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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.

PLAINTIFF'S BRIEF IN REPLY TO BRIEF OF ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. AS *AMICUS CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. Comparative Negligence Does Not Apply To All Causes Of Action 3

II. Under South Carolina Law, Comparative Fault Does Not Apply To Strict Liability And Breach Of Warranty Actions 7

III. There Is No Public Policy Bar Applicable To This Action 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Berberich v. Jack, 392 S.C. 278, 709 S.E.2d 607 (2011) 3, 4, 7

Binakonsky v. Ford Motor Co., 133 F.3d 281 (4th Cir. 1998).............................. 6

Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995) 9

Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 508 S.E.2d 565 (1998) 8

Hart v. Doe, 261 S.C. 116, 198 S.E.2d 526 (1973).................................... 4

Hawkins v. Pathology Assocs., P.A., 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998) 9

Langley v. Boyter, 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984) 5, 6

Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991) 5, 9

Ritter & Assocs. v. Buchanan Volkswagen, 405 S.C. 643, 748 S.E.2d 801 (Ct. App. 2013) 7

Stephens v. Draffin, 327 S.C. 1, 488 S.E.2d 307 (1997) 9

Yaun v. Baldridge, 243 S.C. 414, 134 S.E.2d 248 (1964) 4

STATUTES

S.C. CODE ANN. § 15-38-10 (1976, as amended)..................................... 7

S.C. CODE ANN. § 15-38-15 (1976, as amended)..................................... 12

S.C. CODE ANN. § 15-73-10 (1976, as amended)..................................... 5

S.C. CODE ANN. § 15-73-20 (1976, as amended)..................................... 7, 8

S.C. CODE ANN. § 47-3-110 (1976, as amended)..................................... 10

S.C. CODE ANN. § 56-5-2930 (1976, as amended)................................... 11

OTHER AUTHORITIES

RESTATEMENT (SECOND) OF TORTS § 402A.. 5

INTRODUCTION[1]

This brief is organized in the same fashion as the *Amicus Curiae* Brief of Alliance of Automobile Manufacturers, Inc. ("the Manufacturers"). Thus, for ease in reference, Donze includes specific responses to the Manufacturers' statements and arguments under the same headings used in the Amicus brief.

Donze questions the Manufacturers' alleged "motor vehicle safety" interest in this case. (Br. of Amicus p. 1). The Manufacturers' only real interest is whether the result of this case "would subject manufacturers to liability"[2] and, consequently, result in financial responsibility for products proven to be defective and unreasonably dangerous. (*Id.*) This is not a legitimate interest in the questions before the Court.

The answer to the second certified question, regarding allegedly impaired drivers, will not affect manufacturers' production of safe motor vehicles and therefore does not relate to the Manufacturers' purported motor vehicle safety mission.

This case involves the role, if any, of a plaintiff's alleged negligent conduct in a strict liability and breach of warranty action brought under a crashworthiness theory. In a crashworthiness action, it is a given that an accident occurred. The issue is not which party is responsible for the accident, but which party is responsible for a particular injury. Here, the particular injury is a burn injury.

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

[2] By characterizing this case as an effort by Donze "to exclude product liability claims from this state's comparative fault regime" (Br. of Amicus p. 1) and to obtain a ruling that "will create a particularly high risk" that vehicle manufacturers will be held liable for enhanced injuries in crashworthiness cases (*id.* p. 2), the Manufacturers deceptively frame the issues as if Donze is seeking a change in the law. In fact, as discussed in Donze's prior briefs, the Manufacturers (which include GM) are the parties using this case to lobby for a significant change in existing law regarding the statutory causes of action at issue.

Like GM, the Manufacturers fail to address the narrow questions presented to the Court. Instead they urge the Court to alter statutory law in answering the certified questions. In doing so the Manufacturers blur question one by using language such as "product liability cases" to suggest that Donze seeks to exclude all products liability cases from comparative negligence. That is not the question before this Court. An action sounding in negligence, including a product liability action, is subject to comparative negligence principles. Indeed, if this crashworthiness action were based on negligence, the only issue would be whether any negligence of a plaintiff in causing the accident should be compared with a defendant's negligent conduct given that the causation proof requirements unique to enhanced injury cases inherently insulate a manufacturer from liability for injuries not attributable to the product defect. The way that the Manufacturers couch the issue is not only misleading but does not aid the Court in answering the question. Rather, their characterization of products liability cases illustrates that, if the Court adopts the approach advocated by GM and the Manufacturers, actions based on strict liability and warranty statutes would be subsumed into the law of negligence.

In asserting strict liability and breach of warranty actions, Plaintiff does not, as the Manufacturers suggest, engage in "creative pleading" but instead asserts legally valid, statutorily-based product liability causes of action. (Br. of Amicus p. 3). A plaintiff, as the master of his complaint, may choose to pursue a product liability case under any of the causes of action applicable to the facts of the case. These choices are not fairly characterized as gamesmanship; rather, they can affect the plaintiff's rights and potential remedies. For example, when he chooses to pursue only these statutory causes of action, he foregoes his right to seek a recovery for punitive damages.

ARGUMENT[3]

I. COMPARATIVE NEGLIGENCE DOES NOT APPLY TO ALL CAUSES OF ACTION.

Comparative negligence does not apply to strict liability and breach of warranty actions because they have no fault-based elements of proof. The Manufacturers broadly and incorrectly argue that comparative fault applies to any civil action that involves an injury.[4] (Br. of Amicus p. 6). The Manufacturers would have this Court apply comparative negligence to every civil action or, at the least, every tort action. That is not the law of South Carolina and adoption of the Manufacturers' position would have profound and unintended consequences.

For example, in medical malpractice actions, medical provider defendants could argue that their negligent conduct in providing substandard care should be compared with plaintiff's alleged fault in being overweight or otherwise unhealthy and whose medical condition necessitated the treatment. Similarly, in actions based on the tort of insurance bad faith, liability insurers could defend wrongful denials of or refusals to settle claims based on the insureds' fault in causing accidents that led to the claims. And, in products liability actions, motor vehicle manufacturers would automatically receive a reduction of (if not absolution from) liability in crashworthiness actions where defective safety devices such as seatbelts or airbags cause enhanced injuries in collisions caused by plaintiffs' negligent driving.

The Manufacturers' discussion of *Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011), is misplaced and incorrectly describes the nature of that opinion. (Br. of Amicus pp. 5-6).

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[3] Donze incorporates into this Reply the arguments made in his prior briefing in this case.

[4] The Manufacturers assert that comparative negligence "considers all of the factual and legal causes of an ***indivisible injury***." (Br. of Amicus p. 6) (emphasis added). As Donze explained in his Brief, the injuries in a crashworthiness case are inherently divisible. Specifically, the injuries from the initial collision are divisible from the injuries from the "second collision" with the vehicle defect. This divisibility renders a comparative negligence analysis unnecessary in a crashworthiness case.

Berberich did not involve, as the Manufacturers state, multiple causes of action. Rather, it involved an argument asserting the plaintiff committed a heightened degree of negligence, namely conduct that is reckless, willful, or wanton. "'[N]egligence is the failure to use due care,' i.e., 'that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances.'" *Id.*at 287, 709 S.E.2dat 612, *citing Hart v. Doe*, 261 S.C. 116, 122, 198 S.E.2d 526, 529 (1973). "It is often referred to as either ordinary negligence or simple negligence." *Berberich*, 392 S.C. at 287, 709 S.E.2d at 612. "'Recklessness implies the doing of a negligent act knowingly'; it is a 'conscious failure to exercise due care.'" *Id., quoting Yaun v. Baldridge*, 243 S.C. 414, 419, 134 S.E.2d 248, 251 (1964). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning – the conscious failure to exercise due care." *Berberich*, 392 S.C. at 287, 709 S.E.2d at 612.

Berberich actually undermines the Manufacturers' argument because the Court's discussion there was limited to negligence-based claims and provided a definition of South Carolina's common-law crafted comparative negligence system that forecloses its application to the causes of action before the Court here. This Court defined our system as follows: "all forms of conduct amounting to negligence in any form, including, but not limited to, ordinary negligence, gross negligence, and reckless, willful, or wanton conduct, may be compared to and offset by any conduct that falls short of conduct intended to cause injury or damage." *Id.* at 293, 709 S.E.2d at 615.

The causes of action for strict liability and breach of warranty do not involve any negligent conduct on the part of a defendant; therefore, by definition, comparative negligence cannot apply.

The Manufacturers also rely on *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991) and this Court's decision to change its approach to handling plaintiffs' negligence from contributory negligence to comparative negligence. In adopting comparative negligence, the Court referred to the South Carolina Court of Appeals' decision in *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984) for its discussion of the evolution of comparative negligence. While *Langley* was vacated by this Court on procedural grounds, its detailed discussion of comparative negligence and its application is instructive to the present case – and is appropriate given this Court's recognition of it in *Nelson*.

First, *Langley* recognized that the Legislature had taken action to limit or eliminate the doctrine of contributory negligence by statute on at least four occasions, one of which was with regard to S.C. CODE ANN. § 15-73-10 (1976, as amended), which is one of the statutes at issue here. *Langley*, 284 S.C. at 171, 325 S.E.2d at 555 ("Four statutes appear to limit or eliminate the application of the doctrine in certain cases, without referring to it by name. S.C. Code Ann. § 15–73–30 (1976) (adopts 'comments to § 402A of the Restatement of Torts, Second,' as the legislative intent of Chapter 73, Title 15, including comment 'n' which eliminates contributory negligence as a defense in certain products liability cases)."). Thus, the first case to analyze and adopt comparative negligence in South Carolina recognized the legislative intent as to how a plaintiff's conduct would be treated in an action under the strict liability statute.

Equally instructive is how the *Langley* court addressed the effect its holding may have on the statutory law. After adopting comparative negligence as the law, the court concluded with a discussion of the effects of its decision: "We also decline to express our views as to any changes in the statutory law of this state which may need to be considered in light of this decision. To do so would be an unwarranted invasion of the prerogative of the legislature, in view of our

conclusion that there is no statute applicable to the facts of this case." *Id.* at 189-90, 325 S.E.2d at 566. "Within constitutional limits, courts should defer to their legislatures in construing statutes, so as to give effect to legislative intent. Consistent with this principle, we have deferred in past cases to the legislature by applying statutes enacted by it without regard to our own view of 'wisdom and justice.'" *Id.* at 178, 325 S.E.2d at 559.

It is the very same unwarranted invasion of the legislative prerogative the *Langley* court declined that the Manufacturers seek to have this Court do now. The same rationale for *Langley*'s recognition that it would be up to the Legislature to make any changes needed to statutory law after the adoption of comparative negligence holds equally true today when applied to products liability actions brought under strict liability and warranty statutes. In the 25 years since this Court's adoption of comparative negligence the Legislature has not seen fit to change the statutes at issue in a way that is germane to the issues before the Court here.

Finally, the Manufacturers' argument that "[t]his Court has repeatedly expressed the importance of comparative fault in automobile cases" confuses the causation considerations in this case. (Br. of Amicus p. 8). This case is not a typical "automobile case" in which the jury will determine who caused the accident. Instead it involves a very small subset of cases focused on enhanced injuries due to automotive defects. The causation issue here is who caused the burn injuries. In this crashworthiness case, the occurrence of an accident is a precondition. *See, e.g.*, *Binakonsky v. Ford Motor Co.*, 133 F.3d 281, 288 (4th Cir. 1998) ("The 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.") (internal quotation marks omitted). The jury will not determine who or what caused the accident but, instead, whether a defect exists; if so, it will decide whether that defect caused Donze's

injuries. If Donze proves his case, then he cannot be comparatively negligent in causing his enhanced burn injuries. This is because if the exact same accident happened with the exact same allegedly negligent conduct by Donze or Brazell but with a different fuel tank design, there would be no burn injury. Stated differently, Donze's conduct would not have resulted in the burn injuries but for the defective fuel tank design.[5]

II. UNDER SOUTH CAROLINA LAW, COMPARATIVE FAULT DOES NOT APPLY TO STRICT LIABLITY AND BREACH OF WARRANTY ACTIONS.

Donze does not assert a negligence action in this case and, therefore, the defense of comparative negligence is not applicable. "[U]nder South Carolina law, the doctrine of comparative negligence is only applicable to cases alleging negligence as a cause of action." *Ritter & Assocs. v. Buchanan Volkswagen,* 405 S.C. 643, 651, 748 S.E.2d 801, 805 (Ct. App. 2013), *citing Berberich*, 392 S.C. at 286, 709 S.E.2d at 611. If the Court were to adopt the Manufacturers' argument that comparative negligence applies to strict liability and breach of warranty actions, then it would essentially eliminate those causes of action and judicially alter longstanding statutory product liability law in this State.

The Manufacturers ignore the fact that strict liability and breach of warranty are ***statutory*** causes of action as to which the Legislature has spoken. It is the statutory law of South Carolina that assumption of the risk is the only defense to an action for strict liability. S.C. CODE ANN. § 15-73-20 (1976, as amended). If, in enacting – and later amending – the Contribution Among Tortfeasors Act, S.C. CODE ANN. §§ 15-38-10, *et seq.* (1976, as amended), the Legislature wanted to create another defense to a strict liability action, it could have done so but it did not.

[5] This negates the Manufacturers' argument that "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." (Br. of Amicus p. 9).

Further, the assumption of the risk defense stated in Section 15-73-20 is an absolute bar to recovery, which differs from the application of comparative negligence principles. *Compare* § 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.") *with Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 333 S.C. 71, 87, 508 S.E.2d 565, 573-74 (1998) ("[A] plaintiff is not barred from recovery by the doctrine of assumption of risk unless the degree of fault arising therefrom is greater than the negligence of the defendant."). If the Court were to adopt the approach sought by the Manufacturers, would the absolute statutory bar in Section 15-73-20 become a part of the comparative analysis? It would be patently unfair to add plaintiff conduct now excluded as a defense under the statute but to leave the defense of assumption of the risk as an absolute bar, which no longer exists under our common-law comparative negligence system. This is a glaring example as to why the arguments made by GM and the Manufacturers are properly made to the Legislature and not to this Court as presented in this case.[6]

The Manufacturers' argument regarding the words "contributory" versus "comparative" is misplaced in this case. Both deal with the identical plaintiff conduct. The difference is the effect of the plaintiff's negligence on his ability to recover damages, *i.e.*, whether his negligence

[6] In the same vein, the Manufacturers claim application of comparative negligence "puts plaintiffs and defendants on an even playing field" despite acknowledging, earlier in the same paragraph, that a plaintiff is barred from recovery when his negligence exceeds 50%. (Br. of Amicus p. 3.) This, of course, allows negligent defendants to avoid liability, provided their negligence is less than 50% when compared with the plaintiff.

Since crashworthiness defendants are not, by definition, responsible for the initial collision, one can quickly predict how they would use the comparative negligence doctrine to argue for absolution from liability when a plaintiff is 100% at fault for the initial collision and is therefore, based on the Manufacturers' argument on proximate cause, at least partially at fault for the enhanced injuries resulting from the product defect.

completely bars his recovery or only reduces it. *See Stephens v. Draffin*, 327 S.C. 1, 4, 488 S.E.2d 307, 308 (1997) ("Contributory negligence constitutes a complete bar to the plaintiff's recovery while comparative negligence permits a plaintiff whose negligence is less than or equal to the defendant(s) a proportionate verdict."). This is neither related to nor dispositive of the issue in this case – whether a plaintiff's alleged negligence may be weighed against a defendant's statutory liability. Further, our courts have continued to use the phrase "contributory negligence" after this Court's adoption of comparative negligence in *Nelson*. *See, e.g.*, *Hawkins v. Pathology Assocs., P.A.*, 330 S.C. 92, 105, 498 S.E.2d 395, 402 (Ct. App. 1998) ("The question of contributory negligence is ordinarily a question of fact for the jury.").

Even if this Court were to accept the Manufacturers' argument about the use of the word "contributory" instead of "comparative", that still does not warrant the result the Manufacturers seek. The fact that South Carolina adopted comparative negligence does not eliminate the effect of every use of the phrase "contributory negligence", especially when adopted by statute.

In response to Donze's point that application of comparative negligence will affect other areas of the law, including strict liability law for dog bites and abnormally dangerous activities, the Manufacturers create a non-existent distinction between strict liability and what they label "absolute liability." There is no support in the law for a category of "absolute liability" as a higher standard than strict liability. The reference to "absolute liability" in strict product liability law refers to the fact that "while any product can be made safer, the fact that it is not does not automatically mean the product is unreasonably dangerous." *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 543, 462 S.E.2d 321, 328 (Ct. App. 1995). The dog bite statute is also not "absolute liability" as opposed to strict liability, as the Manufacturers argue. Rather, strict liability does not apply to a dog bite if, for example, the victim provoked the dog, much in the same way that strict

products liability does not apply if the plaintiff knew of and unreasonably assumed the risk of using the defective product. S.C. CODE ANN. § 47-3-110(B) (1976, as amended). Therefore, there is no absolute liability distinction and the Court should ignore this straw man argument.

Finally, it is noteworthy that neither the Manufacturers nor GM has provided the Court with a response to Donze's argument that the changes in the law they seek would likely result in a further change to existing law and make punitive damages recoverable under strict liability and breach of warranty actions. (Br. of Plaintiff p. 13). Implicit in the failure of the Manufacturers and GM to respond to this argument is that it is valid and a persuasive illustration of the differences between negligence and these product liability causes of actions.

III. THERE IS NO PUBLIC POLICY BAR APPLICABLE TO THIS ACTION.

The Manufacturers do not cite any law that supplements what has been presented by GM on this issue. Rather than put forth what the law in South Carolina is currently, the Manufacturers advocate the adoption of a new policy that their brief admits does not exist. The Manufacturers urge the Court to adopt a new bar to recovery on facts where an eighteen-year-old passenger of a known defective vehicle[7] was severely burned by a post collision, fuel-fed fire. And it does so on a record where there is no evidence of the substance allegedly smoked (other than to call it "spice", which comes in several formulations), that includes a toxicology report of the driver which showed no presence of impairing substances, and that lacks evidence of impaired driving.[8] Brazell was not criminally charged, as no evidence supports a claim that his

[7] The United States Secretary of Transportation granted a petition filed by the Center for Auto Safety to initiate a defect investigation into GM pickups with fuel tanks mounted outside of the frame rails (including the model at issue) and made an initial finding "that the subject vehicles contain a defect that relates to motor vehicle safety." *See generally* www.autosafety.org/history-gm-side-saddle-gas-tank-defect/.

[8] In fact, if Brazell were the plaintiff in this action, there would be no admissible evidence of his alleged impairment.

"faculties to drive a motor vehicle [were] materially and appreciably impaired". *See* S.C. CODE ANN. § 56-5-2930 (A) (1976, as amended). GM's own expert admitted at deposition that pulling out in front of another vehicle does not prove impairment.

The fact that the Manufacturers use terms such as "criminal" does nothing to change the fact that the underlying accident involves nothing more than a driver who pulled out in front of another vehicle. While the driver failed to yield the right-of-way, there is nothing egregious or criminal about this accident. This case and record do not provide the Court with the type of record to adopt such a broad-based public policy bar advocated by the Manufacturers and GM. If the Court were to do so it would have to define impairment and the level of impairment at which the bar comes into play. Alternatively, if it were to hold that "impairment" at any level creates a bar to recovery, the Court's holding would have far-reaching effects as almost any substance could be said to provide some level of impairment. For example, there is no doubt that common substances such as caffeine, nicotine, or sugar can alter one's state of mind and that properly taken prescription drugs can cause impairment. The difficulty with the Manufacturers' position is easily seen when one considers all of the possibilities of what could arguably be defined as "impairment".

The Manufacturers and GM also fail to respond to Donze's argument that there is no standard for or definition of what constitutes impairment and how alleged impairment would be proven. (*See* Br. of Donze p. 32 n.22.) Implicit in this failure is that there is no workable standard for the law they are asking this Court to create.

The point Donze seeks to make in response to the Manufacturers' position is that not only is this case a poor vehicle to consider the request but also that the adoption of a one-size-fits-all public policy bar would be very difficult, if not impossible, to implement and will undoubtedly

result in a new wave of litigation in auto accident cases on the issue of impairment. It also opens the question of what happens if a defendant is "impaired". Does he or she automatically lose the ability to defend the case?[9] The current well-functioning system of deciding these issues through our comparative negligence system is the best vehicle to address these issues rather than adoption of an outright bar. The Manufacturers argue that the alleged judicially-created "bar on applying comparative fault for anyone who engages in conscious failure to exercise due care should apply equally to plaintiffs and defendants" (Br. of Amicus p. 16) but immediately undermines its own argument by including a footnote that clearly states the Legislature chose only to bar from the benefit of the Contribution Among Tortfeasors Act "a defendant who causes harm to another while using, or even possessing, illegal drugs" per S.C. CODE ANN. § 15-38-15(F) (1976, as amended).

The alleged impairment of a plaintiff does not cause a vehicle to be defective.

CONCLUSION

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

Respectfully submitted,

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[9] To illustrate the absurd effect of the logical conclusion of the Manufacturers' argument when compared to facts similar to this case, consider whether the occupants of a vehicle that strikes a car which fails to yield the right-of-way would have the basis to impose "outright" or "absolute" liability on a passenger in that vehicle who had drunk coffee, smoked a cigarette, or taken prescription medication (or, for that matter, was intoxicated by alcohol but had taken the reasonable precaution of riding with a sober driver).

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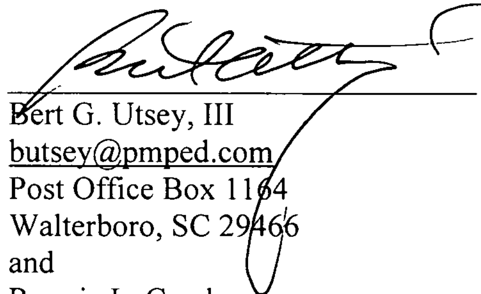
BY: 

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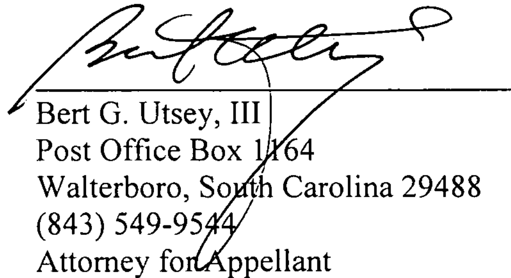
The undersigned certified that this Reply Brief complies with Rule 211(b), SCACR.



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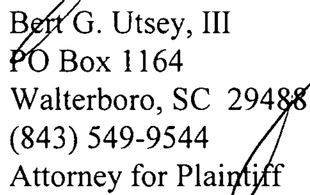

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