Az. App. 1996); *Keltner v. Ford Motor Co.*, 748 F.2d 1265 (8th Cir. 1984) (Arkansas law); *Daly v. General Motors Corp.*, 575 P.2d 1162 (Cal. 1978); *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996) (Colorado law); *Bravo v. Ford Motor Co.*, 2001 WL 477275 (Conn. Super. 2001); *Meekins v. Ford Motor Co.*, 699 A.2d 339 (Del. Super. 1997); *Dannenfelser v. Daimler Chrysler Corp.*, 370 F.Supp.2d 1091 (D.C. Hawaii 2005) (Hawaii law); *Jahn v. Hyundai Motor Co.*, 773 N.W.2d 550 (Iowa 2009); *Albertson v. Volkswagenwerk*, 634 P.2d 1127 (Kan. 1981); *Smith v. Toyota Motor Corp.*, 105 Fed.Appx. 47 (6th Cir. 2004) (Kentucky law); *Moore v. Chrysler Corp.*, 596 So.2d 225 (La.Ct.App. 1992); *Zalut v. Anderson & Assoc.*, 463 N.W.2d 236 (Mich.Ct.App. 1990); *Willis v. Kia Motors Corp.*, 2009 WL 2134359 (N.D. Miss. 2009); *Trust Corp. of Montana v. Piper Aircraft Corp.*, 506 F. Supp. 1093 (D. Mont. 1981) (Montana law); *McNeil v. Nissan Motor Co.*, 365 F.Supp.2d 206 (D.N.H. 2005) (New Hampshire law); *Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540 (10th Cir. 1989) (New Mexico law); *Hinkamp v. American Motors Corp.*, 735 F.Supp. 176 (E.D.N.C. 1989), aff'd, 900 F.2d 252 (4th Cir. 1990) (North Carolina law); *Day v. General Motors Corp.*, 345 N.W.2d 349 (N.D. 1984); *Dahl v. BMW*, 304 Or. 558, 748 P.2d 77 (Or.1987); *Harsh v. Petroll*, 887 A.2d 209, 218 (Pa. 2005); *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684 (Tenn. 1995); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984); *Fietzer v. Ford Motor Co.*, 590 F.2d 215 (7th Cir. 1978) (Wisconsin law); *Harvey v. General Motors Corp.*, 873 F.2d 1343 (10th Cir. 1989) (Wyoming law).

Gen. Motors Corp., 20 Cal. 3d 725, 736, 575 P.2d 1162, 1168 (1978) ("[W]e think the term 'equitable apportionment or allocation of loss' may be more descriptive than 'comparative fault'."); *Zuern v. Ford Motor Co.*, 188 Ariz. 486, 491, 937 P.2d 676, 681 (Ct. App. 1996) ("[O]ur supreme court has made clear that comparative fault principles apply to strict product liability actions."); *Baccelleri v. Hyster Co.*, 287 Ore. 3, 12, 597 P.2d 351, 355 (1979) ("comparative fault is applicable in strict liability in tort"); *Antley v. Yamaha Motor Corp., U.S.A.*, 539 So. 2d 696, 706 (La. Ct. App. 1989) ("Comparative fault is applicable in strict liability cases.") This Court should join the majority of its sister states in allowing a jury to compare all fault in tort cases, regardless of the theory espoused by the Plaintiff.

B. At Most, the Alleged Defect and Plaintiff's Conduct Combined to Cause Plaintiff's Injuries

1. South Carolina's Traditional Proximate Cause Analysis Governs

South Carolina recognizes that an injury may have multiple substantial causes, which can give rise to concurrent or joint liability. *Rife v. Hitachi Const. Mach. Co.*, 363 S.C. 209, 216, 609 S.E.2d 565, 569 (Ct. App. 2005). "Proximate cause does not mean the sole cause." *Id.*

Proximate cause in South Carolina requires only that the party's acts were a substantial factor in causing the Plaintiff's injuries; in crashworthiness cases, where there is no allegation that the alleged defect caused the crash giving rise to

the harm, the alleged defect is always, at most, a concurrent cause. As the Supreme Court of Pennsylvania recognized, "a judicially imposed policy insulating a negligent tortfeasor from liability for enhanced injuries based on his status as the sole cause of some other distinct harm would engender substantial incongruities" in state tort law. *Harsh v. Petroll*, 584 Pa. 606, 621, 887 A.2d 209, 218 (2005).

Plaintiff argues that because the alleged defect was *a* proximate cause of the injuries, his own acts in causing the action necessarily cannot be a proximate cause. But "[p]roximate cause does not mean the sole cause." *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997). Plaintiff's argument is especially untenable in a crashworthiness case because the initial crash is always a proximate cause. If the wreck had not happened, there would never be any "enhanced injury." *See, e.g., GM Corp. v. Lahacki*, 410 A.2d 1039, 1051 (Md. 1980) ("But for the alleged negligence [of the driver] the design defect would not have been manifested").

Fundamentally, the Plaintiff asks the Court to proclaim a bright line rule that, as a matter of law in all crashworthiness cases, the alleged design defect is a superseding cause of the Plaintiff's injuries. Under South Carolina law, an intervening or superseding cause "will not excuse the first wrongdoer, if such intervention ought to have been foreseen in the exercise of due care. In such case, the original negligence still remains active, and a contributing cause of the injury.

The test is to be found in the probable consequences reasonably to be anticipated, and not in the number or exact character of events subsequently arising." *Matthews v. Porter*, 239 S.C. 620, 626, 124 S.E.2d 321, 324 (1962) (citations omitted). An intervening cause will not break the causal chain so long as some injury was foreseeable as a result of the original negligent act. "It is equally well settled that to establish liability, it is not necessary that the person charged with negligence should have contemplated the particular event which occurred. It is sufficient that he should have foreseen that his negligence 'would probably result in injury of some kind to someone'." *Matthews v. Porter*, 239 S.C. 620, 626, 124 S.E.2d 321, 324 (1962) (citations omitted); *see also Buehler v. Whalen*, 355 N.E.2d 99, 111 (Ill. App. 1976) ("[T]he precise manner that the plaintiffs' injuries were enhanced is not significant, so long as it was reasonably foreseeable that such injuries would occur and they were the natural and probable result of the negligent act.") Proximate cause, including whether an act constitutes a superseding cause, is a question for the jury, not judicial fiat. "The question of proximate cause is one of fact for the jury." *E.g., Small,* 329 S.C. at 464, 494 S.E.2d at 843.

The flaw in Plaintiff's argument that an alleged design defect is the sole proximate cause of a Plaintiff's enhanced injuries is evident when the Court considers the implications. What if the automobile accident were caused by the driver of the *other* automobile involved in the crash? Under Plaintiff's logic, the

alleged defect in the Plaintiff's automobile would break the causal chain, and Plaintiff could not recover anything from the at-fault driver for Plaintiff's substantial burn injuries, even if the other driver unequivocally caused the accident. This is not the law in South Carolina, and the Court should reject any argument that would lead to such absurd results.

2. The "Crashworthiness doctrine" does not alter South Carolina law on proximate cause.

Under a crashworthiness theory, "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) (applying South Carolina law)). Crashworthiness claims are frequently termed "second collision" claims, but that label is a misnomer. The first collision occurs when vehicles collide; no injuries ever occur at that point. *All* injuries associated with automobile collisions are suffered later, as the occupants of the vehicle collide with other things inside or outside the vehicle or (as in this case), are exposed to a post-collision fire. Thus, *all* injuries are "second collision" injuries. In some cases, there may be "second collision" injuries for which the manufacturer is not responsible, as in this case where Plaintiff suffered hip and rib injuries apparently caused by a "second collision" with some interior component of the truck. But

such injuries have no bearing on the extent of a manufacturer's responsibility for the injuries caused by the alleged defect.

Crashworthiness cases are often said to involve liability for "enhanced injuries." But "enhanced injuries" are simply those "second collision" injuries caused by the alleged defect, i.e., the injuries that would not have occurred but for the alleged defect. In many cases, all of the injuries will be "enhanced injuries," as would be the case here if Plaintiff had suffered no hip or rib injuries. Of course, the injuries caused by the defect were also caused by the negligence of the driver, because the accident would never have occurred if the driver had not been negligent. Characterizing some injuries as "enhanced" artificially separates indivisible injuries. An indivisible injury is a "single injury, which is the proximate result" of the acts of two or more parties. *Rourk v. Selvey*, 252 S.C. 25, 28, 164 S.E.2d 909, 910 (1968). In reality, a vehicle's relative crashworthiness is a potential concurring cause of a Plaintiff's harms.

To illustrate the fallacy of Plaintiff's argument, note that GM could just as easily make the converse argument—the automobile fire would never have occurred but for the acts causing the accident, and, therefore, GM should be absolved of responsibility as a matter of law. South Carolina jurisprudence does not support such results.

3. *The Second Restatement Does Not Bar Application of Comparative Negligence to Strict Liability Claims, Including Crashworthiness Claims*

Contrary to Plaintiff's argument, the Second Restatement, as adopted by South Carolina's legislature, does not bar application of comparative negligence to strict liability cases. Plaintiff argues that this Court would "violate the separation of powers doctrine of the State Constitution" if it allowed comparative negligence as a defense to its crashworthiness claim. (Pl.'s Brief at 18.) This is totally incorrect.

While South Carolina's statutory scheme does mirror the Second Restatement, and incorporates the comments thereto "as the legislative intent" of the chapter (S.C. CODE ANN. § 15-73-30), neither the statute itself nor the comments speaks to application of the doctrine of comparative negligence (or fault, as it is also known) to products actions.

This Court is free to determine the issue. *Berberich, 392 S.C. 278, 292, 709 S.E.2d 607, 614 (2011).*

This Court has already rejected Plaintiff's suggestion that absolute adherence to the comments of the Second Restatement is constitutionally necessary. For example, in *Branham v. Ford*, this Court determined that the risk-utility test is the proper test in a design defect case, despite the comment in the Second Restatement that favors the consumer expectations test. *Branham v. Ford*

Motor Co., 390 S.C. 203, 220, 701 S.E.2d 5, 14 (2010). In doing so the Court recognized that the Legislature has expressed "no intention to foreclose court consideration of developments in products liability law." *Id.* This Court explained:

> In 1974, our Legislature adopted the *Restatement (Second) of Torts* § 402A (1965), and identified its comments as legislative intent. S.C. Code Ann. §§ 15–73–10–30 (2005). The comments in section 402A are pointed to as the basis for the consumer expectations test. Since the adoption of section 402A, the American Law Institute published the *Restatement (Third) of Torts: Products Liability* (1998). The third edition effectively moved away from the consumer expectations test for design defects, and towards a risk-utility test. We believe the Legislature's foresight in looking to the American Law Institute for guidance in this area is instructive.
>
> The Legislature has expressed no intention to foreclose court consideration of developments in products liability law. For example, this Court's approval of the risk-utility test in *Claytor* yielded no legislative response. We thus believe the adoption of the risk-utility test in design defect cases in no manner infringes on the Legislature's presence in this area.

Id.

A plain reading of Comment n to the Second Restatement demonstrates no bar to application of comparative negligence to strict liability actions. The relevant portion of the comment states: "Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence." Restatement (Second) of Torts § 402A (1965). In summary, the comment merely observes that

a user's failure to notice or take precautions against a latent defect in a product will not bar that user's recovery under 402A. Plaintiff grossly overstates the significance of the comment, for a few reasons.

First, the comment discusses *contributory*, not comparative negligence. The Second Restatement considers contributory negligence as a complete bar to recovery for any tort action. *See* Restatement (Second) of Torts § 467, *Bar Against Negligent Defendant*. At the time the American Law Institute adopted §402A, only a handful of states recognized comparative fault. That 1965 publication does not even contemplate a comparative negligence framework, much less take a position on whether it applies in a strict liability context. South Carolina, of course, has since adopted a comparative negligence rule, and in doing so abandoned the doctrine of pure contributory negligence. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 244, 399 S.E.2d 783, 784 (1991) (abandoning the "long-standing rule of contributory negligence" after "[h]aving determined comparative negligence is the more equitable doctrine.") Comment n to the Restatement addresses only contributory negligence, which in Restatement (Second) nomenclature, is a complete bar to a Plaintiff's recovery in any tort action. This certified question instead concerns comparative negligence, which does not so operate. Thus, Comment n, and its adoption by the General Assembly as an "expression of

legislative intent," does not foreclose—or even speak to—the certified question before this Court.

Other jurisdictions that apply the Second Restatement (and its comments) allow comparative negligence as a defense to strict liability. For example, West Virginia's Supreme Court applies Comment n, and recognizes that only negligence in failing to discover or guard against a defect is prohibited as a defense to a strict liability products claim; other acts of negligence by the plaintiff should be considered by a jury. "[C]omparative negligence is available as an affirmative defense in a cause of action founded on strict liability so long as the complained-of conduct is not a failure to discover a defect or to guard against it." *Star Furniture Co. v. Pulaski Furniture Co.*, 171 W. Va. 79, 88, 297 S.E.2d 854, 863 (1982) (adopting the rationale of Comment n to Restatement (Second) of Torts 402A, and limiting it to narrow circumstances); s*ee also Sandford v. Chevrolet Div. of Gen. Motors,* 292 Or. 590, 595, 642 P.2d 624, 626 (1982) & *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 394 (Minn. 1977) ("the comparative negligence statute applies in actions brought on a [Second Restatement Section] 402A theory").

Second, even if the Court sees fit to equate the "contributory" negligence referenced in the Restatement with South Carolina's current comparative negligence defense, Comment n only prohibits application of the defense "when such negligence consists merely in a failure to discover the defect in the product, or

to guard against the possibility of its existence." Restatement Second of Torts §402A Cmt. n. Thus, the comment addresses only one type of plaintiff negligence – failing to apprehend or protect oneself against the defect itself. *Id.* Those particular acts of "negligence" are not a defense to a strict liability claim, but there is simply no prohibition regarding allowing a jury to consider other acts of plaintiff fault. *See id.* South Carolina, like West Virginia or Minnesota, is free to embrace the concepts outlined in Comment n and still allow a jury to consider a Plaintiff's comparative fault in causing his own injury.

Further, "statutes in derogation of the common law are to be strictly construed." *Ross v. Waccamaw Cmty. Hosp.,* 404 S.C. 56, 63, 744 S.E.2d 547, 550 (2013). Statutes that restrict a common law right should "not be extended beyond the clear intent of the legislature." *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000). Comparative negligence, and the entitlement to plead it to a jury, derives from the common law. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 244, 399 S.E.2d 783, 784 (1991). A decision to deprive a defendant of a defense of comparative negligence, in derogation of the common law governing same, should be as narrowly tailored as possible to effectuate the legislative intent. *See Ross,* 404 S.C. at 63, 744 S.E.2d at 550. Here, the expressed intent of the legislature abridging that defense—as expressed in Comment n—is merely that contributory negligence (a complete bar to recovery under the Second

Restatement's rubric) will not operate as a defense when the Plaintiff's negligence is a failure to guard against or appreciate the defect in the product. The Legislature goes no further, and this Court should not stretch the meaning of the language of this Comment, as Plaintiff urges, to prohibit comparative negligence application to strict liability action.

4. The 2005 Amendment to the Contribution Among Joint Tortfeasors Act Mandates Application of Comparative Fault to All Personal Injury Claims

The 2005 amendment to the Contribution Among Joint Tortfeasors Act ("JTA"), adding §15-38-15, reflects the South Carolina Legislature's intent that Courts compare all parties' fault in allocating liability. Specifically, the statute is not limited merely to negligence claims, but instead applies to all actions for personal injury. S.C. CODE ANN. § 15-38-15 (statute applies "[i]n an action to recover damages resulting from personal injury, wrongful death, or damage to property") or to recover damages for economic loss or for noneconomic loss such as mental distress, loss of enjoyment, pain, suffering, loss of reputation, or loss of companionship resulting from tortious conduct", this Chapter applies.)

Liability pursuant to §15-38-15 is unequivocally grounded in tort. (*E.g.*, Restatement (Second) of Torts §402A cmt. l ("The liability stated is one in tort"). As such, the Legislature has confirmed that the JTA apportionment statute concerns comparison of relative liability, and that a Plaintiff's fault may be

considered in any personal injury case. *Accord Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 404, 904 P.2d 861, 866 (1995) (Arizona's "comparative negligence statute does not limit the application of comparative fault principles to negligence theories. This section instead instructs that "*[i]n an action for personal injury, . . .* liability of the person who caused the injury shall be allocated.")

The enabling language of the Act adopting the apportionment statute reflects that the Legislature did not intend to limit apportionment to negligence actions, but instead intended to compare all forms of party fault. The preamble describes the relevant section as:

> AN ACT TO AMEND . . . BY ADDING SECTION 15–38–15 SO AS TO PROVIDE IN AN ACTION TO RECOVER DAMAGES RESULTING FROM PERSONAL INJURY, WRONGFUL DEATH, DAMAGE TO PROPERTY, OR TO RECOVER DAMAGES FOR ECONOMIC LOSS OR NONECONOMIC LOSS, JOINT AND SEVERAL LIABILITY DOES NOT APPLY TO A DEFENDANT WHO IS LESS THAN FIFTY PERCENT AT FAULT, TO PROVIDE FOR APPORTIONMENT OF PERCENTAGES OF FAULT AMONG DEFENDANTS, AND TO PROVIDE THAT THE PROVISIONS OF THIS SECTION DO NOT APPLY TO A DEFENDANT WHOSE CONDUCT IS WILFUL, WANTON, RECKLESS, GROSSLY NEGLIGENT, INTENTIONAL, OR CONDUCT INVOLVING THE USE, SALE, OR POSSESSION OF ALCOHOL OR DRUGS;

2005 South Carolina Laws Act 27 (H.B. 3008). This enabling language speaks only to "Defendant fault" and does not limit apportionment to negligent defendants; thus, the Court should recognize the Legislature's embrace of a comparative fault for all personal injury claims, regardless of the nomenclature a Plaintiff uses for his claims in his Complaint.

Likewise, the language of the statute itself explicitly applies apportionment to all claims for personal injury. S.C. CODE ANN. § 15-38-15. Specifically, apportionment principles apply "[i]n an action *to recover* damages resulting from personal injury, wrongful death, or damage to property *or to recover* damages for economic loss or for noneconomic loss such as mental distress, loss of enjoyment, pain, suffering, loss of reputation, or loss of companionship resulting from tortious conduct." S.C. CODE ANN. § 15-38-15. The verbiage of the statute highlights two separate situations where apportionment should be applied: (1) actions for damages arising from personal injury, death, or property damages, and (2) actions for damages for both economic and noneconomic loss resulting from tortious conduct. The statute's plain disjunctive language requires tortious conduct as a prerequisite to apportionment only for the second type of action described above.

In *Berberich v. Jack*, this Court recognized that "South Carolina's system is essentially a comparative fault system." *Berberich*, 392 S.C. 278, 292, 709 S.E.2d 607, 614 (2011). The Court observed that the concept of comparative negligence

in South Carolina "encompasses the comparison of ordinary negligence with heightened forms of misconduct such as recklessness, willfulness, and wantonness." *Id.* In *Berberich*, the Court affirmed that a jury could compare a Plaintiff's negligence with a defendant's alleged willful or wanton conduct. The Court cited with approval an *American Jurisprudence* annotation that recognized that, while the concepts are "technically distinct," they can "'be thought of as extensions of the law of negligence'" in this application. *Id.*, citing *Annotation, Application of Comparative Negligence in Action Based on Gross Negligence, Recklessness, or the Like,* 10 A.L.R.4th 946 (1981 & Supp.2010); 57A Am.Jur.2d *Negligence* § 243 (2004). The rationale for departing from the traditional rule that a plaintiff's ordinary negligence is not a defense to reckless conduct was that the traditional rule served to "ameliorate the harshness of the 'all or nothing' result under contributory negligence. Since the abandonment of contributory negligence in this state and the adoption of comparative negligence, the need for this concept has been eliminated." *Berberich*, 392 S.C. at 293, 709 S.E.2d. at 615. The Court held that "all forms of conduct amounting to negligence in any form . . . may be compared to and offset by any conduct that falls short of conduct intended to cause injury or damage." The stated goal of this holding was that "each party's relative fault in causing the plaintiff's injury will be given due consideration." *Id.* South Carolina allows comparison of a Plaintiff's negligence to "heightened' forms of

fault. It defies reason that the lesser forms of liability described in §15-38-15 or implied warranty statutes, which carry with them no intent element, would be prohibited.

II. Crashworthiness Claims Share Fundamental Elements Under All Causes of Action

Design-based crashworthiness claims, like the Plaintiff's, call into question the reasonableness of a manufacturer's design choices, no matter the nomenclature that a plaintiff uses in his Complaint. The nature of a claim, and not the labels used in the complaint, determines the law applicable to that claim. Plaintiff's crashworthiness claim is predicated upon the alleged breach of the manufacturer's duty, and is premised on the foreseeable yet unintended results of automobile use; therefore, it is at its core, a claim that turns on the reasonableness of the manufacturer's choices, regardless of whether the cause is brought under strict liability, negligence, or breach of warranty. If the manufacturer reasonably balanced the risks and utilities of a design, the product is not in a "defective condition, unreasonably dangerous" and there can be no finding of liability under any theory. Because crashworthiness claims are grounded in in these notions of reasonableness, application of comparative negligence to those claims is not a departure from settled South Carolina law.

A. South Carolina Courts Will Discern the True Nature of Claims, Disregarding Plaintiff's Selective Terminology

A Court will determine the character of an action by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought." *State v. Yelsen Land Co.*, 257 S.C. 401, 403 (1972); *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). "The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the pleaders have recited." *Walsh v. Evans*, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919). Courts should use the allegations in the complaint to determine the correct character of an action. *See Seebaldt*, 269 S.C. at 692, 239 S.E.2d at 727 ("The character of an action is primarily determined by the allegations contained in the complaint").

B. Crashworthiness Claims Turn on the Reasonableness of a Design , No Matter the Title of the Cause of Action

Crashworthiness claims like Plaintiff's are necessarily predicated on the notion that the manufacturer made an unreasonable design choice. The doctrine "stems from the foreseeable likelihood that in the normal course of operation an automobile may be involved in a collision." *Jensen v. Am. Suzuki Motor Corp.*, 35 P.3d 776, 779 (Id. 2001) (citations omitted). Succinctly, crashworthiness is the breach of the duty to design a vehicle that guards against harms that are foreseeable after a crash. This is the language of negligence—duty of care,

reasonableness and foreseeability—and these concepts are an integral, requisite element for a crashworthiness claim.

An "unreasonable" design choice is an essential element in any crashworthiness claim for "enhanced injuries" premised upon faulty design. *E.g. Volkswagen of Am., Inc. v. Young,* 272 Md. 201, 219, 321 A.2d 737, 746 (1974) ("the manufacturer must use only reasonable care in the design of a vehicle in order to avoid subjecting a user to an unreasonable risk of injury in a collision"). This is so because a crashworthiness claim like Plaintiff's concedes completely that the alleged product defect did not cause or contribute to the crash itself. *See* Pl.'s Brief at 2 (Plaintiff "does not seek recovery for injuries caused by the initial impact but limits his claims to enhanced injuries caused by the fire.") Instead, "the theory of liability obligates the manufacturer to design a vehicle that protects the passenger from *unreasonable* risk of harm." *Madden, Products Liability* § 8.4 (2d ed. 1988).

The first South Carolina case adopting the crashworthiness doctrine held: "Where the injuries or enhanced injuries are due to the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury, general negligence principles should be applicable." *Mickle v. Blackmon*, 252 S.C. 202, 232, 166 S.E.2d 173, 186 (1969) (quoting *Larsen v. GM Corp.*, 391 F.2d 495 at 502). Forty-five years later, the South Carolina courts still

embrace the same premise: the law of crashworthiness requires the plaintiff to show the manufacturers' design creates an *unreasonable* risk, *readily foreseeable*, and an alternative design would have prevented the vehicle from being unreasonably dangerous. *Riley v. Ford Motor Co.*, 408 S.C. 1, 12, 757 S.E.2d 422, 428 (2010) (overturned on other grounds). Adoption of the products liability statute did not alter this proof requirement.

In *Mickle*, decided prior to the adoption of the strict liability statute, a passenger in a wreck was seriously injured by a poorly designed gearshift lever. The issue before that Court was whether "the manufacturer owe[d] a duty of care to reasonably minimize the risk of death or serious injury to collision victims who, quite predictably, will upon impact be forcefully thrown against the interior of the car or outside of it?" *Mickle*, 252 S.C. at 229, 166 S.E.2d at 185. The Court answered in the affirmative, quoting *Larsen v. GM Corp.*, the seminal Eighth Circuit case that first established the crashworthiness doctrine: "Where the injuries or enhanced injuries are due to the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury, *general negligence principles* should be applicable." *Id.*, quoting *Larsen v. GM Corp.*, 391 F.2d 495 (8th Cir. 1968) (emphasis added).

Simply, a crashworthiness claim necessarily fails if the plaintiff cannot establish that the manufacturer violated its duty to design a "crashworthy" vehicle.

"In a products liability action based on a negligent design theory, the plaintiff must establish, among other things, that the defendant failed to exercise due care in designing the product." *5 Star, Inc. v. Ford Motor Co.*, 408 S.C. 362, 366–67, 759 S.E.2d 139, 141 (2014). Crashworthiness claims like Plaintiff's are premised upon an unreasonable design choice, no matter the title the Plaintiff ascribes in his Complaint.

In *Branham v. Ford*, this Court held that the risk-utility test is the "exclusive test in a products liability design case." *Branham v. Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (2010). In doing so, this Court recognized the Third Restatement position that the consumer expectations test is "ill-suited in design defect cases." *Id.* The rationale behind the Third Restatement's embrace of the risk utility test in design cases is that "design defects . . . are predicated on a different concept of responsibility" than manufacturing defect cases. Restatement (Third) of Torts: Prod. Liab. § 2 (1998) cmt. The comments further observe that the risk-utility approach "is also used in administering the traditional reasonableness standard in negligence." *Id.* at cmt. d. Thus, the risk-utility test, which relies upon a reasonableness test, is the same test traditionally used in determining whether an actor has been negligent.

In products claims grounded in negligence, comparative negligence is undisputedly appropriate for jury consideration. *E.g., Wallace v. Owens-Illinois,*

Inc., 300 S.C. 518, 524, 389 S.E.2d 155, 158 (Ct. App. 1989) (jury may consider contributory negligence of Plaintiff compared to manufacturers' negligence in manufacturing defective soda bottle). Because crashworthiness claims are, by their very nature, claims grounded in principles of reasonableness and foreseeability, comparative fault is appropriate.

Plaintiff would rest on the premise that his claim is brought only on strict liability and breach of warranty theories. But the Plaintiff also initially filed a negligence claim against GM, and voluntarily dismissed it. It is antithetical to justice that these three product liability theories based upon identical facts and the same alleged defect would yield widely disparate results on a wide range of issues—including the liability of joint tortfeasors. Yet following Plaintiff's logic, a jury cannot allocate fault in a "strict liability" or warranty design defect action, whereas on identical facts, allocation is permitted between plaintiff and manufacturer in a negligence action. There is no practical reason for such potentially confusing differences. In every situation, the jury is equally competent to evaluate the same evidence. Plaintiff advocates form over substance, and the Court should reject this superficial analysis.

Other states agree that crashworthiness is a single theory involving only one proof. The Texas Supreme Court succinctly summarized the reality that

crashworthiness design claims, whether grounded in strict liability, negligence, or warranty, involve identical proof:

> But in a crashworthiness case involving a claim for personal injuries, like the one now before us, strict-liability's and breach-of-warranty's concepts of "defect" are functionally identical. The claim in a crashworthiness case is that a defect in the vehicle caused an occupant to sustain injuries in an accident that he or she would not otherwise have suffered. A defect in a vehicle that makes it uncrashworthy and thus causes occupants to be exposed to an unreasonable risk of harm in the event of an accident is *both* "unfit for the ordinary purposes for which [it is] used because of a lack of something necessary for adequacy" *and* unreasonably dangerous. An uncrashworthy vehicle cannot be unfit for ordinary use but not unreasonably dangerous, nor can it be unreasonably dangerous but fit for ordinary use; it must be both or neither.

Hyundai Motor Co. v. Rodriguez ex rel. Rodriguez, 995 S.W.2d 661, 665 (Tex. 1999).

C. Breach of Warranty Jurisprudence Does Not Alter this Analysis

Plaintiff argues that a plaintiff's fault is no defense to an implied warranty products claim, except for product misuse or abuse. (Pl.'s Brief at 4.) In support, Plaintiff cites to *Imperial Die Casting v. Covil Insulation*, 264 S.C. 504, 216 S.E.2d 532 (1975). (*Id.*) When that case was decided, South Carolina still operated under the contributory negligence scheme, wherein any negligence of a Plaintiff in causing his own harm would bar his recovery entirely. The Court held only that negligence short of assumption of risk was not a complete bar to a breach

of warranty action, and further held that evidence of the Plaintiff's negligence was still admissible at trial:

> Certainly, [Defendant] should be allowed to introduce any evidence tending to prove that the misuse or abuse of the product was the proximate cause of the damages. Nothing in the order of the lower court relieves the plaintiffs of proving that the breach of warranty was the proximate cause of the loss before damages may be recovered.

Imperial Die Casting Co. v. Covil Insulation Co., 264 S.C. 604, 610, 216 S.E.2d 532, 534 (1975). Thus, the Court recognized that a Plaintiff's actions, even in a warranty action, may be a proximate cause of his own damages. The law at the time held that "[i]f in the exercise of ordinary care, the plaintiff might have avoided the consequences of the defendant's negligence, he is the author of his own injury in the eyes of the law." *Wallace v. Owens-Illinois, Inc.*, 300 S.C. 518, 523, 389 S.E.2d 155, 157 (Ct. App. 1989). While *Imperial Die Casting* stands for the premise that a Plaintiff's negligence is not a complete bar to his warranty claim, it also recognizes that the Plaintiff's negligence may, in fact, be the cause of the Plaintiff's harm. Even under South Carolina's prior harsh contributory negligence scheme, such evidence was admissible for the jury's consideration in an implied warranty case. It is certainly appropriate now as well.

III. SOUTH CAROLINA'S PUBLIC POLICY BARS IMPAIRED DRIVERS' CLAIMS IN THIS CONTEXT

South Carolina statutes and the common law have espoused a public policy that seeks to protect the public from the dangers created by impaired drivers. Plaintiff would have this Court abandon this sound policy and instead permit windfall verdicts for drunk drivers who are injured in wrecks of their own causing.

The public policy aiming to prevent impaired driving is warranted, given the statistics in South Carolina. According to the South Carolina Department of Transportation, "South Carolina has one of the highest alcohol-impaired driving fatality rates (per 100 million vehicle miles traveled) in the country. The average rate from 2008 to 2010 was *more than twice that of the national average.*" S.C. Dept. of Transp., "Impaired Driving," *http://www.sctargetzeroplan.org/img/pdf/Impaired-Driving.pdf* (last accessed Oct. 27, 2016) (emphasis added). Almost half of the injuries or deaths were of people between ages 15 and 34. *Id.*

GM alleges that Plaintiff and the driver were under the influence of "Spice," also known as "K2." The National Institute of Drug Addiction, a section of the United States Department of Health and Human Services' National Institute of Health, explains the harmful effects of this relatively new class of chemical substance:

> These chemicals are called *cannabinoids* because they are related to chemicals found in the marijuana plant. Because of this

> similarity, synthetic cannabinoids are sometimes misleadingly called "synthetic marijuana" (or "fake weed"), and they are often marketed as "safe," legal alternatives to that drug. In fact, they may affect the brain much more powerfully than marijuana; their actual effects can be unpredictable and, in some cases, severe or even life-threatening.

National Institute of Drug Abuse, "Synthetic Cannabinoids," Retrieved October 27, 2016, from https://www.drugabuse.gov/publications/drugfacts/synthetic-cannabinoids.

According to the NIDA, users report effects such as altered perception and psychotic effect, including disordered thinking, paranoia, and hallucinations. *Id.* Spice has been classified as a Schedule 1[3] controlled substance since 2012. S.C. CODE ANN. §44-53-190(d)(24).

The General Assembly has evinced a clear policy of deterring drivers from getting behind the wheel while impaired. The Contribution Among Joint Tortfeasors Act, for example, provides that at-fault tortfeasors who are adjudged less than 50 percent at-fault are liable only for that allocated percentage of damages. S.C. CODE ANN. § 15-38-15. However, those tortfeasors whose conduct involves drugs or alcohol cannot avail themselves of this allocation; they are subject to pure joint and several liability. *Id.* at 15-38-15(F). Convictions for driving under the influence ("DUI") are subject to mandatory minimum sentences, including mandatory jail time, for repeat offenders. S.C. CODE ANN. § 56-5-2940.

[3] Schedule 1 controlled substances are those with a high potential for abuse, no accepted medical use in the United States, and a lack of accepted safety for use in treatment under medical supervision. S.C. CODE ANN. § 44-53-180.

Even refusal to participate in a blood-alcohol breathalyzer test results in an automatic suspension of a driver's license. S.C. CODE ANN. § 56-5-2950-51. See also S.C. CODE ANN. §§ 56-5-2930, 56-5-2940, 56-5-2950, 56-5-2990, 56-5-6240 (laws governing operation of a motor vehicle while under the influence); S.C. CODE ANN. § 56-5-2933 & 56-5-2940 (setting mandatory penalties for causing bodily injury of death while driving impaired, including mandatory fines and jail time).

The courts of South Carolina have likewise embraced a policy of deterrence for impaired drivers. In *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 92, 504 S.E.2d 318, 319 (1998) this Court ruled that an intoxicated plaintiff who drove drunk and injured himself and others could not recover from the bar that over-served him because "public policy is 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 319-320. *See also Canady v. Martschink Beer Distributors, Inc.*, 255 S.C. 119, 124, 177 S.E.2d 475, 477 (1970) ("We have held that a guest in an automobile, who voluntarily and knowingly entrusts his safety and security to a driver who is under the influence of intoxicants, is equally at fault with the driver and is guilty of contributory recklessness as a matter of law, so as to preclude him from recovery for injuries sustained in an accident if the intoxicated condition of the driver was a proximate cause thereof.")

In *Lydia v. Horton,* several years later, the Court again refused to allow an intoxicated plaintiff to "deflect the responsibility that should be imposed upon himself toward another." *Lydia v. Horton,* 335 S.C. 36, 42, 583 S.E.2d 750, 754 (2003). The Court's pronouncements of this public policy bar to recovery for intoxicated plaintiffs should be applied without regard to the nature of the Plaintiff's claims. If a Plaintiff contributes to his own harm by endangering South Carolinians by driving under the influence, public policy bars his claims.

Neither *Tobias* nor *Lydia* relied solely on comparative fault principles; each explicitly recognized that separate public policy considerations dictated that Plaintiffs who endanger themselves by driving drunk are not entitled to recover for their injuries from others who were potential joint tortfeasors. *Tobias*, 332 S.C. at 92, 504 S.E.2d at 319-320; *Lydia*, 335 S.C. at 42, 583 S.E.2d at 754. The Lydia decision expressly noted: "We disagree with the Court of Appeals' conclusion that *Tobias* public policy considerations only have bearing in comparing fault . . .". *Lydia v. Horton,* 355 S.C. 36, 42, 583 S.E.2d 750, 754 (2003).

Notably, *Tobias* allowed that third parties who are injured by over-served drivers have a claim against the establishment providing the alcohol. *Tobias*, 332 S.C. at 92, 504 S.E.2d at 319-320; *Lydia*, 335 S.C. at 42, 583 S.E.2d at 754. Thus, the Court recognized that a driver's drunkenness *can* combine with another proximate cause to effectuate the harm. It determined that principles of public

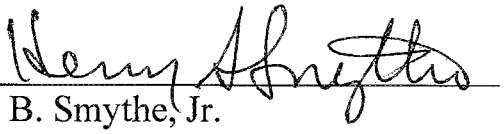
policy dictate that an intoxicated person cannot recover damages for harms caused, in any part, by his own poor choices to drive while intoxicated. This policy should apply regardless of the nature of the claim advanced by the inebriated Plaintiff.

CONCLUSION

Both questions certified by the District Court should be answered "Yes."

Respectfully Submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

By: 

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November 4, 2016

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 the *Amicus Curiae* Brief of The Products Liability Advisory Council, Inc. in Support of Defendant complies with Rule 213, SCACR.

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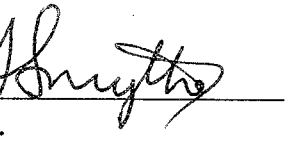
By: 

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PROOF OF SERVICE

I certify that I have served a copy of the *Amicus Curiae* Brief of The Products Liability Advisory Council, Inc. in Support of Defendant upon all counsel of record herein by mailing same via electronic mail and U.S. First Class Mail on November 4, 2016, addressed as follows:

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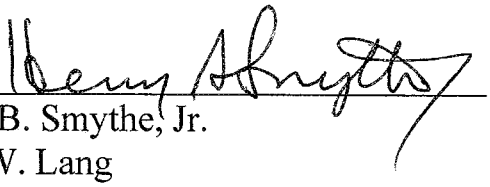
By: 

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APPENDIX A

Corporate Members of the Product Liability Advisory Council

as of 11/2/2016

Total: 95

3M

Altec, Inc.

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