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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

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## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	iii
INTRODUCTION .....	1
QUESTIONS PRESENTED.....	3
STATEMENT OF THE CASE.....	3
<b>I. PUBLIC POLICY BARS RECOVERY BY IMPAIRED DRIVERS WHO CAUSE THEIR OWN INJURIES.....</b>	<b>5</b>
A. South Carolina Public Policy Promotes Public Safety by Discouraging and Punishing Impaired Drivers—Not By Rewarding Them With Large Damage Awards in Civil Actions.....	5
B. No Legislation Allows Impaired Drivers To Recover For Injuries They Themselves Have Caused.....	12
<b>II. COMPARATIVE NEGLIGENCE IN CAUSING AN ACCIDENT SHOULD APPLY IN ALL PRODUCT LIABILITY CASES, INCLUDING CRASHWORTHINESS CASES BASED ON STRICT LIABILITY AND BREACH OF WARRANTY.....</b>	<b>15</b>
A. Sound Public Policy Requires Application Of Comparative Negligence Principles To Product Liability Cases Based on Breach of Warranty and Strict Liability.....	16
B. South Carolina Statutes Permit this Court to Apply Comparative Negligence In Strict Products Liability Cases.....	22
C. The Contribution Among Tortfeasors Act Adopts Comparative Fault For All Cases Alleging Personal Injury.....	25
D. There Is No Reason To Adopt A Special Rule For Crashworthiness Claims.....	28
1. An Impaired Driver Who Causes An Accident Causes All Of The Injuries Resulting From That Accident, Including “Enhanced” Injuries.....	28

2.	“Enhanced Injuries” Are Simply Injuries Caused By The Alleged Crashworthiness Defect.....	33
3.	An Injury Is Indivisible If The Plaintiff And The Defendant Caused The Entire Injury.....	35
4.	A Jury In A Crashworthiness Case Simply Allocates Fault For The Injuries Caused By Both The Driver And The Defect In The Same Way It Allocates Fault In Any Tort Case. ....	36
	CONCLUSION.....	39

## TABLE OF AUTHORITIES

### CASES

<u>Albertson v. Volkswagenwerk</u> , 634 P.2d 1127 (Kan. 1981).....	37
<u>Aldon Indus., Inc. v. Don Myers &amp; Assocs., Inc.</u> , 517 F.2d 188 (5th Cir. 1975) .....	12
<u>Berberich v. Jack</u> , 392 S.C. 278, 709 S.E.2d 607 (2011) .....	16
<u>Bertelmann v. Taas Assocs.</u> , 69 Haw. 95, 735 P.2d 930 (1987) .....	8
<u>Bragg v. Hi-Ranger, Inc.</u> , 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995).....	15
<u>Branham v. Ford Motor Co.</u> , 390 S.C. 203, 701 S.E.2d 5 (2010) .....	14, 16, 23
<u>Bravo v. Ford Motor Co.</u> , No. CV000594807, 2001 WL 477275 (Conn. Super. Ct. Apr. 16, 2001) .....	37
<u>Buehler v. Whalen</u> , 355 N.E.2d 99 (Ill. App. 1976) .....	30, 35
<u>Busch v. Busch Constr., Inc.</u> , 262 N.W.2d 377 (Minn. 1977).....	25
<u>Claytor v. General Motors Corp.</u> , 277 S.C. 259, 286 S.E.2d 129 (1982) .....	23, 24
<u>Cleveland v. Piper Aircraft Corp.</u> , 890 F.2d 1540 (10th Cir. 1989) .....	31, 37
<u>Coney v. J.L.G. Indus., Inc.</u> , 97 Ill. 2d 104, 73 Ill. Dec. 337, 454 N.E.2d 197 (1983) .....	17, 20
<u>D’Amario v. Ford Motor Co.</u> , 743 So. 2d 508 (Fla. 1999).....	38
<u>Dahl v. BMW</u> , 304 Or. 558, 748 P.2d 77 (Or.1987) .....	38
<u>Daly v. Gen. Motors Corp.</u> , 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978) .....	passim
<u>Dannenfelser v. Daimler Chrysler Corp.</u> , 370 F.Supp.2d 1091 (D.C. Hawaii 2005) .....	37
<u>Day v. General Motors Corp.</u> , 345 N.W.2d 349 (N.D. 1984) .....	38
<u>Dippel v. Sciano</u> , 37 Wis. 2d 443, 155 N.W.2d 55 (1967).....	21
<u>Duncan v. Cessna Aircraft Co.</u> , 665 S.W.2d 414 (Tex. 1984).....	38
<u>Egbert v. Nissan Motor Co.</u> , 2010 UT 8, 228 P.3d 737 (Sup.Ct.) .....	38
<u>Fietzer v. Ford Motor Co.</u> , 590 F.2d 215 (7th Cir. 1978) .....	30, 38

<u>Fiske v. MacGregor</u> , 464 A.2d 719 (R.I. 1983).....	18, 21
<u>Gartman v. Ford Motor Co.</u> , 430 S.W.3d 218 (Ark. App. 2013).....	36
<u>Gen. Motors Corp. v. Edwards</u> , 482 So. 2d 1176 (Ala. 1985).....	35
<u>General Motors Corp. v. Farnsworth</u> , 965 P.2d 1209 (Alaska 1998).....	30, 36
<u>General Motors Corp. v. Lahocki</u> , 286 Md. 714, 410 A.2d 1039 (1980) .....	31
<u>Gibbons v. Luby’s Inc.</u> , No. 02-12-00202-CV, 2015 Tex. App. LEXIS 9234, at *28 (App. Aug. 31, 2015).....	22
<u>Green v. Ford Motor Co.</u> , 942 N.E.2d 791 (Ind. 2011) .....	37
<u>Harsh v. Petroll</u> , 584 Pa. 606, 887 A.2d 209 (2005).....	36, 38
<u>Harvey v. General Motors Corp.</u> , 873 F.2d 1343 (10th Cir. 1989) .....	38
<u>Hinkamp v. American Motors Corp.</u> , 735 F.Supp. 176 (E.D.N.C. 1989).....	38
<u>Hurd v. Williamsburg Cty.</u> , 363 S.C. 421, 611 S.E.2d 488 (2005) .....	29, 30
<u>Jahn v. Hyundai Motor Co.</u> , 773 N.W.2d 550 (Iowa 2009) .....	34, 37
<u>JCW Elecs., Inc. v. Garza</u> , 257 S.W.3d 701 (Tex. 2008).....	13, 17
<u>Langley v. Boyter</u> , 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984).....	11
<u>Larsen v. General Motors Corp.</u> , 391 F.2d 495 (8th Cir. 1968) .....	33
<u>Lollar v. Dewitt</u> , 255 S.C. 452, 179 S.E.2d 607 (1971) .....	4
<u>Lydia v. Horton</u> , 355 S.C. 36, 583 S.E.2d 750 (2003) .....	passim
<u>Marcum v. Bowden</u> , Op. No. 26035, 2005 S.C. LEXIS 251, 2005 WL 2129176 (S.C. Sup. Ct., filed Aug. 29, 2005) .....	9
<u>Marcum, Marcum v.</u> , Bowden, 372 S.C.452, 643 S.E. 2d 85 (2007).....	10
<u>McNeil v. Nissan Motor Co.</u> , 365 F.Supp.2d 206 (D.N.H. 2005).....	37
<u>Meekins v. Ford Motor Co.</u> , 699 A.2d 339 (Del. Super. Ct. 1997) .....	31, 32, 37
<u>Miller v. Todd</u> , 551 N.E.2d 1139 (Ind. 1990) .....	34

<u>Montag v. Honda Motor Co.,</u> 75 F.3d 1414 (10th Cir. 1996) .....	37
<u>Moore v. Chrysler Corp.,</u> 596 So. 2d 225 (La. Ct. App. 1992).....	31, 37
<u>Nelson v. Concrete Supply Co.,</u> 303 S.C. 243, 399 S.E. 2d 783 (1991) .....	16, 17, 18
<u>Norfolk S. Ry. v. Sorrell,</u> 549 U.S. 158, (2007).....	29
<u>Ohio Casualty Ins. Co. v. Todd,</u> 813 P.2d 508 (Okla. 1991).....	8
<u>Priester v. Cromer,</u> 401 S.C. 38, 736 S.E.2d 249 (2012) .....	11
<u>Reed v. Chrysler Corp.,</u> 494 N.W.2d 224 (Iowa 1992) .....	38
<u>Roddey v. Wal-Mart Stores E., LP,</u> 415 S.C. 580, 784 S.E.2d 670 (S.C. 2016) .....	29
<u>Sandford v. Chevrolet Div. of Gen. Motors,</u> 292 Or. 590, 642 P.2d 624 (1982) .....	21, 25
<u>Smith v. Toyota Motor Corp.,</u> 105 Fed. App'x. 47 (6th Cir. 2004) .....	29, 37
<u>State v. Austin,</u> 306 S.C. 9, 409 S.E.2d 811 (1991) .....	11
<u>State v. Easler,</u> 327 S.C. 121, 489 S.E.2d 617 (1997) .....	32
<u>State v. Jansing,</u> 918 P.2d 1081 (Ariz. App. 1996).....	33
<u>State v. Paxson,</u> 49 P.3d (Ariz. App. 2002).....	33
<u>Tobias v. Sports Club,</u> 323 S.C. 345, 474 S.E.2d 450 (Ct. App. 1996).....	7
<u>Tobias v. Sports Club,</u> 332 S.C. 90, 504 S.E.2d 318 (1998) .....	7, 8, 9
<u>Trust Corp. of Montana v. Piper Aircraft Corp.,</u> 506 F. Supp. 1093 (D. Mont. 1981).....	37
<u>West v. Caterpillar Tractor Co.,</u> 547 F.2d 885 (5th Cir. 1977) .....	19
<u>Whitehead v. Toyota Motor Corp.,</u> 897 S.W.2d 684 (Tenn. 1995).....	17, 34, 36, 38
<u>Willis v. Kia Motors Corp.,</u> No. CIV.A. 2:07CV062-P-A, 2009 WL 2134359 (N.D. Miss. July 14, 2009) .....	37
<u>Zalut v. Anderson &amp; Assoc.,</u> 463 N.W.2d 236 (Mich.Ct.App. 1990) .....	37
<u>Zuern v. Ford Motor Co.,</u> 937 P.2d 676 (Az. App. 1996) .....	36

## STATUTES

§ 15-73-10.....	14
§ 36-2-714(3).....	12, 22
§ 56-5-2930(A)(1)-(4) (Supp. 2015).....	6
§ 56-5-2945.....	6, 7
Fla. Stat. Ann. § 768.81(3)(b).....	37
S.C. Code Ann. 15-38-15.....	6, 12, 26, 27
S.C. Code Ann. 15-38-15.....	25
S.C. Code Ann. 15-38-15).....	5, 26
S.C. Code Ann. 15-73-10(1) (2005).....	13
S.C. Code Ann. 15-73-20.....	24
S.C. Code Ann. 15-73-30.....	23, 24
S.C. Code Ann. 36-1-103.....	23
S.C. Code Ann. 36-2-714 and 36-2-715 (2003).....	12
S.C. Code Ann. 44-53-190(D)(24) (Supp. 2015).....	6
S.C. Code Ann. 56-5-2910.....	2, 6
S.C. Code Ann. 56-5-2910.....	6
S.C. Code Ann. 56-5-2930(A) (Supp. 2015).....	6
S.C. Code Ann. 56-5-2945.....	2, 6
S.C. Code Ann. 61-6-4070.....	10
S.C. Const. art. XVII.....	10, 11
Section 15-38-15.....	26
Section 36-2-715(2)(b).....	12

## RULES

244 (b), SCACR.....	10
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## OTHER AUTHORITIES

David G. Owen, <u>Products Liability Law</u> 847 (3d ed. 2015).....	13, 17, 39
Restatement (2d) of Torts § 402A.....	22
Restatement (Second) of Torts § 465(2).....	29
Restatement (Second) of Torts, § 5.....	14
Restatement (Third) Of Torts: Apportionment of Liability § 26.....	36
Restatement (Third) of Torts: Apportionment of Liability § 7.....	35
Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 26.....	30
Restatement (Third) of Torts: Products Liability, § 17.....	17
Restatement (Third) of Torts: Apportionment of Liability, § 1.....	17, 25
Restatement (Third) Of Torts: Products Liability, § 16.....	38
<u>The Puzzle of Comment j</u> ,	
55 Hastings L.J. 1377 (2004).....	24
UCC Article 2.....	13
Uniform Commercial Code § 1-103.....	13, 23
W. Prosser, W.P. Keeton, D. Dobbs, R. Keeton, and D. Owen, <u>Prosser and Keeton on the Law of Torts</u> § 67, at 471 (5th ed. of Prosser on Torts 1984).....	22

## INTRODUCTION

This case involves a driver and his passenger who smoked the drug “Spice” (synthetic marijuana) “until they were high” and then took turns driving the Plaintiff’s pickup truck around the upstate. The driver ran a stop sign and drove into the path of a truck and trailer weighing more than seven tons and travelling at nearly 50 mph. The driver of the Plaintiff’s pickup, the passenger (the Plaintiff), and the driver of the other vehicle were all injured (fatally in the case of the driver of the Plaintiff’s pickup). The fundamental issue raised by both certified questions is whether, under circumstances like this, impaired drivers bear *any* responsibility for the injuries they cause to themselves and—because the same principles of proximate cause apply to impaired drivers whether they are plaintiffs or defendants—for injuries they cause to others.

The answer would seem to be obvious. Both the Legislature and this Court have effectuated the clear policy of the state by acting to reduce the serious public health problem of impaired driving.<sup>1</sup> Among other things, the Legislature has made felony driving under the influence an offense separate from reckless vehicular homicide, with

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<sup>1</sup> According to data compiled by the National Highway Traffic Safety Administration (“NHTSA”), between 2005 and 2014, there were almost 8,400 fatal accidents on South Carolina’s highways. Of these, 41% involved alcohol impaired-drivers, compared to 31% nationwide. See NHTSA, Fatal Accident Reporting System (FARS) Encyclopedia (available at <http://www-fars.nhtsa.dot.gov/Crashes/CrashesAlcohol.aspx>). South Carolina’s rate of alcohol-related fatalities per 100 million vehicle miles travelled is 0.66, twice the rate for the country as a whole. NHTSA, Traffic Safety Facts: South Carolina, 2011-2015 (available at <https://cdan.nhtsa.gov/SASStoredProcess/guest>). These figures do not include fatal accidents involving drug-impaired drivers, but nationwide NHTSA studies have shown that the percentage of drivers with detectable levels of illegal drugs increased significantly between 2007 and 2014; for marijuana alone, there was a 48% increase in drivers with detectable levels of THC. NHTSA Research Note, Results of the 2012-2014 National Roadside Survey of Alcohol and Drug Use by Drivers (February 2015) (available at <http://www.nhtsa.gov/Driving-Safety/Research-&-Evaluation/Alcohol-and-Drug-Use-By-Drivers>).

criminal fines up to five times larger and prison sentences up to two times longer.<sup>2</sup> In addition, although the Legislature otherwise allows apportionment of fault among joint tortfeasors, where the fault of a defendant involves impairment from drugs or alcohol that defendant is not allowed to apportion and is responsible for 100% of the judgment. In similar fashion, this Court has held that there is an outright bar against recovery for injuries to impaired plaintiff-drivers who cause their own injuries, even though the conduct of others may have contributed to those injuries. Lydia v. Horton, 355 S.C. 36, 42, 583 S.E.2d 750, 753 (2003).

Plaintiff now urges this Court to undercut these efforts and to reward impaired drivers who cause injuries to themselves (and others) by allowing them to recover damages that will likely exceed even the maximum permissible criminal fines that seek to punish and deter this very same behavior. Moreover, Plaintiff advocates a rule that would allow negligent and impaired drivers to escape civil responsibility for injuries they cause to themselves. But nothing in South Carolina law requires this Court to reward and excuse impaired drivers in this fashion. Decisions of this Court in fact support holding, as a matter of public policy, that impaired drivers should not be allowed to “deflect the responsibility that should be imposed upon [themselves] towards another,” and therefore should not be allowed to recover for injuries that they have caused to themselves. Id. At the very least, this Court should apply ordinary principles of proximate cause (and common sense) and hold that impaired drivers and other negligent plaintiffs in product liability cases are subject to the same comparative fault principles that apply in other

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<sup>2</sup> Compare S.C. Code Ann. 56-5-2945(A) (Supp. 2015) (felony driving under the influence) with S.C. Code Ann. 56-5-2910 (Supp. 2015) (reckless vehicular homicide).

actions, without regard to whether the claims are based on negligence, strict liability, or breach of warranty.

### **QUESTIONS PRESENTED**

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

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

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

### **STATEMENT OF THE CASE**

This is a product liability action brought against General Motors LLC ("GM"). It arises out of a November 11, 2012, collision between a 1987 Chevrolet pickup truck and a Ford F-350 truck towing a horse trailer. The Chevrolet pickup was being driven at the time by Allen Brazell, but it was owned by Plaintiff Reid Harold Donze ("Plaintiff"), who was the front-seat passenger and had given Brazell permission to drive. Plaintiff testified that before the accident, they had both smoked the drug "Spice" "until we were high." The accident occurred because Brazell drove through a stop sign and pulled directly into the path of a Ford F-350 truck towing a horse trailer. Having no time to stop, the Ford struck the Chevrolet, and a post-collision fire ensued. Brazell died in the crash, and Plaintiff was severely burned. The driver of the Ford, Clyde Rhyne, was also injured.

Brazell's estate filed an action against GM in the South Carolina Court of Common Pleas. Brazell v. General Motors, LLC f/k/a General Motors Corporation and Goforth Auto, Inc. C/A No. 2013-CP-23-06438. Plaintiff filed a separate action against GM in the District Court for the District of South Carolina alleging negligence, strict liability, and breach of warranty. He subsequently dismissed his negligence claim. He alleges that the post-collision fire was caused by a defect in the placement of the Chevrolet's fuel tank. He does not allege that he suffered any significant injury in the collision other than his burn injuries.

GM claims that Brazell, the driver, was negligent in driving while under the influence of "Spice," and that the driver's negligence should be imputed to Plaintiff because the two were engaged in a joint enterprise.<sup>3</sup> GM claims that the driver's impaired driving (imputed to Plaintiff) bars any recovery as a matter of South Carolina public policy. Alternatively, GM claims that the driver's imputed negligence, combined with Plaintiff's own independent negligence, should reduce or bar Plaintiff's recovery under principles of comparative fault.

The district court recognized that Plaintiff "vehemently contests" GM's allegations regarding the use of Spice and the joint enterprise, but held that these issues presented genuine issues of material fact for a jury to decide. The District Court did not certify any question concerning joint enterprise or imputation of a driver's negligence to a passenger. Rather, the questions certified by the district court ask (1) whether

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<sup>3</sup> See Lollar v. Dewitt, 255 S.C. 452, 456-57, 179 S.E.2d 607, 609 (1971) ("[I]n order to constitute joint enterprise so that the negligence of a driver of a vehicle may be imputed to an occupant of the vehicle, there must be a common purpose and a community of interest in the object of the enterprise and an equal right to direct and control the conduct of each other with respect thereto.").

“comparative negligence in causing an accident” can be considered in a crashworthiness case brought on theories of breach of warranty and strict liability, and (2) whether this State’s public policy bar against “impaired drivers” recovering damages applies in a crashworthiness case. Thus, the questions certified by the District Court can be answered as if Plaintiff had been the impaired driver.

**I. PUBLIC POLICY BARS RECOVERY BY IMPAIRED DRIVERS WHO CAUSE THEIR OWN INJURIES.**

GM begins with the second question certified by the District Court: whether South Carolina’s public policy bars vehicle drivers from recovering damages in crashworthiness cases when their own impaired driving is a cause of their injuries. GM begins with this issue because the same public policy considerations that should bar any recovery by an impaired driver who causes his own injuries—and perhaps injuries to others—should also inform this Court’s rulings on the comparative fault issues. Nevertheless, this policy bar is a distinct defense, independent of comparative fault. Lydia, 355 S.C. at 42, 583 S.E. 2d at 754.

**A. South Carolina Public Policy Promotes Public Safety by Discouraging and Punishing Impaired Drivers—Not By Rewarding Them With Large Damage Awards in Civil Actions.**

In a variety of contexts, the courts and the Legislature of this State have articulated a policy of protecting public safety by discouraging people from driving while impaired by drugs or alcohol. For example, the South Carolina Contribution Among Tortfeasors Act modifies joint and several liability and provides that most at-fault tortfeasors found less than 50% at fault are liable only for their percentage of fault. S.C. Code Ann. 15-38-15(A) (Supp. 2015). But the Legislature refused to extend the benefits of this statute to any tortfeasor whose conduct involves the “use, sale, or possession of

alcohol or illicit use, sale, or possession of drugs.” S.C. Code Ann. 15-38-15(F) (Supp. 2015). Under this statute, therefore, a non-impaired driver found 30% at fault for running a red light will be liable for only 30% of the damages, and yet an impaired driver found 30% at fault for running the same red light will be liable for 100% of the recoverable damages.

The policy of deterring, punishing, and refusing to reward impaired drivers is also reflected in criminal statutes that similarly impose more serious penalties on impaired drivers who cause injuries than on non-impaired drivers. A reckless driver who causes death to another can be fined up to \$5,000 and imprisoned up to ten years. S.C. Code Ann. 56-5-2910(A) (Supp. 2015). In contrast, a driver who causes death to another while under the influence of alcohol or drugs, even if only negligent, can be fined up to \$25,100 and imprisoned for up to 25 years. S.C. Code Ann. 56-5-2945(A)(2) (Supp. 2015).

Plaintiff’s position in this case is utterly inconsistent with the policy underlying this and similar legislation.<sup>4</sup> His position is that criminally-responsible impaired drivers

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<sup>4</sup> Other criminal and civil statutes also reflect the public policy that supports punishing, not rewarding, impaired drivers, even when they do not actually cause injuries to others. For example, the South Carolina Code criminalizes the mere possession of synthetic cannabinoids, like “Spice,” as a Schedule 1 controlled substance. See S.C. Code Ann. 44-53-190(D)(24) (Supp. 2015); § 44-53-370(c)-(d) (Supp. 2015). Persons in South Carolina are also subject to criminal prosecution for driving under the influence of “any [] drug or a combination of drugs or substances which cause impairment to the extent that the person’s faculties to drive a motor vehicle are materially and appreciably impaired[.]” S.C. Code Ann. 56-5-2930(A) (Supp. 2015). And there are a host of other provisions intended to deter and punish driving by those who are impaired by drugs or alcohol. See, e.g., S.C. Code Ann. 56-5-2910(B)(1) (Supp. 2015) (courts do not have the discretion to reinstate a driver’s license that has been revoked for reckless vehicular homicide if drugs and/or alcohol were involved in the accident that caused the revocation); § 56-5-2930(A)(1)-(4) (Supp. 2015) (progressively increasing penalties for subsequent offenses for driving under the influence of drugs and/or alcohol); § 56-5-2945 (Supp. 2015) (enhanced penalties for drivers that cause great bodily injury or death to another while driving under the influence of drugs and/or alcohol); § 56-5-2946(A) (Supp. 2015) (requiring drivers to submit to breath, blood, or urine tests for the presence of drugs and/or alcohol if there is probable cause to believe the person violated § 56-5-2945); §

who can find another party to blame for injuries they and others have sustained in an accident they have caused should be allowed to recover damages, even though those damages are likely to be far in excess of the criminal fines to which they are subject. But this Court's decisions do not require such bizarre results. See Tobias v. Sports Club, 332 S.C. 90, 504 S.E.2d 318 (1998).

In Tobias, according to the decision of the Court of Appeals, the notably-intoxicated plaintiff was served liquor by a bar. Tobias v. Sports Club, 323 S.C. 345, 347, 474 S.E.2d 450, 451 (Ct. App. 1996). While driving home, he crossed the centerline and collided with another vehicle. Id. The collision resulted in the death of one of the other vehicle's occupants and injury to another. Id. The plaintiff was probably guilty of a felony under § 56-5-2945 (causing serious injury or death from driving under the influence of drugs or alcohol) and subject to a fine and imprisonment, but he was also injured in the accident and sued the tavern that served him alcohol while he was noticeably intoxicated. Id. This Court ruled that the plaintiff was barred from recovering from the tavern because "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 319-320. Among the decisions cited to support this conclusion was a decision of the Oklahoma Supreme Court in which that court observed:

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56-5-2947 (Supp. 2015) (persons guilty of driving under the influence of drugs and/or alcohol are also guilty of child endangerment if, while under the influence, they had a passenger under the age of sixteen); § 56-5-2950(A) (Supp. 2015) (imposing implied consent to breath, blood, or urine tests for drugs in the event a suspect is arrested in connection with allegations of acts related to driving under the influence of drugs); § 56-5-2990(A) (Supp. 2015) (requiring the Department of Motor Vehicles to suspend a person's driver's license when the person has been convicted of driving under the influence of drugs and/or alcohol).

Governmental paternalism protecting people from their own conscious folly fosters individual irresponsibility and is normally to be discouraged. . . . To go yet another step and allow monetary recovery to one who knowingly becomes intoxicated and thereby injures himself is in our view morally indefensible.

Ohio Casualty Ins. Co. v. Todd, 813 P.2d 508, 511-12 (Okla. 1991) (cited in Tobias, 332 S.C. at 93, 504 S.E. 2d at 320). Like this Court in Tobias, the Ohio Casualty court concluded that “[s]ocietal considerations aimed at deterring drunken driving forbid the driver’s recovery of damages.” Ohio Casualty, 813 P.2d at 512. See also Bertelmann v. Taas Assocs., 69 Haw. 95, 100, 735 P.2d 930, 933-34 (1987) (cited in Tobias, 332 S.C. at 93, 504 S.E. 2d at 320) (“To allow recovery in favor of one who has voluntarily procured a quantity of liquor for his or her own consumption with full knowledge of its possible or probable results ‘would savor too much of allowing [said] person to benefit by his or her own wrongful act.’”).

In Lydia v. Horton, 355 S.C. 36, 42, 583 S.E. 2d 750, 754 (2003), this Court, though asked to limit this outright bar to dram shop cases, “appl[ied] these same public policy considerations,” confirming that there is no reason in law, logic, or public policy to limit Tobias to cases where intoxicated plaintiffs bring actions against the persons or entities who served them alcohol. The defendant in Lydia did not serve alcohol to the plaintiff; rather, he entrusted his car to the plaintiff, whom he should have known was intoxicated. The plaintiff wrecked the car and sued the defendant for negligent entrustment. This Court held that “[t]he essence of this case and the Tobias case are the same, for in both cases, the plaintiff, who was voluntarily intoxicated when the accident occurred, is attempting to deflect the responsibility that should be imposed upon himself toward another.” Lydia, 355 S.C. at 42, 583 S.E. 2d at 754.

Plaintiff's attempts to avoid the clear import of Tobias and Lydia are meritless. He suggests the two cases did not create a new affirmative defense but simply refused to recognize a new cause of action. But the causes of action alleged in both cases were existing ones—negligence and negligent entrustment—and this Court held that impaired drivers could not recover under either theory. In fact, it so held while simultaneously recognizing that third parties injured by the intoxicated driver *did* have negligence causes of action against the supplier of alcohol and the negligent entrustor. Both cases, therefore, effectively created a public policy-based affirmative defense to existing causes of action. The public policy underlying the decisions in Tobias and Lydia applies equally in this case, regardless of the name attached to Plaintiff's causes of action.

Plaintiff also argues that to the extent Tobias and Lydia addressed defenses, they did not “create[] a new defense separate from comparative negligence.” (Plaintiff's Br. at p. 28). Plaintiff's assertion was explicitly rejected by this Court in Lydia, which there stated that “we disagree with the Court of Appeals' conclusion that the Tobias public policy considerations only have bearing in comparing fault but have no bearing on whether or not to impose an outright bar.” Lydia at 42, 583 S.E.2d at 754. It then separately addressed both comparative fault and the public policy bar, and it concluded that the intoxicated driver's claim was barred “because his negligence outweighed [the defendant's] *and* because of the public policy considerations we set forth in Tobias.” Lydia at 43, 583 S.E.2d at 754 (emphasis added).

Plaintiff's argument that Tobias and Lydia are based solely on comparative fault principles is based primarily on this Court's *withdrawn* opinion in Marcum v. Bowden, Op. No. 26035, 2005 S.C. LEXIS 251, 2005 WL 2129176 (S.C. Sup. Ct., filed Aug. 29,

2005). But this *withdrawn* opinion addressed and distinguished Lydia's holding that the driver's intoxication necessarily outweighed the negligence of the person who simply entrusted an automobile to that driver. The holding of the withdrawn opinion was that "unlike the situation in Lydia, it is possible that a social host could be more than fifty percent negligent when an underage guest has become intoxicated and subsequently injures himself."

The controlling opinion in Marcum, Marcum v. Bowden, 372 S.C.452, 643 S.E. 2d 85 (2007), did permit an intoxicated adult under age 21 to pursue recovery from social hosts who served him alcohol, but only because of a unique constitutional and statutory scheme that treats adults between 18 and 20 as children with respect to alcohol, and only with respect to alcohol. See S.C. Const. art. XVII, 14 (citizens over 18 are "endowed with full legal rights and responsibilities, provided, that the General Assembly may restrict the sale of alcoholic beverages to persons until age 21"); S.C. Code Ann. 61-6-4070 (unlawful to provide alcohol to person under 21). If Marcum had involved a driver impaired by a drug other than alcohol (such as "Spice," which at the time was legal), the same public policy of protecting public safety by discouraging impaired driving that was articulated in Tobias and Lydia would have applied, and that policy would have required the same result: The impaired adult driver, who had full rights and responsibilities under the South Carolina Constitution, would not have been allowed to recover for injuries he himself caused.<sup>5</sup> And that same policy applies with equal force here.

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<sup>5</sup> Plaintiff obliquely suggests that Marcum's analysis might be applicable here because he and the driver were both between 18 and 20. But this is not part of the certified question. See 244 (b), SCACR ("The Supreme Court will not consider any documents or other evidentiary materials unless the certifying court has submitted those materials."). Besides, this case does not involve alcohol, and the South Carolina Constitution provides

Finally, Plaintiff cites several post-Lydia cases considering evidentiary and jury instruction issues in various types of tort cases where there were fact questions on whether a driver was impaired by drugs or alcohol to argue these decisions “would have been unnecessary if there were a public policy bar to such claims.” (Plaintiff’s Br. at p. 31). The cases primarily deal with the extent to which there was evidence of driver impairment under their specific facts, not with the ramifications of any impairment. None of these cases considered, and none rejected, the applicability of the policy bar, which seems to indicate the respective defendants never raised it. For example, Plaintiff cites to a single crashworthiness case, Priester v. Cromer, 401 S.C. 38, 736 S.E.2d 249 (2012), where this Court ruled that summary judgment had been properly granted in favor of Ford Motor Company on federal preemption grounds. (Plaintiff’s Br. at p. 30.) The Court did not address the applicability of the policy bar because Ford pursued and won summary judgment on preemption grounds. As the Court of Appeals has colorfully explained, “Appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.” State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (1991) (citing Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984).

It is this State's public policy to enhance public safety by discouraging impaired driving. In the end, GM asks only that this policy, articulated in Tobias and Lydia and reflected in the Contribution Among Tortfeasors Act, be applied to both plaintiffs and defendants alike, when they engage in such behavior. As discussed above, the

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that, with the sole exception of alcohol, citizens over 18 are "endowed with full rights and responsibilities[.]" S.C. Const. art. XVII, 14 (emphasis added).

Legislature holds impaired defendant-drivers 100% responsible for a plaintiff's recoverable damages. S.C. Code Ann. 15-38-15(F) (Supp. 2015). This Court should similarly hold impaired plaintiff-drivers 100% responsible for their own damages.

**B. No Legislation Allows Impaired Drivers To Recover For Injuries They Themselves Have Caused.**

Not only do various State statutes implicitly *deny* drug-impaired drivers recovery, but no statutes *allow* recovery in such cases. Plaintiff argues (with respect to both questions certified by the District Court) that breach of warranty and strict products liability in tort, as creations of the Legislature, cannot be modified by judicial decision without violating the separation of powers clause of the South Carolina Constitution. But in making this argument, Plaintiff fails to recognize the big difference between altering a statute's provisions, and supplementing them. And the Plaintiff's argument also ignores the actual language of the relevant statutes, to say nothing of their policies.

Recovery of damages for personal injury caused by a breach of warranty is governed by South Carolina's version of the Uniform Commercial Code, S.C. Code Ann. 36-2-714 and 36-2-715 (2003). Section 36-2-715(2)(b) defines "consequential damages" available for breach of warranty to include "injury to person." And § 36-2-714(3) provides that "consequential damages" may be recovered "[i]n a proper case." But the statute does not define "proper case." "Because the Code does not define what is a 'proper case,' we must look to state common law to resolve the issue." Aldon Indus., Inc. v. Don Myers & Assocs., Inc., 517 F.2d 188, 190 (5th Cir. 1975). In other words, it is the common law articulated by this Court that governs whether any particular case is a "proper case" to award damages for personal injury as consequential damages for breach

of warranty. See, e.g., Uniform Commercial Code § 1-103, Official Comment 2 (“principles of common law and equity may supplement provisions of the Uniform Commercial Code”); David G. Owen, Products Liability Law 847 (3d ed. 2015) (“[B]ecause the Official Text [of UCC Article 2 governing warranty law] did not explicitly address the subject of buyer conduct, the enactment of the UCC did not displace prior law. Nor did it interfere with the ongoing development of supplementary law on how a buyer’s conduct should affect a warranty claim.”). Consistent with this, for example, most courts in comparative fault jurisdictions apply comparative fault principles to personal injury claims for breach of implied warranty, with the result that otherwise recoverable damages for personal injury (“consequential damages”) are limited or barred. See, e.g., JCW Elecs., Inc. v. Garza, 257 S.W.3d 701, 707 (Tex. 2008) (“[T]his Court, and many others, have historically included breach of implied warranty claims as part of the mix when comparing fault in tort-based litigation.”) (collecting cases). Similarly, this Court, consistent with this State’s policy, may hold that breach of implied warranty actions brought by impaired drivers for injuries they have caused to themselves are not “proper cases” in which to award consequential damages.

The statute codifying strict products liability in tort similarly leaves numerous issues for judicial decision. S.C. Code Ann. 15-73-10(1) (2005), adopting § 402A of the Restatement (Second) of Torts, provides as follows:

One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property *is subject to liability* for physical harm caused to the ultimate user or consumer, or to his property, if (a) The seller is engaged in the business of selling such a product, and (b) It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(Emphasis added.) The use of the words “is subject to liability” rather than “is liable for” was unquestionably deliberate, because the Restatement specifically defines the words “subject to liability”:

The words “subject to liability” are used throughout the Restatement of this Subject to denote the fact that the actor’s conduct is such as to make him liable for another’s injury, if

(a) the actor’s conduct is a legal cause thereof, and

***(b) the actor has no defense applicable to the particular claim.***

Restatement (Second) of Torts, § 5 (emphasis added). Thus, whether an actor who is “subject to liability” under § 402A—and therefore under § 15-73-10—is actually liable depends on the defenses that are available to the actor. Available defenses may include established tort defenses, but they may also include “reasons not based upon any principle of tort law” and which are “not within the scope of the Restatement of this Subject.” *Id.*, Comment a. In fact, in the first Restatement this section was limited to the defense of contributory negligence, but “it was changed to include other defenses.” *Id.*, Reporter’s Notes. Thus, § 402A and § 15-73-10 were deliberately left subject to any other defense that might be applicable, including recognized defenses beyond the specific provisions of the Restatement. This, of course, is consistent with this Court’s recognition that “[t]he Legislature [by enacting § 15-73-10] has expressed no intention to foreclose court consideration of developments in products liability law.” Branham v. Ford Motor Co., 390 S.C. 203, 220, 701 S.E.2d 5, 14 (2010).

In short, nothing in the relevant statutes, or the doctrine of separation of powers, requires this Court to allow recovery by impaired drivers for injuries they cause to

themselves. In fact, to do so would be contrary to the public policy of this state as articulated by both this Court and by the Legislature itself.

**II. COMPARATIVE NEGLIGENCE IN CAUSING AN ACCIDENT SHOULD APPLY IN ALL PRODUCT LIABILITY CASES, INCLUDING CRASHWORTHINESS CASES BASED ON STRICT LIABILITY AND BREACH OF WARRANTY.**

The first question certified by the District Court embraces two subsidiary questions: (1) Does comparative negligence apply at all to product liability cases based upon breach of warranty or strict liability, and, if so (2) can comparative negligence in causing an accident be considered in a crashworthiness case when the plaintiff is seeking damages relating only to the plaintiff's enhanced injuries? Even if this Court determines that the public policy bar does not extend to product liability cases, the same underlying policy considerations at least support this Court in ruling, like the courts of almost every other state, that comparative fault applies to impaired drivers and other negligent plaintiffs, regardless of the theory of recovery on which their claims are based.

In South Carolina, product liability cases may be brought under theories of strict liability, negligence, and breach of warranty. Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 538, 462 S.E.2d 321, 325 (Ct. App. 1995). But, regardless of the theory of recovery, a product liability plaintiff must always establish that "(1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) that the product at the time of the accident was in essentially the same condition as when it left the hands of the defendant." Id. at 539, 462 S.E.2d at 326. Negligence is different only in that a plaintiff must also establish a product manufacturer was negligent in some respect. Id. Despite this difference, if a

plaintiff fails to prove an element common to all theories, then that plaintiff cannot prevail under any theory. Branham v. Ford Motor Co., 390 S.C. 203, 209-12, 701 S.E.2d 5, 8-9 (2010).

Comparative fault's fairness and logic in any context apply equally to *all* product liability cases, including cases brought on theories of breach of warranty and strict liability. Any other result would reward impaired and other *negligent* parties by allowing them to deflect 100% of the responsibility for injuries they have caused to *non-negligent* defendants. The result would be contrary both to sound public policy, the modern law of most other states, and to this State's Contribution Among Tortfeasors Act.

**A. Sound Public Policy Requires Application Of Comparative Negligence Principles To Product Liability Cases Based on Breach of Warranty and Strict Liability.**

In 1991, this Court “join[ed] the vast majority of our sister jurisdictions” and judicially adopted comparative negligence in actions based on negligence, finding that it “is the more equitable doctrine.” Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E. 2d 783 (1991). In 2011, this Court recognized that “South Carolina’s system is essentially a comparative fault system,” and it “encompasses the comparison of ordinary negligence with heightened forms of misconduct such as recklessness, willfulness, and wantonness.” Berberich v. Jack, 392 S.C. 278, 292-293, 709 S.E.2d 607, 614-615 (2011). Under this system, “each party’s relative fault in causing the plaintiff’s injury will be given due consideration.” Id.

Other courts almost uniformly recognize that this same policy—giving due consideration to each party’s relative fault—also encompasses *lesser* forms of “fault” such as strict liability and breach of warranty. See, e.g., Daly v. Gen. Motors Corp., 20

Cal. 3d 725, 739, 144 Cal. Rptr. 380, 388, 575 P.2d 1162, 1170 (1978). In 1978, thirteen years before this Court's decision in Nelson, the California Supreme Court in Daly reviewed the existing case law and found that "the majority of our sister states which have addressed the problem, either by statute or judicial decree, have extended comparative principles to strict products liability." Daly, 20 Cal. 3d at 739, 144 Cal. Rptr. at 388, 575 P.2d at 1170. This overwhelming trend continues to this day. See, e.g., David G. Owen, Products Liability Law §13.3, at 803 (3d ed. 2015)) ("[W]hile some courts disagree, the great majority of courts apply comparative fault to products liability claims based on strict liability in tort."); id. at §13.6, at 849 (in states where comparative fault was adopted by the courts, they generally apply it to warranty claims); Restatement (Third) of Torts: Apportionment of Liability, § 1, Reporters' Notes to Comment b ("Most states now apply their comparative-responsibility system to strict products liability."); Restatement (Third) of Torts: Products Liability, § 17, Comment a ("A strong majority of jurisdictions" have extended the doctrine to apply to all product liability actions, regardless of the theory on which they are brought); JCW Elecs., Inc. v. Garza, 257 S.W.3d 701, 707 (Tex. 2008) ("[T]his Court, and many others, have historically included breach of implied warranty claims as part of the mix when comparing fault in tort-based litigation.") (collecting cases); Whitehead v. Toyota Motor Corp., 897 S.W.2d 684, 691 (Tenn. 1995) ("An overwhelming majority of states have adopted the view that comparative fault should apply to products liability actions based on strict liability."); Coney v. J.L.G. Indus., Inc., 97 Ill. 2d 104, 113, 73 Ill. Dec. 337, 341, 454 N.E.2d 197, 201 (1983) (noting that "[t]he vast majority" of other states had "found comparative negligence theory applicable in strict liability cases.").

Sound public policy and basic fairness suggest that the time has come for this Court to join this overwhelming consensus. As discussed above, sound public policy requires rules of law that discourage driving while intoxicated or impaired; allowing impaired and intoxicated drivers who are subject to criminal fines and imprisonment to recover at all—let alone recover fully—for injuries they have caused to themselves is obviously contrary to that policy. This may be an extreme example, because most forms of plaintiff negligence are not criminal in nature. Nevertheless, a plaintiff's negligence can present a risk not only to the plaintiff but to others—particularly in automotive product liability cases like this—and sound public policy supports discouraging such conduct. Allowing negligent plaintiffs to recover fully by simply changing the name of their theory from “negligence” to “strict liability” or “breach of warranty” renders this policy meaningless with regard to any plaintiff who can find another party to sue for injuries that they have caused to themselves.

It would also produce an anomalous result: Defendants held liable “without fault” for an alleged defect on theories of strict liability in tort or breach of implied warranty must pay all of a plaintiff's damages, no matter how innocent the defendant's conduct may be. On the other hand, defendants held liable for negligence will have their liability reduced, and may even escape liability altogether if their fault is less than the plaintiff's. Nelson, 303 S.C. at 245, 399 S.E.2d at 784. No public policy supports reducing the liability of *negligent* parties, but not the liability of parties held liable “without fault.” See, e.g., Fiske v. MacGregor, 464 A.2d 719, 728 (R.I. 1983) (“Ironically, defendant manufacturers found liable in negligence would have the damages apportioned, despite the fact that their conduct was clearly more culpable than the conduct of those defendants

found liable in strict liability or implied warranty.”); West v. Caterpillar Tractor Co., 547 F.2d 885, 887 (5th Cir. 1977) (allowing the defense of comparative fault in product liability cases based on strict liability and breach of warranty “avoids the anomaly of those jurisdictions in which the specifically negligent (and therefore more plainly culpable) tortfeasor ... may assert the victim’s fault while his strictly-liable or implied warranty-breaching companions may not.”).

Further, as the vast majority of courts have found, applying comparative fault to product liability cases—regardless of the theories of recovery on which such cases are brought—does not undermine the goals of product liability law. The California Supreme Court explained in Daly:

The foregoing goals [the protection of defenseless victims of defects and spreading the cost of compensation] ... will not be frustrated by the adoption of comparative principles. Plaintiffs will continue to be relieved of proving that the manufacturer or distributor was negligent in the production, design, or dissemination of the article in question. Defendant’s liability for injuries caused by a defective product remains strict. The principle of protecting the defenseless is likewise preserved, for plaintiff’s recovery will be reduced *only* to the extent that his own lack of reasonable care contributed to his injury. The cost of compensating the victim of a defective product, albeit proportionately reduced, remains on defendant manufacturer, and will, through him, be “spread among society.” However, we do not permit plaintiff’s own conduct relative to the product to escape unexamined, and as to that share of plaintiff’s damages which flows from his own fault we discern no reason of policy why it should ... be borne by others.

20 Cal. 3d at 736-37, 144 Cal. Rptr. at 386-87, 575 P.2d at 1168-69. Nor will adoption of comparative negligence in product liability cases reduce a manufacturer’s incentive to produce safe products:

First, of course, the manufacturer cannot avoid its continuing liability for a defective product even when the plaintiff’s own conduct has contributed to his injury. The manufacturer’s liability, and therefore its incentive to

avoid and correct product defects, remains; its exposure will be lessened only to the extent that the trier finds that the victim's conduct contributed to his injury. Second, as a practical matter a manufacturer, in a particular case, cannot assume that the user of a defective product upon whom an injury is visited will be blameworthy. Doubtless, many users are free of fault, and a defect is at least as likely as not to be exposed by an entirely innocent plaintiff who will obtain full recovery. In such cases the manufacturer's incentive toward safety both in design and production is wholly unaffected.

20 Cal. 3d at 737-38, 144 Cal. Rptr. at 387, 575 P.2d at 1169.

Plaintiff in this case argues that a plaintiff's negligence cannot be compared to the conduct of the strict liability defendant because strict liability is liability "without fault." Decades of experience in states across the nation, and thousands of cases in which juries have allocated fault among negligent plaintiffs and strictly liable defendants with no apparent difficulty, confirm that this argument is largely semantic in nature. "[S]trict liability has never been, and is not now, absolute liability" and "under strict liability the manufacturer does not thereby become the insurer of the safety of the product's user." Daly, 20 Cal. 3d at 733, 144 Cal. Rptr. at 384, 575 P.2d at 1166. Thus, in some sense at least, there is indeed "fault" associated with designing and marketing a defective product that creates an unreasonable danger to the public. See, e.g., Coney, 97 Ill. 2d 104 at 113, 73 Ill. Dec. at 341, 454 N.E.2d at 201. The Oregon Supreme Court addressed the issue at length and explained as follows:

[I]f the plaintiff's behavior which was one cause of the injury is alleged to have been negligent or otherwise "fault," it is to be measured against behavior that would have been faultless under the circumstances. The factfinder is to determine the degree to which the plaintiff's behavior fell short of that norm and express this deficit as a numerical percentage, which then is applied to diminish the recoverable damages. There necessarily must be some comparable assessment of the fault attributable to defendants as a departure from the norm invoked against them (which, in products liability, will involve the magnitude of the defect rather than

negligence or moral “blameworthiness”) in order to determine which is greater. In this comparison, the benchmark for assessing a defendant’s fault for marketing a product which is dangerously defective in design, manufacture, or warning is what the product should have been without the defect. The benchmark for the injured claimant’s fault is conduct which would not be unlawful or careless in any relevant respect.

Sandford v. Chevrolet Div. of Gen. Motors, 292 Or. 590, 607, 642 P.2d 624, 633-34 (1982); see also, e.g., Dippel v. Sciano, 37 Wis. 2d 443, 462, 155 N.W.2d 55, 65 (1967) (“[A] defective product can constitute or create an unreasonable risk of harm to others. If this unreasonable danger is a cause, a substantial factor, in producing the injury complained of, it can be compared with the causal contributory negligence of the plaintiff.”). In any event, as the California Supreme Court has explained, “[f]ixed semantic consistency at this point is less important than the attainment of a just and equitable result.” Daly, 20 Cal. 3d at 736, 144 Cal. Rptr. at 386, 575 P.2d at 1168.

[T]he expressed purposes which persuaded us in the first instance to adopt strict liability in California would not be thwarted were we to apply comparative principles. What would be forfeit is a degree of semantic symmetry. However, in this evolving area of tort law in which new remedies are judicially created, and old defenses judicially merged, impelled by strong considerations of equity and fairness we seek a larger synthesis. If a more just result follows from the expansion of comparative principles, we have no hesitancy in seeking it [in order to] promote the equitable allocation of loss among all parties legally responsible in proportion to their fault.

20 Cal. 3d at 737, 144 Cal. Rptr. at 387, 575 P.2d at 1169; accord, e.g., Fiske, 464 A.2d at 729 (“The contention that such a comparison amounts to mixing apples and oranges is nothing more than an argument based on semantics. Adhering to such artificial distinctions would result in a windfall for plaintiffs, in that their conduct, however

culpable, could not be taken into account as long as it fell short of their assuming the risk.”).<sup>6</sup>

**B. South Carolina Statutes Permit this Court to Apply Comparative Negligence In Strict Products Liability Cases.**

Apart from the uniformly-rejected “semantics” argument, the Plaintiff’s principal argument against applying comparative negligence to product liability claims for breach of implied warranty under the UCC and strict products liability in tort under the 402A statute is that these causes of action were legislatively created and so cannot be modified by judicial decision without violating the separation of powers clause of the South Carolina Constitution. But nothing in the UCC even addresses comparative fault, because the comparative fault doctrine had not developed at the time the UCC was drafted in the 1940s and 1950s.<sup>7</sup> As previously discussed, the UCC allows consequential damages for breach of warranty in a “proper case,” but it does not define “proper case.” S.C. Code Ann. 36-2-714(3); 36-2-715(2)(b). The Legislature left it to this Court to apply its provisions in a way that is consistent with the purposes of the commercial code, and those purposes include “moderniz[ation] of the law” and “mak[ing] uniform the law

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<sup>6</sup> If the Court is troubled by the semantics of “comparing” the “fault” of a negligent plaintiff to the “fault” of a defendant held liable “without fault,” it can address the issue in other terms, such as “comparative responsibility” or “equitable apportionment.” See, e.g., Daly, 575 P.2d at 1172 (mentioning but not adopting “equitable apportionment”); Gibbons v. Luby’s Inc., No. 02-12-00202-CV, 2015 Tex. App. LEXIS 9234, at \*28 (App. Aug. 31, 2015) (“The system of comparative negligence replaced contributory negligence, and comparative negligence was then replaced with the comparative responsibility framework ....”); Restatement (Third): Apportionment of Liability § 8, comment a (explaining that “assigning responsibility” is a more accurate description of the process and that “the term ‘comparing responsibility’ is used pervasively by courts and legislatures”).

<sup>7</sup> See W. Prosser, W.P. Keeton, D. Dobbs, R. Keeton, and D. Owen, Prosser and Keeton on the Law of Torts § 67, at 471 (5th ed. of Prosser on Torts 1984) (Until 1969, only a few states had begun to replace the contributory negligence bar with comparative fault damages apportionment). Restatement (2d) of Torts § 402A and its comments, on the other hand, were drafted some years before.

among the various jurisdictions. S.C. Code Ann. 36-1-103; Uniform Commercial Code § 1-103, Official Comment 2. Applying comparative fault to breach of warranty cases will promote both of these objectives without contravening any statutory provision.

Nor does the Plaintiff's legislation exclusivity argument under § 15-7-10, enacting § 402A of the Restatement (Second), have any more merit. Plaintiff asserts that the Legislature has "adopted" Comment n to § 402A, and further argues that Comment n "states that comparative negligence is not applicable to strict liability." (Plaintiff's Br. at pp. 7-8.) In fact, however, the Legislature did not "adopt" Comment n at all, but merely provided that the comments to § 402A are "incorporated herein by reference thereto as the legislative intent of this chapter." S.C. Code Ann. 15-73-30. Nothing in § 15-73-30 suggests that the Legislature intended to chain this Court, rigidly and forever, to inflexible "rules" that quite obviously would need to grow and adjust to new problems as thousands of judicial decisions in all the states attempted to understand, adapt, and apply these modern principles of products liability law to myriad new situations. In fact, first in Claytor v. General Motors Corp., 277 S.C. 259, 265, 286 S.E.2d 129, 132 (1982), and more recently in Branham, 390 S.C. at 220, 701 S.E.2d at 14, this Court ruled directly contrary to explicit § 402A comments. In both cases, this Court defined liability for design defects according to modern risk-utility principles rather than the outmoded consumer expectation principles expressly articulated in Comments g and i. By so doing, this Court chose to apply the 402A statute in the spirit in which the Legislature intended—to modernize products liability law, to make this field of law current and applicable to a modern, ever-changing world.

Even if this Court were to ignore its holdings in Claytor and Branham, and heed Plaintiff's call for a technical and rigid interpretation of § 15-73-30, the statutory language does not support the view that it prohibits this Court from applying comparative fault to claims brought under the statute. First, like the UCC, Comment n's discussion of *contributory* negligence was drafted well before the subsequent development of comparative fault and so hardly could have addressed a doctrine not yet part of American law.<sup>8</sup> For this reason, Comment n understandably says nothing about comparative negligence of any kind, nor anything, of course, about conduct that consists of driving while intoxicated or otherwise impaired.

As previously explained, the Legislature never did "adopt" any of § 402A's comments, especially not the entire comment n. For when the Legislature really did intend to adopt a specific portion of Comment n as a legislative command, it did so. Thus, in S.C. Code Ann. 15-73-20, the statute adopts in black letter, verbatim, the last sentence of comment n: "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." Plaintiff's position would treat every sentence in all of the many comments to § 402A as if they had the same weight as Comment n's final sentence—a specific sentence which, unlike the rest of the comments, the Legislature *did* in fact "adopt."

Moreover, on its face, Comment n applies explicitly *only* to cases where the plaintiffs' negligence "consists *merely* in the failure to discover the defect in the product,

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<sup>8</sup> And certainly not yet part of South Carolina law. Dean Prosser likely drafted comment n about 1959 or 1960. See D. Owen, The Puzzle of Comment j, 55 *Hastings L.J.* 1377, 1391 (2004).

or to guard against the possibility of its existence.” (Emphasis added.) “Comment n [is] silent about a plaintiff’s negligence that [is] more than a mere failure to discover or guard against the possibility of a product defect ....” Restatement (Third) of Torts: Apportionment of Liability, § 1, Reporters’ Notes to Comment b. Other courts who have looked to Comment n for guidance in adopting comparative negligence in strict liability cases have concluded that all forms of negligence by a plaintiff can and should be considered in allocating fault *except* failure to discover or guard against the alleged defect. See, e.g., Sandford, 292 Or. at 610, 642 P.2d at 635 (“‘Fault’ includes contributory negligence except for such unobservant, inattentive, ignorant, or awkward failure of the injured party to discover the defect or to guard against it as is taken into account in finding the particular product dangerously defective.”); Busch v. Busch Constr., Inc., 262 N.W.2d 377, 394 (Minn. 1977) (“[A] consumer’s negligent failure to inspect a product or to guard against defects is not a defense and thus may not be compared with a distributor’s strict liability. All other types of consumer negligence, misuse, or assumption of the risk must be compared with the distributor’s strict liability....”).

In short, nothing in Comment n reflects a Legislative intent to immunize drivers who cause injuries to themselves and others from the consequences of their highly negligent conduct.

**C. The Contribution Among Tortfeasors Act Adopts Comparative Fault For All Cases Alleging Personal Injury.**

Of greater significance is another statute, the South Carolina Contribution Among Joint Tortfeasors Act, S.C. Code Ann. 15-38-15. That statute, enacted in 2005,

effectively requires application of comparative fault principles to all actions to recover damages for personal injury.

Section 15-38-15(A) applies in any “action to recover damages resulting from personal injury” where the damages are caused by more than one defendant.<sup>9</sup> With respect to actions for personal injury, that section applies regardless of the cause of action asserted. It provides that a jury must determine the “fault” of all the defendants and the “fault (comparative negligence)” of the plaintiff. 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.’” A defendant whose conduct is determined to be less than 50% of the “total fault” is only liable for the percentage of damages allocated by the jury to that defendant. S.C. Code Ann. 15-38-15(A).

This statute would simply make no sense unless the Legislature intended comparative fault to apply to all cases, including all product liability cases (whether based on negligence, strict liability, or breach of warranty). To illustrate, consider how the statute would apply to the facts of this case if there were two defendants (GM and the driver of the other vehicle involved in this accident, the Ford truck) and the jury found

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<sup>9</sup> Section 15-38-15(A) provides in full as follows:

In an action to recover damages resulting from personal injury, wrongful death, or damage to property or to recover damages for economic loss or for noneconomic loss such as mental distress, loss of enjoyment, pain, suffering, loss of reputation, or loss of companionship resulting from tortious conduct, if indivisible damages are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the indivisible damages as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of plaintiff. 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.

GM strictly liable and the other defendant negligent. If Plaintiffs are correct and strict liability truly imposes liability “without fault,” the jury would be required to allocate fault as to the plaintiff and the other defendant (the driver of the Ford truck), but it could not allocate fault to GM. Yet—because the statute expressly provides that a defendant can be held liable only for the percentage of fault allocated to it, this would mean that *GM could not be held liable at all*. But the result would be drastically different if the jury determined that the other defendant was not liable. Under those circumstances, § 15-38-15(A) would not apply, because by its terms it applies only where two or more defendants cause the same injury. Under Plaintiff’s theory, GM in that instance would be liable for 100% of the damages, regardless of any fault of the Plaintiff, no matter how egregious.

In other words, Plaintiff’s position when combined with § 15-38-15(A) would make GM responsible for either 100% of the damages or none of the damages, depending on whether another tortfeasor also happens to be responsible for causing the same injuries. This cannot be what the Legislature intended.<sup>10</sup> On the other hand, the statute makes perfect sense if “fault” is interpreted to encompass conduct giving rise to strict liability or breach of warranty, just as it is interpreted in most comparative fault jurisdictions. So interpreted, all responsible parties, whether plaintiffs or defendants, would bear their fair share of responsibility for the damages all of them have caused. This must be what the Legislature intended.

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<sup>10</sup> Such a reading would lead to other illogical benefits being awarded by virtue of the number of defendants found to be liable. For instance, subsection (D) permits a defendant to argue the fault of a non-party tortfeasor and subsection (E) permits a setoff in proportion to a defendant's apportioned fault. It would make no sense to grant these rights only in instances where there are multiple defendants.

**D. There Is No Reason To Adopt A Special Rule For Crashworthiness Cases**

Plaintiff argues that comparative fault is not applicable here because this is a crashworthiness case in which he seeks to recover only for “enhanced injuries,” i.e., his burn injuries. Crashworthiness cases are unique, according to Plaintiff, because “there is simply no risk that a plaintiff will recover for damages caused by his own negligence.” He claims that “the very nature of a crashworthiness claim is that the damages from the initial collision and the second accident are divisible” and that “there is no basis to apply comparative negligence in crashworthiness cases.”

These arguments are all fundamentally misguided. Under ordinary principles of proximate causation, both the driver and the alleged defect caused the same indivisible injuries for which Plaintiff seeks recovery (Plaintiff’s burn injuries), and allocating fault for that injury raises no issues beyond those inherent in allocating fault in any product liability case. Plaintiff’s arguments on this point, like his arguments on comparative fault generally, have been rejected in the vast majority of other jurisdictions.

1. An Impaired Driver Who Causes An Accident Causes All Of The Injuries Resulting From That Accident, Including “Enhanced” Injuries.

Plaintiff’s most fundamental mistake is to assume that the driver’s impairment, while a proximate cause of the accident, could not be a proximate cause of any injuries caused by the alleged defect, i.e., the “enhanced injuries.” But in this case there can be no serious dispute that, applying ordinary principles of proximate causation, the driver of the Plaintiff’s pickup proximately caused the Plaintiff’s burn injuries—the only injuries at issue—regardless of whether that injury was also caused by the alleged defect.

The test for proximate causation is well established:

To show proximate cause, a plaintiff must show both causation in fact and legal cause. A plaintiff proves causation in fact by establishing that the injury would not have occurred “but for” the defendant’s negligence, and legal cause by establishing foreseeability. “Foreseeability is determined by looking at the natural and probable consequences of the complained of act, although it is not necessary to prove that a particular event or injury was foreseeable.”

Roddey v. Wal-Mart Stores E., LP, 415 S.C. 580, 590, 784 S.E.2d 670, 675-76 (S.C. 2016) (citations omitted). There can be more than one proximate cause of the same injury. Id. “Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge’s sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence.” Hurd v. Williamsburg Cty., 363 S.C. 421, 427-28, 611 S.E.2d 488, 492 (2005). And it is generally recognized that the same causation standard applies to both defendant and plaintiff negligence. Norfolk S. Ry. v. Sorrell, 549 U.S. 158, 168, (2007); Restatement (Second) of Torts § 465(2).

But in cases like this, the proximate cause analysis is straightforward and uncomplicated, as decisions from numerous other courts confirm:

- The driver’s conduct in failing to stop at a stop sign was a cause in fact of Plaintiff’s burn injuries because it satisfies the “but for” test, i.e., but for the driver’s conduct Plaintiff would not have suffered that injury. See, e.g., Smith v. Toyota Motor Corp., 105 Fed. App’x. 47, 51 (6th Cir. 2004)(“[O]f course the initial collision is a proximate cause of the enhanced injuries, for if there had been no initial collision, there would be no enhanced injuries.”).
- Serious personal injuries of all kinds from accident forces, including burn injuries, are a foreseeable consequence of high-speed motor vehicle accidents.

While the driver could not foresee exactly the effect the collision would have on the vehicles involved in the accident, he certainly could foresee, in a general way, the injurious consequences of his conduct. See, e.g., Buehler v. Whalen, 355 N.E.2d 99, 111 (Ill. App. 1976) (“[T]he precise manner that the plaintiffs’ injuries were enhanced is not significant, so long as it was reasonably foreseeable that such injuries would occur and they were the natural and probable result of the negligent act.”).

- Even if there were some conceivable basis for concluding that Plaintiff’s conduct was not a proximate cause of his injuries, the question would still be for the jury unless reasonable minds could not differ on the issue. See, e.g., Hurd, 363 S.C. at 428, 611 S.E.2d at 492.

In fact, the only reasonable conclusion is that the driver’s negligence was at least one of the proximate causes of the accident, the fire that resulted, and the resulting injuries. See, e.g., Fietzer v. Ford Motor Co., 590 F.2d 215, 218 (7th Cir. 1978) (as a matter of law and of “common sense,” negligence of drunk driver caused plaintiff’s injuries, including injuries caused by alleged defect); General Motors Corp. v. Farnsworth, 965 P.2d 1209, 1217-18 (Alaska 1998)(a drunk driver’s negligence caused all of plaintiff’s injuries as a matter of law, including injuries caused by alleged defect).

Plaintiff’s argument to the contrary is simply this: if the impaired driver can establish that the burn injuries were proximately caused by the alleged crashworthiness defect, he simultaneously establishes that his negligence did *not* proximately cause those injuries. But this argument ignores the axiomatic principle that there can be multiple proximate causes of the same injury. See, e.g., Restatement (Third) of Torts: Liability

for Physical and Emotional Harm, § 26, Comment c. Thus, proof that a vehicular defect was one cause of the burn injuries (or any other injuries to Plaintiff or anyone else) has no tendency whatsoever to prove that the driver did not also cause those same injuries. See, e.g., Cleveland v. Piper Aircraft Corp., 890 F.2d 1540, 1548 (10th Cir. 1989) (fact that plaintiff would not have received any injuries absent the crashworthiness defect did not establish that the negligence of the original tortfeasors was not a proximate cause of those injuries); Meekins v. Ford Motor Co., 699 A.2d 339, 345 (Del. Super. Ct. 1997) (“The existence of other proximate causes of an injury does not relieve a plaintiff driver under Delaware’s comparative negligence statute from responsibility for his own conduct which proximately caused him injury.”); Moore v. Chrysler Corp., 596 So. 2d 225, 238 (La. Ct. App. 1992), writ denied, 599 So. 2d 316 (La. 1992) and writ denied, 599 So. 2d 317 (La. 1992) (driver who fell asleep at the wheel “cannot be absolved of responsibility just because someone else’s fault served to worsen the injury”); General Motors Corp. v. Lahocki, 286 Md. 714, 735, 410 A.2d 1039, 1050 (1980) (“Contee would have us hold that because the injuries . . . came as a result of [a crashworthiness defect], this relieves Contee of any obligation. This argument fails to recognize that there may be more than one proximate cause of injuries.”).

Accepting Plaintiff’s argument that an impaired driver’s conduct in running a stop sign cannot be a proximate cause of his injuries if those same injuries were also caused by a crashworthiness defect would have profound consequences far beyond crashworthiness cases. And many of those consequences are patently absurd and unacceptable. In this very case, for example, Plaintiff’s theory would allow the driver, Brazell, to escape responsibility for his passenger’s injuries *completely* by showing that

*all* of his passenger's injuries were caused by the alleged defects in the Chevrolet pickup truck. But "[t]his result would run counter to well settled principles of tort law." Meekins, 699 A.2d at 345 (under plaintiff's theory, carried to its logical conclusion, "only the manufacturer should have the liability because the . . . driver's conduct in causing the initial collision would not have caused the injury").

Plaintiff's argument has other disturbing implications. Consider, for example, the facts of State v. Easler, 327 S.C. 121, 124-25, 489 S.E.2d 617, 619 (1997). The criminal defendant in that case, Easler, crossed the center line of a street and struck an oncoming vehicle head-on. The driver of the oncoming vehicle was seriously injured and her 7-year old son was killed. Easler was drunk, and he was convicted of felony driving under the influence causing death and felony DUI causing great bodily injury. He was sentenced to prison. There should be no question that Easler should be held civilly liable in damages for his gross negligence in causing the mother's injuries and the child's death. But under Plaintiff's theory in this case, Easler could escape civil liability to his victims completely by successfully claiming that the mother and child would have suffered no serious injuries absent a defect in (for example) the airbag in their vehicle. Even more disturbing, the crimes for which Easler was convicted also required proof of proximate cause. See, e.g., Easler, 327 S.C. at 133, 489 S.E.2d at 624. Thus, applying the proximate cause standard Plaintiff asks this Court to adopt, Easler would have been acquitted of any crime if he could have established that a defective airbag (or some other

defect that some expert witness might discover) was *also* a cause of the mother's injury and the child's death.<sup>11</sup>

Disturbing and illogical results like these would necessarily follow from adopting Plaintiff's theory, which asks this Court to adopt a special standard for proximate causation applicable only to plaintiff's fault and only in cases alleging crashworthiness claims. But there is no support for adopting, and no need to adopt, a new and unprecedented standard for proximate causation. Ordinary principles of proximate causation work perfectly well in crashworthiness cases, just as they do in other cases.

2. "Enhanced Injuries" Are Simply Injuries Caused By The Alleged Crashworthiness Defect.

It follows from the discussion above that Plaintiff is also mistaken in his assumption that an "enhanced injury" is somehow different in kind from other injuries. Of course, GM can be held liable only for the injuries caused by the alleged crashworthiness defect, i.e., that "portion of the damage or injury caused by the defective design over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design." Larsen v. General Motors Corp., 391 F.2d 495, 503 (8th Cir. 1968). These injuries are commonly referred to as "enhanced

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<sup>11</sup> This is not a mere hypothetical possibility; this precise argument in fact has been made by intoxicated drivers trying to escape criminal liability. See, e.g., State v. Jansing, 918 P.2d 1081, 1084-85 (Ariz. App. 1996), overruled on other grounds by State v. Bass, 12 P.3d 796 (Ariz. 2000). In Jansing, a drunk driver ran a stop sign and slammed into the side of a truck occupied by a father and his three children. The truck burst into flames, killing the father and severely injuring one of the children. In his prosecution for manslaughter, the drunk driver claimed that a crashworthiness defect in the vehicle, not his drunk driving, was the proximate cause of the father's death. The court rejected this argument: "Regardless of the design defect, it is not unforeseeable that a truck will catch fire when struck by another vehicle travelling forty miles an hour." Id.; but see State v. Paxson, 49 P.3d 312 (Ariz. App. 2002) (drunk driver's conviction of manslaughter overturned because he was not permitted to present evidence that his passenger's death was caused by a defect in an airbag).

injuries,” but that term can be misleading because it suggests that they are different than “ordinary” damages typically sought in tort cases and therefore require special analysis.

In fact, however, the term is simply a “convenient label” for those injuries that were caused by the alleged defect and for which the manufacturer is responsible under the same basic principles of liability, including proximate causation, applicable to all tort cases. Jahn v. Hyundai Motor Co., 773 N.W.2d 550, 553 n.1 (Iowa 2009). It “has no independent significance.” Id.; accord, e.g., Miller v. Todd, 551 N.E.2d 1139, 1142 (Ind. 1990) (“the doctrine of crashworthiness merely expands the proximate cause requirement to include enhanced injuries”). As the Tennessee Supreme Court has observed, “[a]ny claim for ‘enhanced injuries’ is nothing more than a claim for injuries that were actually and proximately caused by the defective product.” Whitehead v. Toyota Motor Corp., 897 S.W.2d 684, 694 (Tenn. 1995); see also id. at 694-95 (“This type of claim is often characterized as one for “enhanced injuries,” but the name “has no real significance . . . because it merely represents the portion of the total damages for which the manufacturer is potentially liable.”).

In fact, in many cases *all* of the injuries will be “enhanced injuries.” Here, for example, Plaintiff took the position in the District Court that he suffered no significant injuries other than his burn injuries, i.e., that absent the alleged defect he would have suffered no significant injuries at all. Thus, if Plaintiff proves his claim, his *only* significant injury is an “enhanced” injury. Stated another way, *all* of his injuries are “enhanced injuries,” and they would be the same injuries for which the driver of the Ford truck would be liable (had he negligently caused the accident). Plaintiffs in crashworthiness cases often claim that *all* of the injuries suffered in an accident are

“enhanced” injuries, i.e., that they would have suffered no injury at all had there been no defect. If, as Plaintiff argues, impaired drivers cannot be held responsible for “enhanced injuries,” they could completely escape responsibility for injuries they cause to themselves or others by showing that a defect also caused all of the injuries suffered in the accident they caused.

3. An Injury Is Indivisible If The Plaintiff And The Defendant Caused The Entire Injury.

Plaintiff’s assumption that crashworthiness cases by definition involve “divisible” injuries is simply wrong. “An injury is indivisible if, according to the applicable rules of causation, the plaintiff and each relevant person caused the entire injury.” Restatement (Third) of Torts: Apportionment of Liability § 7, Comment e. The only injuries at issue in this case are Plaintiff’s burn injuries. Plaintiff claims that the alleged defect caused the fire, which caused all of his burn injuries. As discussed above, under ordinary principles of causation the driver *also* caused all of those burn injuries. Therefore, the burn injuries for which the Plaintiff seeks recovery are indivisible. See Gen. Motors Corp. v. Edwards, 482 So. 2d 1176, 1190 (Ala. 1985) (“As Fox points out, death is certainly an indivisible injury. The same can be said for the Edwardses’ burn injuries.”); Buehler v. Whalen, 41 Ill. App. 3d 446, 461, 355 N.E.2d 99, 112 (1976) (burn injuries allegedly caused by crashworthiness defect were indivisible).

According to Plaintiff, he also suffered a broken rib and hip. (Plaintiff’s Brief at p. 9.) These alleged injuries were caused by the driver, but not by GM, and so are divisible. But Plaintiff is not seeking recovery for these injuries and they have no bearing on the extent of GM’s liability for the burn injuries. It would be irrational to make

application of comparative fault to Plaintiff's burn injuries depend upon whether or not he suffered some other unrelated injuries caused solely by his own negligence. See Harsh v. Petroll, 584 Pa. 606, 621, 887 A.2d 209, 218 (2005)(it would be incongruous to relieve a party from responsibility for enhanced injuries "based on his status as the sole cause of some other distinct harm").

4. A Jury In A Crashworthiness Case Simply Allocates Fault For The Injuries Caused By Both The Driver And The Defect In The Same Way It Allocates Fault In Any Tort Case.

For all of the reasons discussed above, "[i]t is illogical to hold that comparative fault applies to products liability actions generally, but does not apply to 'enhanced injury' claims. The questions are, in reality, the same." Whitehead, 897 S.W.2d at 695. Once the jury identifies the injuries caused by the defect (the burn injuries, for example, but not the hip and rib injuries), it simply allocates fault for that injury to all parties whose conduct also caused the same injury—just as the jury allocates fault among multiple responsible persons in any other product liability case and in any other tort case governed by comparative fault principles. See generally Restatement (Third) Of Torts: Apportionment of Liability § 26 (jury first divides damages by causation and then apportions fault).

Not surprisingly, then, the overwhelming majority of jurisdictions to address the issue presented in this case have concluded that comparative fault principles apply to crashworthiness claims, including the following states:

- Alaska: General Motors Corp. v. Farnsworth, 965 P.2d 1209 (Al. 1998)
- Arizona: Zuern v. Ford Motor Co., 937 P.2d 676 (Az. App. 1996)
- Arkansas: Gartman v. Ford Motor Co., 430 S.W.3d 218 (Ark. App. 2013)

- California: Daly v. General Motors Corp., 575 P.2d 1162 (Cal. 1978)
- Colorado: Montag v. Honda Motor Co., 75 F.3d 1414 (10th Cir. 1996)
- Connecticut: Bravo v. Ford Motor Co., No. CV000594807, 2001 WL 477275 (Conn. Super. Ct. Apr. 16, 2001)
- Delaware: Meekins v. Ford Motor Co., 699 A.2d 339 (Del. Super. 1997)
- Florida: Fla. Stat. Ann. § 768.81(3)(b)
- Hawaii: Dannenfelser v. Daimler Chrysler Corp., 370 F.Supp.2d 1091 (D.C. Hawaii 2005)
- Indiana: Green v. Ford Motor Co., 942 N.E.2d 791 (Ind. 2011)
- Iowa: Jahn v. Hyundai Motor Co., 773 N.W.2d 550 (Iowa 2009)
- Kansas: Albertson v. Volkswagenwerk, 634 P.2d 1127 (Kan. 1981)
- Kentucky: Smith v. Toyota Motor Corp., 105 Fed.Appx. 47 (6th Cir. 2004)
- Louisiana: Moore v. Chrysler Corp., 596 So.2d 225 (La.Ct.App. 1992)
- Michigan: Zalut v. Anderson & Assoc., 463 N.W.2d 236 (Mich.Ct.App. 1990)
- Mississippi: Willis v. Kia Motors Corp., No. CIV.A. 2:07CV062-P-A, 2009 WL 2134359 (N.D. Miss. July 14, 2009)
- Montana: Trust Corp. of Montana v. Piper Aircraft Corp., 506 F. Supp. 1093 (D. Mont. 1981)
- New Hampshire: McNeil v. Nissan Motor Co., 365 F.Supp.2d 206 (D.N.H. 2005)
- New Mexico: Cleveland v. Piper Aircraft Corp., 890 F.2d 1540 (10th Cir. 1989)

- North Carolina: Hinkamp v. American Motors Corp., 735 F.Supp. 176 (E.D.N.C. 1989), aff'd, 900 F.2d 252 (4th Cir. 1990)
- North Dakota: Day v. General Motors Corp., 345 N.W.2d 349 (N.D. 1984).
- Oregon: Dahl v. BMW, 304 Or. 558, 748 P.2d 77 (Or.1987)
- Pennsylvania: Harsh v. Petroll, 887 A.2d 209, 218 (Pa. 2005)
- Tennessee: Whitehead v. Toyota Motor Corp., 897 S.W.2d 684 (Tenn. 1995)
- Texas: Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984)
- Utah: Egbert v. Nissan Motor Co., 2010 UT 8, ¶ 40, 228 P.3d 737, 746 (Sup.Ct.)
- Wisconsin: Fietzer v. Ford Motor Co., 590 F.2d 215 (7th Cir. 1978)
- Wyoming: Harvey v. General Motors Corp., 873 F.2d 1343 (10th Cir. 1989).

In fact, the two leading cases holding to the contrary—that accident-causing fault *cannot* be considered in allocating fault in a crashworthiness case—both were overruled, either judicially or by legislation. D’Amario v. Ford Motor Co., 743 So. 2d 508 (Fla. 1999), overruled by Fla. Stat. Ann. § 768.81(3)(b); Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1992), overruled by Jahn v. Hyundai Motor Co., 773 N.W.2d 550 (Iowa 2009).

Further, in 1999, after extensive analysis and debate, the American Law Institute likewise adopted the majority view that comparative negligence applies to crashworthiness claims, providing in the Restatement that the “fault of the plaintiff in causing an accident that results in defect-related increased harm is relevant in apportioning responsibility between or among the parties, according to applicable apportionment law.” Restatement (Third) Of Torts: Products Liability, § 16, Comment f. This approach is both logical and fair:

[B]oth auto makers and auto drivers have roughly equivalent responsibility to take reasonable steps to avoid and minimize injuries in automotive collisions—at bottom, quite like the duty of care all actors owe to one another when they interact in the world. Tort law, that is, broadly and fairly requires people to act with reasonable care to protect the interests of those who may be expected to be affected by their conduct.

Outside products liability law, drivers are obligated to avoid intoxication, maintain a proper lookout, observe traffic signals, drive at an appropriate speed, and adopt other reasonable measures to protect foreseeable victims on and near the highway—certainly other people, but also themselves. If two drivers collide, of course, we allow fact finders to apportion responsibility between both the actors—both of whom were duty-bound to act carefully to protect one another and themselves—on the basis of comparative fault. Inside products liability law, regardless of the type of product, it now is axiomatic that manufacturers must employ designs with reasonable attention to the kinds of mistakes foreseeably made from time to time by users and consumers—persons who are sometimes distracted, sometimes careless, and sometimes intoxicated. And basic principles of comparative fault and equity also hold that drivers, who are bound to act prudently to avoid harm, have no fair claim on that portion of their damages attributable to their own misconduct in causing a vehicular accident—whether the other party was another driver or the manufacturer of the plaintiff’s vehicle.

In the end, a vehicle manufacturer’s duty to design its products to be reasonably safe for a user’s mistakes is nothing special in the law of tort, as it should be nothing special in the field of products liability. For this reason, principles of comparative fault logically apply to crashworthiness cases no less than any other type of case involving responsibility for product accidents.

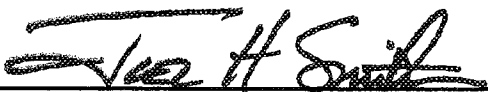
David G. Owen, Products Liability Law §17.5, at 1088-89 (3d ed. 2015).

In short, both law and policy support treating crashworthiness cases the same as other product liability cases.

### CONCLUSION

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

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October 21, 2016

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

Timothy M. Cain, United States District Judge

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Appellate Case No. 2016-001437

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Reid Harold Donze .....Plaintiff

v.

General Motors, LLC .....Defendant

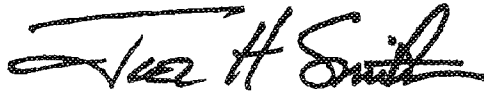
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**CERTIFICATION PURSUANT TO RULE 211, SCACR**

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Pursuant to Rule 211(a), SCACR, undersigned counsel certifies that the Defendant's Brief filed in this matter on behalf of General Motors, LLC. complies with Rule 211(b), SCACR.



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October 21, 2016

**RECEIVED**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

OCT 21 2016

**S.C. SUPREME COURT**

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT  
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I certify that I have served the Defendant's Brief on Plaintiff, by depositing a copy of it in the United States Mail, postage prepaid, on October 21, 2106, addressed to his attorneys of record, Ronnie L. Crosby, Esq. and Austin H. Crosby, Esq., Peters Murdaugh Parker Eltzroth & Detrick, P.A., P.O. Box 457, Hampton, South Carolina, 29924; S. Kirkpatrick Morgan, Esq. and Charles T. Slaughter, Esq., Walter & Morgan, LLC, P.O. Box 949, Lexington, South Carolina, 29071; and Bert G. Utsey, III, Esq., Peters Murdaugh Parker Eltzroth & Detrick, P.A., P.O. Box 1164, Walterboro, South Carolina, 29488.

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