THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED QUESTIONS 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

BRIEF OF ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT GENERAL MOTORS, LLC

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STATEMENT OF THE ISSUE ON APPEAL

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

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 INTEREST

The Alliance of Automobile Manufacturers, Inc. ("the Alliance"), formed in 1999 and incorporated in Delaware, has twelve members: BMW Group, FCA US LLC, Ford Motor Company, General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, and Volvo Car Corporation. Alliance members manufacture 77% of all new cars and light trucks sold in the United States. The Alliance's mission is to improve the environment and motor vehicle safety through the development of global standards and market-based, cost-effective solutions to meet emerging challenges associated with the manufacture of new automobiles.

This case is of importance to the Alliance because Plaintiff seeks to exclude product liability claims from this state's comparative fault regime. Such a result would subject manufacturers to liability far above their fair share of responsibility, even when a plaintiff engages in criminal misconduct in causing his or her own injuries. If this Court were to adopt this position, it would push South Carolina law far outside the mainstream

of American jurisprudence. The overwhelming majority of courts around the country apply their comparative fault regimes to product liability cases. Courts should consider all of the factual and legal causes of a plaintiff's injuries. Failure to do so will create a particularly high risk of unwarranted liability exposure in cases assessing the crashworthiness of automobiles. In many such situations, a plaintiff's own negligence in causing the collision may be a significant contributor of his or her injuries.

The Alliance's *amicus* brief urges the Court to find that the state's comparative fault law applies to all causes of a plaintiff's injuries, including product-based causes.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case provides the Court with an important opportunity: to formally join the overwhelming majority of states that apply comparative fault principles to the factual and legal causes of product-based injuries. As this brief explains, such a ruling is fully consistent with South Carolina products liability law, is required under the comparative fault principles this Court has set forth, and should be adopted as a matter of sound public policy and judicial fairness. Injuries from products, whether from auto collisions under the crashworthiness doctrine or otherwise, should not be treated differently from the other but-for causes of the same harm by being segregated from comparative fault. Just as with these other personal injury cases, plaintiffs in car accidents should not receive payment for the portions of the harm they cause to themselves. The severity and extent of a plaintiff's injuries, which here are significant, should not lead to unsound liability law.

Here, the allegations are that Plaintiff and his friend, who was driving Plaintiff's car, smoked synthetic marijuana called "spice" and were "high" when they got in the car and started to drive. The driver, who was likely impaired from this drug-use (and thus engaged in a criminal activity), allegedly ran a stop sign and entered oncoming traffic.

At that point, Plaintiff's car appears to have been immediately struck by a truck. In this situation, the act of driving through a stop sign into traffic is a direct cause of the collision and, therefore, a but-for cause of all of the Plaintiff's injuries resulting from the accident, including the burns alleged in this case. *Amicus* appreciates that there may be other but-for causes of these harms, including under the state's crashworthiness doctrine.

Under the state's comparative fault laws, the trial court's job is to assess all of the factual and legal causes of an injury and assign each cause a percentage of the liability. South Carolina courts and juries regularly make these types of factual determinations, with each party bearing the cost of his, her or its level of responsibility. Because South Carolina has adopted a modified comparative fault rule, if the trier-of-fact finds that the plaintiff's acts collectively caused more than 50 percent of his or her own injuries, the plaintiff cannot recover damages for these injuries. By law, the plaintiff is deemed too much at fault for the harms. This is long-established South Carolina legal policy. Comparative fault, therefore, puts plaintiffs and defendants on an even playing field. A plaintiff cannot recover for the portion of the injuries that he or she caused, and a defendant cannot be subject to liability for more than his or her fair share.

In this case, Plaintiff seeks to be excused entirely from the state's comparative fault law and, consequently, his clear contributions to his own injuries solely because the Defendant's contributions to his injuries were allegedly through an unreasonably dangerous product (a design defect/breach of warranty) rather than an unreasonably dangerous act (negligent conduct). He alleges the design of his car, namely the location of the gasoline tank, contributed to his injuries. The history of this case demonstrates the creative pleading such a distinction would create. Plaintiff originally sued under all three

product claims – negligence, design defect, and breach of warranty. He then dropped his negligence claim, contending that comparative fault applies only to negligence. He points out that the Court initially referred to the doctrine as "comparative negligence," whereas design defect and breach of warranty claims sound in strict liability. As discussed below, such strict adherence to the word "negligence" has been rejected by this Court and should not be artificially adhered to here. Comparing fault for all causes of an accident, not solely those sounding in negligence, is the core of this doctrine.

Absolving a plaintiff of his own malfeasance based on the type of tort he invokes confounds both law and logic. It also advances the wrong public policies. *See Kaneko v. Hilo Coast Processing*, 654 P.2d 343 (Haw. 1982) ("[J]urisdictions that are in favor of the merger [of strict products liability and comparative negligence] argue that fairness and equity are more important than semantic consistency."). Comparative fault should remain a fact-based endeavor. A jury hearing a crashworthiness case should be able to look at all of the factual and legal causes of an injury and assign percentages of responsibility, just as in other car accident cases. If a jury determines the plaintiff's criminal and negligent misconduct were the majority causes of an injury and the car was a minor contributor, the defendant should not be 100 percent responsible for the injuries.

Amicus respectfully urges the Court to join with the overwhelming majority of states and apply comparative fault to product-based claims, including in this crashworthiness case. Such a ruling would discourage litigation gamesmanship and ensure that people cannot avoid responsibility for their own misconduct.

ARGUMENT

I. SOUTH CAROLINA'S COMPARATIVE FAULT LAW IS NOT LIMITED TO NEGLIGENCE; IT SHOULD LOOK AT ALL FACTUAL AND LEGAL CAUSES OF AN INJURY, INCLUDING FROM PRODUCTS

This Court has made the legal and public policy determinations needed to decide this case, both in establishing comparative negligence in *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991) and explaining its reach in *Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011). When adopting comparative fault, the Court issued a short opinion and, by reference, adopted the explanation of comparative negligence set forth years earlier by then Chief Judge Sanders. *See Nelson*, 303 S.C. at 244, 399 S.E.2d at 784 ("For an exhaustive analytical discussion of the history and merits of comparative negligence, we refer the bench and bar to the opinion of Chief Judge Sanders in *Langley v. Boyter*, 248 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984)). Both *Nelson* and *Langley* involved automobile collisions. In *Langley*, the court explained that the foundation of comparative fault is ensuring a plaintiff can only "recover the proportion of damages not attributed to his own fault." 248 S.C. at 172, 325 S.E.2d at 556.

In *Berberich v. Jack*, the plaintiff, as here, sought to avoid the off-set for his contribution to his own injuries by bringing his claim under legal theories other than negligence. *See* 392 S.C. 278, 709 S.E.2d 607 (S.C. 2011) (alleging recklessness, willfulness, and wantonness). The Court unequivocally rejected any adherence to the "negligence" label, clarifying that "South Carolina's system is essentially a comparative fault system, but comparative negligence is the term most often used in this state, and we recognize the terms as equivalent." *Id.* at 292, 614; *see also* W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 65, at 453 (5th ed. 1984) ("It is perhaps unfortunate that contributory negligence is called negligence at all. 'Contributory fault'

would be a more descriptive term.").[1] The only difference between *Berberich* and the case at bar is that *Berberich* involved theories of recklessness, willfulness and wantonness, whereas this case involves products liability claims. The legal issues, though, are the same: comparative fault is not limited to claims sounding only in negligence; it considers all of the factual and legal causes of an indivisible injury.

The Court explained that the only reason it may have distinguished among negligent acts and other factual or legal causes of an indivisible harm in the past were because of the state's earlier contributory negligence regime. *See id.* at 293, 615. Under contributory negligence, any amount of a plaintiff's contribution to his or her own harm would negate any recovery. Accordingly, this Court, as did many others, developed work-arounds "meant to ameliorate the harshness of the 'all or nothing' result under contributory negligence." *Id.* These exceptions, though, have no purpose in a comparative fault regime, and South Carolina has been eliminating them. *See, e.g., Senn. v. Sun Printing Co.*, 295 S.C. 169, 367 S.E.2d 456 (Ct. App. 1988) (abolishing the assumption of the risk defense); *Spahn v. Town of Port Royal*, 330 S.C. 168, 499 S.E.2d 205 (1998) (eliminating the last clear chance doctrine). Under the current comparative fault system, these rules actually interfere with the ability of courts to do their job of fully

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[1] S.C.'s Contribution Among Joint Tortfeasors Act, S.C. Code Ann. 15-38-15 officially merges the concepts of negligence and fault in assessing damages in tort litigation, stating that a jury must determine the "fault" of the defendants and the "fault (comparative negligence)" of the plaintiff. Section 15-38-15(A). Section 15-38-15(C) further provides that the trier of fact "shall: (1) specify the amount of damages; [and] (2) determine the percentage of fault, if any, of plaintiff and the amount of recoverable damages under applicable rules concerning 'comparative negligence.'" Thus, equating negligence with fault in applying comparative negligence is consistent with how the legislature views these terms and, arguably, required under this law.

considering the factors that contributed to the injuries alleged and apportioning responsibility fairly. They put blinders on the jury so the jurors cannot see the full truth.

This factual, proximate cause, or fault-based approach to comparative responsibility is the approach taken by the overwhelming majority of courts around the country with comparative fault regimes, including those with modified comparative fault statutes such as the one here. *See, e.g.*, *Goetzman v. Wichern*, 327 N.W.2d 742, 754 (Iowa 1982) (superseded by Iowa statute) ("Under a system of comparative negligence, the keystone to fairness is proportionate responsibility for fault."). The "fundamental reason" courts all around the country are moving to comparative fault, as explained in *Langley*, is to give effect to society's cumulative belief that "persons are responsible for their acts to the extent their fault contributes to an injurious result." Gail D. Hollister, *Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault*, 46 Vand. L. Rev. 121, 128 (1993). Comparative fault "comports with common sense and practical understanding," and "it resonates with our ordinary experiences in culpability and causation." Gregory C. Sisk, *Comparative Fault and Common Sense*, 30 Gonz. L. Rev. 29, 37 (1995) (internal citations omitted). There is no reason not to apply it here.

Courts around the country have also found that a car design's responsibility for a person's indivisible harm under the crashworthiness doctrine is not a separate category to be walled off from a plaintiff's fault for the collision. "[T]he plaintiff should be held responsible for his fault in causing the initial accident because his subsequent second impact injuries are a direct and foreseeable consequence of his negligence." *See* Robert H. Brunson, Comparing First Collision "Fault" with Second Collision "Defect," 11 S.C.

Law. 39 (July/Aug. 1999); *cf. Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 428 (Tex. 1984) (explaining that "comparative causation" is "especially appropriate" in such accidents because certain acts or omissions may "cause[] or enhance[] injuries" but not "cause the accident."). The overwhelming majority of courts to address this issue have applied comparative fault to these so-called "enhanced injury" cases: "the fault of the defendant and of the plaintiff should be compared with each other with respect to all damages and injuries for which the conduct of each party is a cause in fact and a proximate cause." *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684 (Tenn. 1995).

This approach is fully consistent with the manner in which this Court handles other causes of injuries in car accident cases. This Court has repeatedly expressed the importance of comparative fault in automobile cases, stating that comparative fault "could not be achieved unless the broad spectrum of conduct was considered so that a jury could evaluate the overall culpability of each party . . . ." *Berberich*, 392 S.C. at 289, 709 S.E.2d at 613 (*citing Stockman v. Marlowe*, 271 S.C. 334, 247 S.E.2d 340 (1978) (applying a now-defunct comparative fault statute for car cases)). South Carolina juries have shown themselves capable of assessing the various contributions to car accident injuries, and pursuant to the state's crashworthiness doctrine, have already been distinguishing between the causes of injuries caused by the drivers and those relating to any defects in the car. Thus, "enhanced injury" claims should be no differently situated from the other potential factual causes of a plaintiff's injuries; they should be considered together. *See* Hollister, 46 Vand. L. Rev. at 128. ("[F]airness requires that courts treat plaintiffs and defendants consistently.").

In this case, a jury may find that had Plaintiff and his friend not smoked spice to the point of impairment and had not then pulled out in front of an oncoming vehicle, Plaintiff would not have sustained burns from this collision. But, if this information is withheld from the jury and separated from the alleged design defect for liability purposes, the court would be in the position of legally undoing the improper and dangerous choices that the Plaintiff and his friend made. The result could give rise to what some courts call "deep pocket jurisprudence." *See Huck v. Wyeth*, 850 N.W.2d 353 (Iowa 2014) (calling deep pocket jurisprudence "law without principle"); *see also Kingman v. Dillard's, Inc.*, 835 F. Supp. 2d 732, 734 (W.D. Mo. 2011) (calling on courts to avoid "deep pocket jurisprudence"). In these cases, courts and juries sympathize with the severity of a plaintiff's injuries, are presented with only the alleged wrongdoing of the defendant at trial, and award outsized compensation even when the defendant had little to no role in the plaintiff's injuries. Comparative fault is one instrument to avoid such unfairness.

II. SOUTH CAROLINA'S PRODUCTS LIABILITY DOCTRINE IS FULLY CONSISTENT WITH PRINCIPLES OF COMPARATIVE FAULT

This Court should not be swayed by Plaintiff's arguments that product liability claims in South Carolina should be exempt from the state's comparative fault regime. As discussed below, Plaintiff misstates several key principles of law. Rather, the Court should follow the overwhelming majority of courts that follow Restatement (Second) of Torts § 402(A) and apply comparative fault to product liability cases.

The fundamental error in Plaintiff's argument is that he relies on case law and sections of the Restatement (Second) addressing the interplay between products liability and the old contributory negligence regime, <u>not</u> the comparative negligence/fault framework this Court has adopted over the past twenty-five years. *See*, *e.g.*, Pl. Br. at 4

(citing to *Imperial Die Casting Co. v. Covil Insulation Co.*, 264 S.C. 604, 216 S.E.2d 532 (1975) for the proposition that "*contributory negligence* is not a defense to breach of warranty") (emphasis added), Pl. Br. at 9 (citing to *Wallace v. Owens-Illinois, Inc.*, 300 S.C. 518, 523, 389 S.E.2d 155, 158 (Ct. App. 1989) as stating that "*contributory negligence* . . . has no application to an action based on breach of warranty or liability for a defective product") (emphasis added). Contributory negligence is not the law in South Carolina. Doctrines anachronistic to avoiding its harshness have no place here because they interfere with the jury's ability to know the facts and fairly apportion fault.

Where Plaintiff's misplaced reliance on contributory negligence doctrines is most stark is with regard to the General Assembly's adoption of the Restatement (Second) of Torts § 402(A). *See* Pl. Br. at 7. Plaintiff writes that comment n to Section 402(A) is "dispositive" and incorrectly claims that comment n "states that *comparative negligence* is not applicable to strict liability." *Id.* (emphasis added). Comment n states no such thing. It makes no reference to comparative negligence. Rather, comment n is titled "contributory negligence" and deals *solely* with the application of products liability claims to *contributory negligence*. *See* Restatement (Second) § 402(A), cmt n.

At the time of the Restatement (Second), most states, including South Carolina, adhered to the old contributory negligence regime. As with the other exceptions to contributory negligence, it was widely viewed that depriving a plaintiff of all recovery in all product liability cases because he or she contributed to his or her own injuries was unjust. Comment n made sure that a product manufacturer could not escape liability merely because a plaintiff was minimally at fault, such as by misusing a product. Comparative fault negates these concerns. Thus, comment n is irrelevant to this case.

The authors of the Restatement of Torts: Third, Products Liability recognized this fact and indicated that comparative fault applies to product liability cases. *See* § 17, cmt a (summarizing jurisprudence related to § 402(A) of the Restatement (Second)).

Second, Plaintiff incorrectly compares strict product liability with *absolute* liability. With absolute liability, a defendant is subject to liability for causing a plaintiff's harm regardless of wrongdoing. *See* Pl. Br. at 12 (referring to the dog bite statute and abnormally dangerous activities such as the use of explosives). In these rare situations, the activity is deemed so dangerous that liability automatically ensues if the activity causes injury, thereby requiring the defendant to be the insurer of any harm caused by that activity. "Strict liability is not equivalent either to absolute liability or to insurance of the safety of the product's user." *Bragg v. Hi Ranger*, 319 S.C. 531, 543, 462 S.E.2d 321, 328 (Ct. App. 1995); *Daly v. General Motors Corp.*, 575 P.2d 1162, 1166 (Cal. 1978) (affirming strict products liability "has never been, and is not now, absolute liability."). "[T]he mere fact that a product malfunctions does not demonstrate the manufacturer's negligence nor does it establish that the product was defective." *Id.* The plaintiff must show that the product was mismanufactured, had a design defect, or was not accompanied by an adequate warning. *See Sunvillas Homeowners Ass'n v. Square D Co.*, 301 S.C. 330, 391 S.E.2d (Ct. App. 1990). Thus, labeling products liability "strict liability" does not make it inconsistent with comparative fault.

Third, Plaintiff wrongfully argues that comparative negligence applies only to fault-based liability theories and that "fault is simply not a consideration" in a product liability action. Pl. Br. at 6. For more than forty years, courts, scholars and the reporters of the Restatement (Second) themselves have repeatedly explained that "strict liability" is

a misnomer for design defect and breach of warranty, which are the liability theories at issue here. The American Law Institute adopted the "strict liability" moniker in Section 402(A) solely with manufacturing defects and product malfunctions in mind, such as a bicycle that had a missing spoke or a beverage containing a foreign object. *See* John W. Wade, *On the Nature of Strict Liability for Products*, 44 Miss. L.J. 825, 825 (1973) ("The prototype case was that in which something went wrong in the manufacturing process, so that a product had a screw loose or a defective or missing part or a deleterious element, and was not the safe product it was intended to be."). The value of 402(A) was not the "strict liability" label, but its adoption of the rule in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963). Section 402(A) established a direct, tort-based cause of action against a product manufacturer for harms caused by its products by casting aside the doctrinal mix of warranty and contract law that had existed to that point.[2]

Contrary to Plaintiff's assertion, therefore, the design defect and breach of warranty claims before the Court here are fault-based theories.[3] This Court has long held that design defect and breach of warranty claims are based on the reasonableness of the

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2 The seeds of product liability law were formed in 1916 when Justice Cardozo eliminated the privity rule for negligence actions in a case in which a wooden wheel of a 1909 Buick Runabout collapsed while operating, throwing the plaintiff from the vehicle. *See MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). Justice Cardozo found a consumer can reasonably expect that a wheel will not come off a moving car, and when it does, it may indicate a lack of reasonable care in the manufacturing process. *See id.* at 1051. In 1960, the New Jersey Supreme Court eliminated privity in product warranty-based actions, which had already been done for food products. *See Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 83-87 (N.J. 1960). There, a new car went out of control after "something went wrong" with the steering gear. *See id.* at 75 (finding an implied warranty of merchantability guaranteed against defects in manufacturing or installation of parts).

3 *See* U.S. Dep't of Commerce, Model Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,711 (Oct. 31, 1979) (explaining that the reporters were not focusing on problems relating to defective design or duty to warn.)

manufacturer's design choices: "A common element to each of these separate causes of action is proof that the product was not *reasonably* fit or safe for its intended use." *See Claytor v. General Motors Corp.*, 277 S.C. 259, 265, 286 S.E.2d 129, 132 (1982) (emphasis added). "A product is unreasonably dangerous and defective if the danger associated with the use of the product outweighs the utility of the product." *Branham v. Ford*, 390 S.C. 203, 225, 701 S.E.2d 5, 16 (2010).

The value of strict product liability, as compared with negligence, is that it relieves the plaintiff of the obligation to identify what the defendant *did* that was wrong in the manufacturing process, and allow him or her to focus solely on what is *wrong with the product* itself. *See Bragg*, 319 S.C. at 540-41 ("The focus here is on the condition of the product, without regard to the action of the seller or manufacturer."). These claims are easier for plaintiffs to prove, but they are still fault-based theories of liability that require a violation of reasonableness. *See* William C. Powers, *The Persistence of Fault in Products Liability*, 61 Tex. L. Rev. 777 (1983) (explaining that fault remains the essence of liability under both design defect and breach of warranty theories).[4] The plaintiff must point out what is wrong with the product.

Thus, while even true strict product liability is consistent with comparative fault, the fact that the liability theories here are fault-based creates conceptual synergies with the Court's comparative fault jurisprudence. A jury in a product case can determine

[4] Negligence and product liability both subject one to liability for unreasonableness; the former looks at unreasonableness of conduct, while the latter looks at the unreasonableness design. *See Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 674 (Ga. 1994) ("[R]isk-utility analysis incorporates the concept of 'reasonableness,' *i.e.*, whether the manufacturer acted reasonably in choosing a particular product design, given the probability and seriousness of the risk posed by the design, the usefulness of the product in that condition, and the burden on the manufacturer to take the necessary steps to eliminate the risk.").

whether the product design was reasonable, whether an unreasonable product design was a cause of the plaintiff's injuries, whether there were other causes of the injury including a plaintiff's own negligence, and using common-sense judgment can apportion a percentage of responsibility to those causes. Courts with similar legislation to South Carolina's product liability statute have applied comparative fault to all product-based claims. As the Supreme Court of Arkansas explained, "it was not the intent of 402(A) to make manufacturers insurers of their products, irrespective of fault or warranty, and going beyond foreseeable consequences, and hence to apply strict liability simply on the basis of a finding of 'defective condition' widens the scope of 402A considerably." *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 653 S.W.2d 128, 132 (Ark. 1983). The Supreme Court of California, which gave rise to strict products liability in *Greenman*, has long followed this approach. *See Daly*, 575 P.2d at 1162.

III. SOUTH CAROLINA LIABLITY LAW SHOULD REINFORCE THE IMPORTANT PUBLIC POLICY OF DETERRING IMPAIRED DRIVING

The only exception to comparative fault this Court has carved out is when an injury is caused by the "conscious failure to exercise due care." *See Berberich*, 392 S.C. at 287, 709 S.E.2d at 612. The Court concluded that if a defendant "intended to cause injury or damage," it cannot avail itself of comparative fault to reduce its obligation to the plaintiff. *Id.* at 293, 615. The purpose of this rule is to ensure that a litigant cannot escape its heightened wrongdoing. Here, it is Plaintiff who reportedly engaged in conscious disregard for the safety of himself and others. As discussed, the allegations are that he and his friend smoked spice and then drove while impaired, thereby causing the collision. Thus, the state's comparative fault law and the public policy bar against impaired drivers recovering damages are in full alignment.

The risks posed by impaired drivers are high. In 2014, nearly 10,000 people across the United States died in impaired driving crashes. *See* National Highway Traffic Safety Administration (NHTSA), Traffic Safety Facts, 2014 Data 2 (No. 812231, Dec. 2015).[5] That year, more than a third of the 824 fatalities on South Carolina roads were due to impaired driving. National Highway Traffic Safety Administration (NHTSA), Traffic Safety Facts, 2014 Data 2 (No. 812231, Dec. 2015). Over the decade from 2003 to 2012, almost 4,000 people were killed in South Carolina from a motor vehicle accident involving an impaired driver. *See* Centers for Disease Control, Sobering Facts: Drunk Driving in South Carolina, Nat'l Center for Injury Prevention and Control (Dec. 2014).[6]

The problems of impaired driving are particularly acute for marijuana use, which is on the rise in many states. "Marijuana is the most frequently detected drug (other than alcohol) in crash-involved drivers as well as the general driving population." Richard P. Compton and Amy Berning, Drug and Alcohol Crash Risk, Traffic Safety Facts, U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin. (Feb. 2015). This study found a "statistically significant increase" in crash risks when drivers tested positive for use of illegal drugs, including marijuana. *Id.* at 8 (finding drivers high on marijuana to be 1.25 times more likely to be involved in a crash than those driving unimpaired). Others have found that a driver's use of marijuana "doubles the risk of being fatally injured" in a car accident. Wilson, Stimpson & Pagán, Fatal Crashes from Drivers Testing Positive for Drugs in the U.S., 1993-2010, Public Health Rep., Jul-Aug 2014, 342. To deter such impaired driving, South Carolina's Code creates higher fines and prison time for

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5 http://www-nrd.nhtsa.dot.gov/Pubs/812231.pdf.

6 http://www.cdc.gov/motorvehiclesafety/pdf/impaired_driving/drunk_driving_in_sc.pdf.

vehicular deaths caused by impaired driving rather than by reckless driving. *See* S.C. Code Ann. 56-5-2910(A) (A driver, who is under the influence of alcohol or drugs and causes the death of another, may be fined up to $25,100 and imprisoned for up to 25 years.).

The Court should not nullify or mitigate the egregiousness of driving while "high" or intoxicated by allowing anyone to legally avoid responsibility and be over-compensated for his injuries predicated by such criminal acts. *Berberich's* bar on applying comparative fault for anyone who engages in conscious failure to exercise due care should apply equally to plaintiffs and defendants.[7] As this Court has appreciated, the role of tort law is not merely to compensate injured people, but to assign liability based on the wrongfulness of conduct. The Court has denied liability in car accident cases when a Plaintiff's harms have resulted from impaired driving. *See Lydia v. Horton*, 355 S.C. 36, 42, 583 S.E.2d 750, 754 (2003) (barring impaired driver from recovery in first-party negligent entrustment suit); *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998) (barring intoxicated driver from recovery against tavern owner based on alleged violation of alcohol control statute). Allowing Plaintiff to recover here would undermine these statutes and case law; others in society would have to carry the burden of Plaintiff's illegal decisions and resulting consequences.[8]

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7 *Cf.* S.C. Code Ann. 15-38-15(A); 15-38-15(F) (stating a defendant who causes harm to another while using, or even possessing, illegal drugs loses the benefit of the South Carolina Contribution Among Tortfeasors Act).

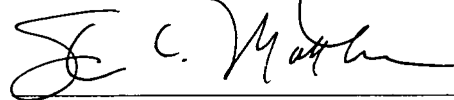
8 *See* Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 Yale L.J. 697, 723 (1978) (observing certain behaviors that lead to car accidents, such as driving at night without lights, rise above traditional negligence); Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. Davis L. Rev. 1125, 1127 n.9 (1989) (asserting a heightened standard for when a plaintiff's negligence exposes others to harm).

To be clear, this case is different from inadvertently running a stop sign. If the statutory violation at issue here were solely of a safety statute, such as a speed limit or other traffic law, there could be a valid argument to allow the jury to assess relative fault. *See* Victor E. Schwartz, Comparative Negligence § 6.03(f) (5th ed. 2010) *id.* (citing cases that allow comparative fault to be applied when someone violates a minor safety statute). Endangering others through the violation of criminal prohibitions against impaired driving can and should be treated differently. *See Ohio Casualty Ins. Co. v. Todd*, 813 P.2d 508, 51-12 (Okla. 1991) (Allowing "monetary recovery to one who knowingly becomes intoxicated and thereby injures himself is in our view morally indefensible."). The deterrence aspect of tort law should remain in concert with the strong public policy against impaired driving.

CONCLUSION

For these reasons, *Amicus* Alliance of Automobile Manufacturers respectfully requests that this Court answer "yes" to both questions certified by the district court.

Respectfully submitted,



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Dated: November 15, 2016

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED QUESTIONS 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 certifies that Alliance of Automobile Manufacturers, Inc.'s foregoing *Amicus Curiae* Brief in Support of Defendant, which Amicus has moved for leave to file, complies with Rule 211(b), SCACR.

Respectfully submitted,

By: ______________________

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PROOF OF SERVICE OF MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. IN SUPPORT OF DEFENDANT

I, Steve A. Matthews, hereby certify that on November 15, 2016, I served a copy of the Motion for Leave to File Brief as *Amicus Curiae* in Support of Defendant General Motors, LLC submitted by the Alliance of Automobile Manufacturers, Inc., with a copy of the proposed Brief attached thereto, on counsel for all parties via the United States Postal Service First-Class mail, postage pre-paid, and addressed as follows:

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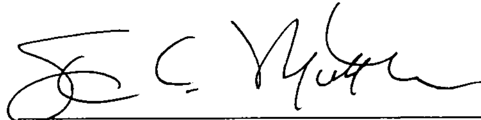

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