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S.C. SUPREME COURT

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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION[1]

This brief is organized in the same fashion as GM's Brief. Thus, for ease in reference, specific responses to GM's statements and arguments are included under the same headings used by GM.

The version of the events before the collision is not as factual as GM states on page 1 of its brief. Rather, it is disputed whether Brazell and Donze smoked spice on the date of the collision (in fact, Mr. Brazell's toxicology report was negative); there is no evidence they were impaired at the time of collision; and there is no evidence that alleged impairment caused the collision. Moreover, eyewitness testimony is that Brazell stopped at the stop sign before proceeding into the intersection where the collision occurred – not that he "ran a stop sign and drove into the path of a truck and trailer." (GM's Brief p. 1.)

GM claims that the "fundamental issue" here is whether impaired drivers bear any responsibility for injuries they cause in a collision. (GM's Brief p. 1.) If so, this is not a novel issue for the Court. Drivers have always borne responsibility for injuries they cause in a wreck involving a non-defective vehicle. Likewise, in crashworthiness cases, drivers have borne and continue to bear responsibility for all injuries that would have been caused by the collision in the absence of the defective condition. Similarly, there is nothing new about holding manufacturers responsible for enhanced injuries caused by their defective vehicles in foreseeable collisions.

Judicial and legislative efforts to address drivers impaired by alcohol are not evidence of a clear policy regarding the application of tort law principles to drivers who operate vehicles after allegedly using spice. Spice, of course, is not alcohol. There was no public policy regarding spice at the time of the subject collision; in fact, spice was not even illegal in South Carolina

[1] In this brief, Donze uses the same capitalized defined terms as in his initial brief.

when it happened. (GM's Motion for Summary Judgment p. 3, n. 1; GM's Brief p. 10.) The federal study cited in footnote 1 of GM's brief ("NHTSA Study") does not prove spice has caused more collisions, nor does it evidence a "clear policy of the state" against spice use. In fact, the portions of that study cited by GM discussed "estimates ... of drug use"[2] by drivers, related only to "drug presence [that] does not necessarily imply impairment" (NHTSA Study p. 2), and was not based on data from collisions. In fact, the study expressly stated:

> Whereas the impairment effects for various concentration levels of alcohol in the blood or breath are well understood, there is little evidence available to link concentrations of other drugs to driver performance.
>
> . . .
>
> A strong relationship between alcohol concentration and impairment has been established, as has the correlation between alcohol concentration and crash risk.
>
> [There are a number of f]actors that make similar prediction difficult for most other psychoactive drugs....
>
> At the current time, specific drug concentration levels cannot be reliably equated with a specific degree of driver impairment.

(NHTSA Study pp. 2, 4.)

Donze's injuries from the initial impact were such that he could have walked away from the collision. However, the Truck then exploded into a fireball fed by fuel spewing from its defectively designed tank, causing Donze to suffer painful, disabling, and grotesque burns over his entire body. These burns – the only physical injuries for which Donze seeks to recover damages herein – would not have existed but for GM's defective design. Nevertheless, GM perversely describes Donze's potential recovery for his disfiguring injuries and their consequences as a "reward" (GM's Brief p. 2), presumably to suggest it would be unfair to hold GM responsible for vehicle design decisions over which Donze had no control.

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[2] It is unclear whether the NHTSA study included use of the type of spice Brazell and Donze allegedly smoked on the date of the collision. Rather, it "tested for selected [but unspecified] synthetic cannabinoids." (NHTSA Study p. 3.)

STATEMENT OF THE CASE

For the most part, Donze does not take issue with GM's Statement of the Case. As noted above, though, Donze does dispute GM's characterization of the evidence of events prior to the collision. Moreover, as GM notes in its brief, Donze vigorously contests in the District Court the argument that, by being a passenger in his own vehicle while Brazell operated it with his permission, Donze was engaged in a "joint enterprise" with Brazell.

ARGUMENT

I. GM'S CLAIM THAT "PUBLIC POLICY BARS RECOVERY BY IMPAIRED DRIVERS WHO CAUSE THEIR OWN INJURIES."

Curiously, GM reverses the order of the certified questions to assert first its argument for a so-called "public policy bar". This argument is predicated upon Donze's alleged imputed fault in causing the initial impact of the collision. However, for the reasons set forth under heading II below and in Donze's initial brief with regard to the first certified question, any argument based on a plaintiff's claimed fault is inapplicable in a crashworthiness case where there is no negligence claim. It is therefore more appropriate for the Court to address the initial certified question first because, if the Court were to agree with Donze on that question, the second certified question would become moot.

Even if it were to examine GM's public policy argument separately, the Court should reject extension of its dram shop negligence and negligent entrustment holdings to strict liability and breach of warranty cases for the reasons set forth in Donze's brief. GM fails to provide any valid reasoning to expand the scope of the limited 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).

Initially, GM claims that S.C. CODE ANN. § 15-38-15 (1976, as amended) created different liability rules for "any tortfeasor" who is impaired, thus suggesting the Legislature

intended that statute to affect an impaired plaintiff's right of recovery. However, subsection F upon which GM relies applies only to *defendants*, not to tortfeasors generally. Its sole effect is to prevent impaired defendants from benefiting from an allocation of liability otherwise permitted in Section 15-38-15. If any relevant conclusion is to be drawn from the language of this statute, it is the opposite of what GM claims; that is, by omitting plaintiffs from the exception in Section 15-38-15(F), the Legislature chose *not* to bar impaired plaintiffs' recoveries absolutely.

In addition, Section 15-38-15 does nothing to alter common law principles of comparative negligence. Its purpose is to alter defendants' joint and several liability in certain circumstances. It only addresses comparative negligence in dictating how a court should consider a plaintiff's comparative negligence when comparing a defendant's fault with "the total fault for the indivisible damages." S.C. CODE ANN. § 15-38-15(A). In other words, the Legislature did not attempt to change – but instead respected – the law of comparative negligence as adopted by this Court in *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991).

GM is also incorrect in asserting that applying existing law of comparative negligence to impaired plaintiffs is "utterly inconsistent" with the felony DUI statute. (GM's Brief p. 6.) In fact, an impaired driver remains subject to criminal prosecution under this statute regardless of how his impairment is treated under tort law; therefore, Donze's position does nothing to reduce the effect of S.C. CODE ANN. § 56-5-2945 (1976, as amended) or to undermine the express legislative policy regarding impaired drivers. Contrarily, although that statute only applies to drivers of motor vehicles, GM is attempting to enlarge its scope by urging it as a basis to bar recovery by an allegedly impaired passenger, a topic on which the Legislature has not spoken.

Most of GM's argument on the public policy bar topic is devoted to a discussion of the *Tobias* and *Lydia* decisions. GM mischaracterizes those cases in ways Donze must address.

Initially, GM claims *Tobias* held "public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct." (GM's Brief p. 7.) This quote is taken out of context. Rather than making the sweeping generalization asserted by GM, the *Tobias* court's reference to "public policy" was clearly a comment on the legislative purposes behind South Carolina's dram shop statutes, S.C. CODE ANN. §§ 61-4-580(2) & 61-6-2220 (1976, as amended). Specifically, the Court there stated:

> In recognizing a private cause of action for a violation of [the dram shop] statutes, the Court of Appeals stated that *their purpose* is to promote public safety, and to prevent an already intoxicated person from becoming even more intoxicated, and thus an even greater risk to the public at large, when he leaves the establishment. We agree. The Court of Appeals went further, however, *and held that another of the statutory purposes* was to protect the intoxicated person from their own incompetence and helplessness, and therefore concluded the intoxicated patron himself was entitled to bring a negligence suit for a statutory violation. *We disagree*, and now hold that public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct.

Tobias, 332 S.C. at 92, 504 S.E.2d at 319-20 (emphasis added; citations omitted).

Here, the dram shop statutes are not at issue and Donze is not an admittedly overserved patron seeking to impose liability on his server. Instead, Donze seeks to make GM responsible for severe injuries that resulted from a product defect which would have manifested itself in the subject collision regardless of whether Brazell or Donze had smoked spice as GM alleges. For these reasons and reasons set forth in Donze's initial brief, the *Tobias* holding is inapplicable.

GM is also incorrect when it claims *Tobias* and *Lydia* dealt with existing causes of action. (GM's Brief p. 9.) Instead, as is clear from the opinions in both cases, they addressed whether to adopt new, first-party causes of action that had not been previously recognized by this Court. The *Tobias* court stated: "We ... hold that South Carolina does not recognize a 'first party' cause of action against the tavern owner by an intoxicated adult predicated on an alleged violation of

[the dram shop statutes]." *Tobias*, 332 S.C. at 91, 504 S.E.2d at 319. In *Lydia*, the Court clearly stated:

> Horton argues that the Court of Appeals erred in adopting a first party negligent entrustment cause of action asserted by an intoxicated party. We agree.
>
> Whether South Carolina recognizes a first party negligent entrustment claim is a novel question of law.

Lydia, 355 S.C. at 38-39, 583 S.E.2d at 751-52.

As discussed in Donze's initial brief, this Court's reasoning for rejecting these causes of action does not create new defenses to the established, statutory causes of action for strict liability and breach of warranty.[3]

Additionally, and perhaps most importantly, GM's characterization of the *Tobias* and *Lydia* holdings as creating an "outright" or "absolute" bar to recovery – even under the first-party causes of action each addressed – is itself inaccurate. In fact, underage drinkers/drivers are permitted to pursue causes of action for dram shop negligence and for negligent entrustment, a circumstance that is inconsistent with the idea of a "complete bar" to recovery.[4] The fact that this Court has refused to extend the holdings of *Tobias* and *Lydia* to some types of dram shop negligence and negligent entrustment cases is an additional basis for this Court to refuse to extend them to statutory causes of action that are not only distinct but also entirely conceptually different in that they do not depend on a plaintiff's admitted intoxication for recovery.

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[3] This is particularly true where the Legislature has not seen fit to create such defenses. *See* the discussion on separation of powers under heading II, *infra*.

[4] Paradoxically, if the Court were to adopt GM's argument, it would effectively declare that the public policy of this State is promoted by allowing intoxicated underage drivers to recover in dram shop negligence and negligent entrustment cases – despite the fact they illegally consumed alcohol and illegally drove under the influence – while disallowing drivers and passengers of the same age group from recovering for strict liability or breach of warranty because they allegedly consumed a substance that was not illegal.

II. GM'S CONTENTION THAT "COMPARATIVE NEGLIGENCE IN CAUSING AN ACCIDENT SHOULD APPLY IN ALL PRODUCT LIABILITY CASES, INCLUDING CRASHWORTHINESS CASES BASED ON STRICT LIABILITY AND BREACH OF WARRANTY."

As discussed in Donze's initial brief, this Court has already held that negligence concepts – including defenses based on a plaintiff's alleged negligence[5] – are not applicable in breach of warranty actions or in strict liability actions. (Donze's Brief pp. 4-9.) Because these issues are not novel but are settled, the Court's purpose behind answering this certified question is to resolve whether the law has changed, not whether the law should change.[6]

Because the causes of action involved here are statutory, the Court's focus should be on whether the Legislature has altered the express statutory language on this topic or has otherwise changed the law to overturn this Court's previous construction of these laws. As this Court noted in *Layton v. Flowers,* 243 S.C. 421, 134 S.E.2d 247 (1964):

> [T]he statute, as construed, in *Tate*[*v. Brazier,* 115 S.C. 283, 105 S.E. 413 (1920)], has, with the implied approval of the Legislature, been the law of this State for more than forty years. When a statute which has been construed by a court of last resort is included in a codification of laws thereafter adopted, without significant change in phraseology, the presumption is that the Legislature intended to adopt such construction. 50 Am.Jur., *Statutes*, Sec. 455; 82 C.J.S. *Statutes* § 385 c. While this is not an invariable rule, the presumption in this instance is strengthened by the passage of time and by an amendment and re-enactment of the statute in 1942, which simply broadened its coverage by including damages for wrongful death. 82 C.J.S. *Statutes* § 370 b. We think that it would exceed the bounds of proper judicial restraint to overturn a construction which has had implied legislative sanction through the inclusion of the statute in five successive codes and its re-enactment in 1942, all without significant amendment.
>
> It is well settled that the doctrine of *stare decisis* is especially applicable to decisions construing statutes because any desirable change may be readily accomplished by the Legislature. *Powers v. Powers*, 239 S.C. 423, 123 S.E.2d 646 [(1962)]; 21 C.J.S. *Courts* § 214.

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[5] As used in this brief, "defenses based on a plaintiff's alleged negligence" refers to defenses not adopted by the Legislature in S.C. Code Ann. § 15-73-20 (1976, as amended).

[6] Stated differently, using the language of the certification rule, the question is whether there is "no controlling precedent in the decisions of the Supreme Court" because of some intervening change in the law. *See* Rule 244(a), SCACR.

Layton, 243 S.C. at 423-24, 134 S.E.2d at 247-48; *cited with approval in McLeod v. Starnes,* 396 S.C. 647, 723 S.E.2d 198 (2012); *see also State v. Sawyer,* 409 S.C. 475, 481, 763 S.E.2d 183, 186 (2014) ("The General Assembly is presumed to be aware of this Court's interpretation of a statute, and where that statute has been amended, but no change has been made that affects the Court's interpretation, the Legislature's inaction is evidence that our interpretation is correct.").

Without question, the Legislature has been aware of this Court's previous interpretations of the breach of warranty and strict liability statutes. Yet, during the intervening passage of time, it has not changed those statutes to overturn the Court's earlier holdings that negligence is irrelevant to claims thereunder. Therefore, the presumption is that the Legislature did not intend to undo the judicial constructions of these statutory causes of action. This is a particularly strong presumption when one considers its amendment of the strict liability law in 2000 to heighten a plaintiff's burden of proof in cases involving firearms or ammunition, *see* S.C. CODE ANN. § 15-73-40 (1976, as amended), well after it was presumed to be aware of this Court's decision in *Imperial Die Casting Co. v. Covil Insulation Co.* 264 S.C. 604, 216 S.E.2d 532 (1975) (a plaintiff's negligence does not bar his recovery for breach of warranty), the Court of Appeals' decision in *Wallace v. Owens-Illinois, Inc.* 300 S.C. 518, 389 S.E. 2d 155 (Ct. App. 1989) (a defense of a plaintiff's negligence has no application to an action for breach of warranty or strict liability), and this Court's adoption of comparative negligence in *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991).[7]

Beyond principles of *stare decisis*, constitutional limits of separation of powers govern the Court's response to this certified question. (*See* Donze's Brief pp. 18-22.)

[7] In addition, the Legislature amended South Carolina's version of UCC Article 2 in 2005 Act No. 27, Section 8, *see* S.C. CODE ANN. § 36-2-803 (1976, as amended), but did not change its implied warranty provisions.

Instead of addressing the present state of South Carolina law or any arguable legislative changes to this Court's previous decisions, GM argues what it wants the law to be on these issues. It fails to address the fact that South Carolina law currently provides that a plaintiff's negligence is inapplicable in actions based on breach of warranty or strict liability. *See Imperial Die Casting Co. v. Covil Insulation Co.* 264 S.C. 604, 216 S.E.2d 532 (1975); *Wallace v. Owens-Illinois, Inc.* 300 S.C. 518, 389 S.E. 2d 155 (Ct. App. 1989).

Rather, GM argues that "[s]ound public policy and basic fairness suggest that the time has come for this Court to join this overwhelming consensus" and allow the use of comparative negligence to all product liability causes of action. (GM's Brief p. 18.) It claims failing to apply comparative negligence to strict liability and breach of warranty claims would allow recovery against non-negligent defendants, a result it suggests is unfair.

However, liability without fault is the point of strict liability and is a policy decision that the Legislature made in adopting that cause of action; that is, the cost of a defective product should be borne by its manufacturer, regardless of fault. *See Purvis v. Consolidated Energy Products Co.*, 674 F.2d 217, 219 (4th Cir. 1982) ("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.").

Implicit in GM's argument is that the law is something different than what it urges; this is an acknowledgement that this Court can answer the questions certified by the District Court based on existing precedent, without the need to study what other jurisdictions are doing or to consider policy determinations different from those made by the Legislature. Other states cited by GM are different in that they have different forms of strict liability and/or have legislatively

adopted comparative fault to apply outside of the negligence paradigm. GM's arguments to change our statutory law consonant with those states must be made in the Legislature as only it has the power to amend the longstanding statutory schemes at issue here. The Court need not look to California and beyond to find the answer to this certified question because the answer lies within the statutory enactments and prior decisions from *this* Court.

A. Public Policy Arguments Do Not Allow The Court To Alter Statutory Causes Of Action For Breach Of Warranty And Strict Liability.

The public policy with regard to the statutory causes of action for breach of warranty and strict liability must be ascertained from the statutes as enacted by the Legislature.

> The public policy of the government is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but, when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts.

Cato v. Grendel Cotton Mills, 132 S.C. 454, 129 S.E. 203, 204 (1925), *quoting United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 S. Ct. 540, 41 L. Ed. 1007 (1897). "Where the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute." *Barnwell v. Barber-Colman Co.,* 301 S.C. 534, 537, 393 S.E.2d 162, 163 (1989).

In making its public policy argument, GM fails to cite to either of the statutory schemes at issue and makes no argument that the Legislature intended for defenses based on a plaintiff's alleged negligence to apply to breach of warranty and strict liability claims and were thus a part of the public policy behind those enactments.[8] Instead, based on what courts and legislatures in

[8] The legislative intent and purposes are clear from S.C. CODE ANN. § 36-1-103(a) (1976, as amended) (setting forth the underlying purposes and policies behind the adoption of the Uniform Commercial Code); S.C. CODE ANN. § 15-73-30 (1976, as amended) (expressly adopting the comments to *Restatement (Second) of Torts* § 402A as the legislative intent).

other states may have done, GM asks this Court to read into South Carolina's statutes something it has already found was not a part of the Legislature's intent. However, it is incumbent on this Court to respect the Legislature's public policy determinations.

> It is perhaps unnecessary to say that Courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. They 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.

Barnwell, 301 S.C. 534, 538, 393 S.E.2d at 163-64. Thus, in *Barnwell*, this Court held – as it should in this case – that, given the Legislature's adoption of strict liability by statute, the Court was "limited to interpretation and construction of that statute." *Id.* at 537, 393 S.E.2d at 163.

Because GM has not, and cannot, demonstrate any legislative intent in the breach of warranty and strict liability statutes that supports its public policy argument, it improperly urges this Court to read something into those statutes that is not there.

B. The Statutes Do Not Allow For A Defense Of Comparative Negligence In Breach Of Warranty And Strict Liability Cases.

Breach of Warranty Cases

GM relies upon the term "proper case" as used in S.C. CODE ANN. § 36-2-714(3) (1976, as amended) for its argument that the Court can read a defense of comparative negligence into the UCC's breach of warranty provisions. However, the term "proper case" in this context relates to the quantum of proof necessary to recover consequential damages. It does not create a loophole in the statutory scheme through which defendants can rely upon common law defenses that are inapplicable to warranty causes of action.

That GM's reliance on this term is misplaced is evident from the fact that UCC Section 2-714 is found in Part 7 of the UCC's Article 2. That part deals with remedies, not performance

(which is found in Part 5), breach (which is found in Part 6), or defenses (which are also found in Part 6).

Moreover, there is no authority to substantiate GM's position. GM cites *Aldon Indus. v. Don Myers & Assocs.*, 517 F.2d 188 (5th Cir. 1975) in support of its construction of the term "proper case". But, while *Aldon* stated a court may look to common law to interpret the term, it did not hold – or even suggest – that the term opens the door for common law defenses to a breach of warranty cause of action. Rather, the court there looked to state law on the degree of proof necessary to establish damages for future lost profits. Because applicable state law denied recovery in all cases for prospective lost profits as inherently speculative, the court found the plaintiff did not present a proper case for the award of such damages, the only consequential damages it sought. *Id.* at 193.

This Court has similarly interpreted the term "proper case" under Section 36-2-714. In *John D. Hollingsworth on Wheels, Inc. v. Arkon Corp.*, 279 S.C. 183, 305 S.E.2d 71 (1983), the counterclaiming defendant sought recovery for its alleged lost profits due to the plaintiff's breach of warranty. The Court undertook to determine whether the counterclaim presented a "proper case" for the recovery of such consequential damages under Section 36-2-714. It concluded, by reference to established case law on damages, that a breach of warranty case under the UCC is a proper case for the recovery of lost profits, provided they are proven with requisite certainty. *Id.* at 186, 305 S.E.2d at 72. However, it found the defendant had failed to prove its damages with the required degree of certainty. *Id.* at 186, 305 S.E.2d at 73.

The upshot is that courts have interpreted the term "proper case" to refer to the standard of proof for recovery of consequential damages, not as a basis to allow an additional affirmative defense to breach of warranty claims. *Accord Taylor and Gaskin, Inc. v. Chris-Craft Indus.*, 732

F.2d 1273, 1278 (6th Cir. 1984) ("While the U.C.C. does not define or explicate the section 2–714 phrase 'in a proper case', it is well-settled that consequential damages for the breach of warranties are available where such damages occur. That is to say, a proper case for the award of consequential damages is a case in which damages satisfy the requisites of section 2–715(2).").[9]

Section 36-1-103 provides additional support for the position that the Legislature did not intend to blur the distinction between contract and tort law by supplementing the provisions the Commercial Code with negligence principles.

> Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

S.C. CODE ANN. § 36-1-103(b) (1976, as amended).

Relying upon this section, courts have concluded that common law negligence principles – including the defense of contributory negligence – were supplanted by the adoption of UCC provisions governing a claim for conversion based on payment of an instrument on an unauthorized endorsement. *Flavor-Inn, Inc. v. NCNB Nat'l Bank of S.C.*, 309 S.C. 508, 511, 424 S.E.2d 534, 536 (Ct. App. 1992); *Equitable Life Assur. Soc. of the U.S. v. Okey,* 812 F.2d 906, 908-11 (4th Cir. 1987).

In a case even more on point, this Court applied the holding in *Flavor-Inn* to conclude that Article 2 of the UCC provided a "comprehensive system of remedies" which displaced common law remedies not expressly provided therein. *Hitachi Elec. Devices (USA) v. Platinum*

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[9] GM also cites *JCW Electronics v. Garza*, 257 S.W.2d 701 (Tex. 2008) with regard to its argument. However, *JCW* did not address the "proper case" language of UCC section 2-714. Instead, it construed a comparative negligence statute that, by its express terms, applied to any cause of action "for which recovery of damages is sought, *whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these*." *Id.* at 705 [emphasis in original].

Technologies, 366 S.C. 163, 170, 621 S.E.2d 38, 41 (2005); *see also Rhodes v. McDonald*, 345 S.C. 500, 548 S.E.2d 220 (Ct. App. 2001) (absence of punitive damages in Sections 36-2-714 and -715 evidences legislative intent to limit recoverable damages to those expressly stated in those statutes).

Had the Legislature intended to supplement the provisions of the UCC with negligence principles it would have included negligence in the list of other fields of law that it specifically intended to aid in the application of the provisions of the Code. Instead the Legislature kept a clear distinction between contract and tort law which has been steadfastly maintained by the state and federal courts in South Carolina when considering the question.

> By enacting the Uniform Commercial Code, the General Assembly has recognized that warranty law, not tort law, "function[s] well in a commercial setting." The integrity of contract must be maintained, or contract law will "drown in a sea of tort."

Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp. 1027, 1054 (D.S.C. 1993) (internal citations omitted), *aff'd* 46 F.3d 1125 (4th Cir. 1995); *cf. also Kirkman v. Parex, Inc.,* 369 S.C. 477, 482–83, 632 S.E.2d 854, 857 (2006) (noting that a seller's liability for defects in a new home is not founded upon fault but rather arises in warranty out of the sale of the home.)

Strict Liability Cases

Just as warranty law does not involve fault, South Carolina's statutory scheme of strict liability also operates without consideration of fault on the part of either party, with the exception of a plaintiff's voluntary assumption of the risk in using a product with knowledge of a defect. Section 15-73-10 makes the seller of a defective product liable without regard to fault and comment n to the *Restatement (Second) of Torts* § 402A ("§ 402A") makes clear that an injured plaintiff's fault is not to be considered, with the exception of assumption of the risk. The Legislature expressly adopted this as the sole defense to a strict liability claim in section 15-73-20 ("If the user or consumer discovers the defect and is aware of the danger, and nevertheless

proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."). The omission of other fault-based defenses evidences a legislative policy decision to exclude those defenses. *Hodges v. Rainey,* 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'"), *quoting* Black's Law Dictionary 602 (7th ed. 1999).

GM argues that the specific adoption of this sole defense to a strict liability claim (as opposed to the entire text of comment n) leaves room for the Court to adopt comparative negligence as a defense to a claim based on strict liability. But the Legislature did not need to include contributory or comparative negligence affirmatively in the text of Section 15-73-20 to give meaning to comment n because it specifically adopted the entirety of the comments to § 402A as its intent in adopting this new, no-fault cause of action for recovery of damages for injuries from defective products. GM's argument ignores the entire concept behind strict liability and the meaning of comment n.

Comment n restates that: "Since [a seller's] liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies." § 402A cmt. n. Thus, the rule stated in Section 524 controls and answers the question of what the Legislature meant with regard to whether the ordinary negligence of a plaintiff was foreclosed as a defense to an action based on the statute. The rule from Section 524 clearly states "the contributory negligence of the plaintiff is *not* a defense to the strict liability of one who carries on an abnormally dangerous activity." *Restatement (Second) of Torts* § 524 (emphasis added).

Therefore, contrary to GM's argument that comment n is limited to cases where a plaintiff's negligence is the mere failure to discover the defect, its very first sentence forcefully rejects this notion, stating that it applies to all forms of contributory negligence by referring to Section 524. The comment then makes the one exception to the rule by barring recovery when a plaintiff knowingly uses a product with knowledge of the defect. The second sentence of the comment (pertaining to a plaintiff's mere failure to discover the defect) makes the point that a plaintiff cannot be considered negligent for failing to discover a defect and then defines the sole instance when a plaintiff's negligence can be considered a bar to a strict liability claim. In effect, the second sentence of comment n acknowledges a policy determination against imposing on a plaintiff the duty "to discover the defect in the product, or to guard against the possibility of its existence." And, in the absence of such a duty, there can be no negligence by a plaintiff.

In other words, comment n makes clear in the first sentence that a plaintiff's ordinary negligence is not a defense to a strict liability claim and then states one exception. That the Legislature adopted the exception in Section 15-73-20 in no way supports GM's argument that the remainder of comment n is less important or open to modification by this Court. Instead, it yields the conclusion that the Legislature was aware ordinary negligence of a plaintiff is not a defense to the strict liability action it was adopting (as stated in Section 524) but took the added step of spelling out the sole exception similar to its wording in Section 524(2), which provides: "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." Subsection (1) states the rule that contributory negligence is not a defense and subsection (2) provides the lone exception. Accordingly, Section 15-73-10 states the rule of strict liability and Section 15-73-20 states the sole defense to such an action.

Liability for defective products under Section 15-73-10 does not involve principles of negligence. § 402A cmt. m ("The liability stated in this Section does not rest upon negligence."); *Id.* cmt. n ("[l]iability with which this Section deals is not based upon negligence of the seller".). Because "under South Carolina law, the doctrine of comparative negligence is only applicable to cases alleging negligence" it can have no application to a claim for strict products liability, a type of liability for which the Legislature has made the policy determination to impose without negligence. *Ritter & Associates v. Buchanan Volkswagen,* 405 S.C. 643, 651, 748 S.E. 2d 607, 611 (2013). This case does not involve claims of negligence and therefore comparative negligence is inapplicable.

If this Court were to allow the introduction of fault into a strict liability analysis, it would effectively undermine the public policy of this State, as expressly articulated by the Legislature. Specifically, the Legislature holds manufacturers responsible, without fault, for their defective and unreasonably dangerous products.

C. The Contribution Among Tortfeasors Act Did Not Adopt Comparative Fault; It Only Acknowledged The Doctrine As Adopted By This Court.

Comparative negligence was adopted by this Court in *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991), which set forth the scope of the defense as follows:

> For all causes of action arising on or after July 1, 1991, a plaintiff *in a negligence action* may recover damages if his or her negligence is not greater than that of the defendant. The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence. If there is more than one defendant, the plaintiff's negligence shall be compared to the combined negligence of all defendants.

Id. at 245, 399 S.E.2d at 784 (emphasis added; footnote and citation omitted).

As discussed under heading I, *supra*, the 2005 amendment of the Contribution Among Tortfeasors Act, which added S.C. CODE ANN. § 15-38-15 (1976, as amended), did not alter the common law principles applicable to this defense.

Rather, the purpose of this new statute was – under certain specified circumstances – to alter defendants' joint and several liability and to permit apportionment of fault. *Fay v. Grand Strand Reg. Med. Ctr.*, 412 S.C. 185, 202, 771 S.E.2d 639, 649 (Ct. App. 2015).[10] This did not change the operation of comparative negligence, which provided for apportionment between a plaintiff's fault and a defendant's (or defendants') fault both before and after adoption of Section 15-38-15. *Id.* at 202, 771 S.E.2d at 648-49; *Branham v. Ford Motor Co.*, 390 S.C. 203, 235-36, 701 S.E.2d 5, 22-23 (2010).

Section 15-38-15 only mentions "comparative negligence" twice, first in subsection A (where it equates the terms "comparative negligence" and "fault ... of plaintiff") and second in subsection C (where it requires use of "applicable rules concerning 'comparative negligence'"). Each of these demonstrates that the Legislature was respecting but not attempting to change the law of comparative negligence as adopted by this Court in *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991). Neither broadens the scope of the comparative negligence defense beyond negligence actions, as dictated by *Nelson*.

The lynchpin of GM's argument regarding Section 15-38-15 is that its use of the term "fault" should be interpreted more broadly than fault based on negligence.[11] But, by defining fault in terms of negligence in subsection A and then ratifying existing comparative negligence rules in subsection C, the Legislature clearly intended to limit application of the statute (at least

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[10] 2005 Act No. 27 adopted S.C. CODE ANN. § 15-38-15 (1976, as amended). The preamble to the Act confirms its purpose for adopting Section 15-38-15 was to alter joint and several liability of defendants in some situations: "By adding Section 15-38-15 so as to provide in an action to recover damages ... 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 willful, [etc.]." The focus of the Act was not on plaintiffs or on comparative negligence.

[11] This Court held after the adoption of Section 15-38-15 that "comparative negligence" and "comparative fault" are equivalent terms. *Berberich v. Jack*, 392 S.C. 278, 291-92, 709 S.E.2d 607, 614 (2011).

insofar as plaintiffs are concerned) to negligence cases. Otherwise, it would simply have stated "the defense of a plaintiff's comparative negligence is no longer limited to negligence actions but shall also apply to any tort action." Of course, this is the interpretation sought by GM; however, it is simply not what the legislation said or intended. The Court should not conclude simply from the statute's reference to comparative negligence that the Legislature, through oblique and general means, intended to make such a far-reaching change in this State's tort laws, particularly with respect to other statutory laws that it did not – and has not since – amended specifically.

It is also noteworthy that the scope of Section 15-38-15 is limited to actions where "indivisible damages are determined to be proximately caused by more than one defendant." S.C. CODE ANN. § 15-38-15(A) & (C)(3) (1976, as amended). Not only does this fact further demonstrate that the sole purpose of the statute was to ameliorate the effects of joint and several liability in certain cases involving multiple defendants, it also renders Section 15-38-15 inapplicable to the present case which involves only one defendant and a claim for enhanced injuries (*i.e.*, divisible damages), a point discussed further below.

D. Crashworthiness Cases Provide For The Recovery Of Enhanced Injury Damages Only; Accordingly, Any Damages Proven In A Crashworthiness Case Are, By Definition, Divisible.

Because the only remaining causes of action in this case involve strict liability and breach of warranty where comparative negligence is not a defense the Court need not decide the issue of whether comparative negligence in causing an accident can be a defense to any theory under which a crashworthiness case may be brought. However, if the Court should reach this question it should limit its consideration to whether "accident-causing negligence" of a plaintiff can be considered in a crashworthiness case which is what is at issue in the certified question. GM argues the issue in a broader sense to include any potential type of negligence on the part of plaintiff that may be at issue in a particular case but that is not the question before the Court here.

The only case applying South Carolina law that allowed the jury to consider a plaintiff's accident-causing fault in a crashworthiness is the unpublished opinion in *Quinton v. Toyota Motor Corp.*, 2014 U.S. Dist. LEXIS 16063 (D.S.C. 2014). *Quinton* involved a claim that the subject vehicle was equipped with a defective side airbag that caused plaintiff's injuries. The collision involved only that vehicle while being driven by the plaintiff. The district court ruled that the plaintiff's accident-causing fault could be considered on the negligence claim but did not instruct the jury on comparative negligence after the plaintiff dropped her negligence claim and went to the jury on strict liability. (*See* Donze's Brief p. 22.) While Donze contends the District Judge's decision to admit evidence of accident-causing fault on the negligence claim was erroneous, her ultimate decision not to charge the jury on comparative negligence with regard to the strict liability claim actually supports and is consistent with Donze's position herein.

GM addresses the certified question without any effort to inform the Court as to existing South Carolina law on the admissibility of accident-causing fault in a crashworthiness case. It fails to acknowledge any of the authorities cited in Donze's brief involving crashworthiness claims and ignores a manufacturer's "duty to design and manufacture ... a reasonably safe vehicle" with knowledge that "careless driving is a foreseeable reality." *Branham*, 390 S.C. at 233, 701 S.E.2d at 21. These concepts are essential because "[t]he fact that a negligent driver may be the initial cause of an accident does not abrogate the manufacturer's duty to use reasonable care in designing an automobile to reduce the risk of 'secondary impact injuries.'" *Binakonsky v. Ford Motor Co.*, 133 F.3d 281, 288 (4th Cir. 1998) (discussing Maryland strict liability law in the context of a crashworthiness case involving post collision burn injuries).

As in its other arguments, GM again seeks to have the Court change the law in its answer to this certified question, which is inappropriate. GM supports a push for changing the law based

on unsupported claims of unfair and harsh results without citing any reported case documenting the occurrence of such a result over the course of many decades since the adoption of the crashworthiness doctrine by this Court in *Mickle v. Blackmon,* 252 S.C. 202, 166 S.E.2d 173 (1969). These arguments by GM provide no aid to the Court in answering the certified question.

GM further misconstrues the doctrine of proximate cause in its effort to define damages in terms of whether they are indivisible. The fact that Donze's damages may result from concurring causes does not make the separate element of damages indivisible. It is elemental that damages and causation are distinct elements of a personal injury claim. In addressing joint and several liability, the Legislature acknowledge that a plaintiff may suffer damages from more than one defendant. Section 15-38-15 provides, in pertinent part: "In an action to recover *damages* ... if *indivisible damages* are determined to be *proximately caused* by more than one defendant.... A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the *indivisible damages* determined by the jury or trier of fact." S.C. CODE ANN. § 15-38-15(A) (1976, as amended) (emphasis added). It is important to note first the separate treatment of causation and damages and second the corollary to "indivisible damages" caused by multiple defendants is divisible damages from multiple causes.

This case involves a clear example of divisible damages. Donze's burn injuries are separate and distinct from his initial collision-related injuries. This is undisputed. Under the crashworthiness doctrine, GM could never be held jointly liable for all of Donze's damages under any scenario as it can only be held liable for the easily divisible burn injuries.

In crashworthiness cases, courts have frequently looked to the *Restatement (Second) of Torts* § 433A in addressing the divisibility of damages so as to support a claim for enhanced injuries. *See, e.g., Voelkel v. General Motors Corp.,* 846 F.Supp. 1468, 1481 (D. Kan. 1994);

LaHue v. General Motors Corp., 716 F. Supp. 407, 418-19 (W.D. Mo. 1989) (and cases discussed therein). Section 433A, "Apportionment of Harm to Causes" states:

> (1) Damages for harm are to be apportioned among two or more causes where
>
> (a) there are distinct harms, or
>
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
>
> (2) Damages for any other harm cannot be apportioned among two or more causes.

As one can see, the analysis is largely factual and case-specific. *Accord Restatement (Third) of Torts* § 26. In other words, where the evidence supports a finding of distinct injuries or harms, then the damages are divisible. Because a crashworthiness plaintiff has the burden of proving an enhanced injury separate from those caused by the initial collision, the question of divisibility in Section 15-38-15 should not come into play in such a case. Either the plaintiff proves divisibility in satisfying his burden of proof or there is a defense verdict which renders the question of apportionment moot.

While there are certainly cases where damages are so indivisible that proof cannot allow the finder of fact to sort out injuries caused by the product defect from those caused by the initial collision, that is not the case here. The Court is not asked to make the determination of how it would treat indivisible damages in the context of a crashworthiness case in connection with this question. GM's claim that the damages here are indivisible is contrary to the law and of no benefit to this discussion. Because the damages claimed are divisible, Section 15-38-15 simply does not apply and provides no basis for the Court to conclude comparative negligence is a defense in a crashworthiness case.

Finally, GM cites to a string of cases from other jurisdictions for the proposition that comparative negligence should apply to crashworthy cases. As noted in Donze's initial brief,

case law from other jurisdictions is of limited, if any, value on this point as – unlike South Carolina – many of those states apply statutory comparative fault schemes to statutory products liability actions and none of them have adopted the comments to § 402A as evidence of legislative intent.

Moreover, while GM argues South Carolina is in the minority with respect to this topic, a number of jurisdictions refuse to apply comparative negligence to strict liability and breach of warranty causes of action. *See e.g., Hulstine v. Lennox Indus.,* 357 Mont. 228, 237 P.3d 1277 (2010); *Minter v. Prime Equipment Co.*, 356 Fed. Appx. 154 (10th Cir. 2009); *General Motors Corp. v. Eighth Judicial Dist. Court of State of Nev. ex rel. County of Clark*, 122 Nev. 466, 134 P.3d 111 (2006); *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006); *Surace v. Caterpillar, Inc.* 111 F.3d 1039, 46 Fed. R. Evid. Serv. 1487 (3d Cir. 1997); *Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 904 P.2d 861 (1995); *Novak v. Navistar Intern. Transp. Corp.*, 46 F.3d 844 (8th Cir. 1995); *Young's Mach. Co. v. Long*, 100 Nev. 692, 692 P.2d 24 (1984); *Kirkland v. General Motors Corp.*, 1974 Ok. 52, 521 P.2d 1353 (1974).

CONCLUSION

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

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

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