THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr.

Appellate Case No. 2016-002209

Steven Newbern and Claudia Newbern,..... Appellants,

v.

Ford Motor Company,.....Respondent.

INITIAL REPLY BRIEF OF APPELLANTS

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FACTS

Appellants rely on and incorporate the statement of facts in its Initial Brief and reply below only to certain factual allegations made by Ford.

The title to Part A. of Ford's facts section is incorrect. It states "The Newberns crashed their Ford Focus into co-defendant McGee's Chevy Caprice at high speed, resulting in significant crash forces." (Br. of Resp't at p. 3). However, as acknowledged by Ford, "McGee failed to yield the right of way" and caused the accident, not the Newberns. *Id.* Ford's attempt to characterize the Newberns' crash as so severe that it required an airbag is directly contradicted by its specification for no airbag deployment for the crash test most similar to the Newberns' crash. That crash test involved a deceleration of approximately 68 Gs and an acceleration of approximately 56 Gs, while the Newberns' crash was much less severe, involving only about 25 Gs deceleration and 8 Gs acceleration. (9-13-16 Tr. pp. 398-99; Br. of App. p. 12).

Ford misstates that Paul Lewis testified "that given the severity of this crash, he would have expected the airbags to deploy as they did." (Br. of Resp't p. 4). Mr. Lewis testified about airbag deployment for a frontal crash with a 26 mile-per-hour delta-v (decrease in velocity). (9-14-16 Tr. pp. 619-20). However, delta-v is not the measure of crash severity because it does not take into account how fast the vehicle stops. (9-14-16 Tr. pp. 649-50; 9-13-16 Tr. pp. 392 ln. 24 – 393 ln. 7, p. 397). The calibration report demonstrates this basic proposition of physics. It shows two twenty-five-mile-per-hour crash tests but requires stage 2 airbag deployment for one and non-deployment for the other. (Exh. 50, test numbers 15979 and 15978). Both crashes have a delta-v of 25 miles-per-hour but one takes longer to stop than the other. *Id.* As Lewis explained, "two different same speed crashes can be somewhat different severity given that one is a significant longer pulse than the other." (9-14-16 Tr. p. 650 lns. 10-13). Testimony that a 26 mile-per-hour

delta-v may get an airbag does not mean that the Newberns' crash was so severe as to warrant an airbag for Mr. Newbern.

Ford devotes nine-and-a-half pages of its Facts section to characterizing Krishnaswami's testimony. To the extent Ford attempts to show Krishnaswami testified only generally about design history, Ford is incorrect. Ford's opening statement makes clear that it based the success of its case on Krishnaswami's testimony because he was speaking on behalf of Ford and as its expert. (9-12-16 Tr. pp. 267, 277-80).

Ford misstates that Krishnaswami was deposed "as a fact witness." (Br. of Resp't p. 7). The citations for that misstatement show Krishnaswami was deposed three times—twice as a corporate representative and once as an expert, which Ford admits one paragraph after it misstates that Krishnaswami was deposed as a fact witness. (Br. of Resp't p. 7). At the beginning of his direct testimony as an adverse witness, Krishnaswami acknowledged his "deposition has been taken in different capacities in this case three times." (9-13-16 Tr. p. 340 lns. 21-24). In one he was "called as a corporate representative and [] understood that to mean that [he] w[as] speaking for the corporation on certain subject matters." *Id.* at pp. 340 ln. 25 – 341 ln. 12. A second deposition was taken in which he was "designated to be an expert witness . . . related to airbag sensors and things of that nature." *Id.* at p. 341 lns. 13-17. In the third deposition he testified "as a corporate representative regarding owner's manuals declarations." *Id.* at p. 342 lns. 3-6. Krishnaswami did not testify in discovery or at trial as a fact witness. More importantly, Ford represented to the lower court that the Newberns planned to call Krishnaswami as its corporate representative. "During the lunch hour [the Newberns' counsel] informed us that he plans on calling Mr. Krishnaswami, Ford's corporate representative, that we have presented fully. We are going to have Mr. Krishnaswami here. He has given three depositions in the case. We intend to

call him. He's the technical airbag guy." (9-13-16 Tr. p. 324 lns. 12-18) (emphasis added). Ford knew prior to and at trial that Krishnaswami could only be testifying as a corporate representative and expert.

Ford's attempt to characterize as an "abstract principle" that a manufacturer does not deploy an airbag unless needed is not supported by the record. (Br. of Resp't p. 11). Deploying an airbag only when needed is a longstanding, well-accepted design principle in the automotive industry. Counsel asked Krishnaswami, testifying as Ford, "And there's plenty of rule making which – in which everybody agrees that you don't want to deploy airbags unless they are necessary; is that fair?" (9-13-16 Tr. p. 382 lns. 10-13). Krishnaswami answered, "Correct" and said Ford "tr[ies] to preserve the airbag [for] when you need it." *Id.* at lns. 14-19; p. 400-01, 403. Further, Krishnaswami did not "reject" the assertion that it is unreasonably dangerous to design a system that will not deploy an airbag when it is not needed. (Br. of Resp't p. 16). A review of the exact question and answer, viewed in the light most favorable to the Newberns, shows that Krishnaswami, as Ford, admitted that an airbag system that deploys an airbag when it is not needed is unreasonably dangerous.

> Q. Would it be unreasonably dangerous to provide a person with a system that will deploy airbags when they are not needed?
>
> A. ***Yes.*** Depends on the occupant kinematics.

(9-14-16 Tr. pp. 548 ln. 25 – 549 ln. 4) (emphasis added). An explanation that an airbag may or may not cause injury, depending on the particular occupant's positioning, does not make it safe and does not erase the "Yes" answer. Krishnaswami testified at length about specific, known dangers created by unnecessary airbag deployment. (9-13-16 Tr. pp. 376-78, 382, 400-02). Whether Krishnaswami's answer was a qualification and, if so, the effect of any such qualification was a matter for the jury.

The Newberns did not have a drinking glass in the vehicle and do not know what supposed glass piece EMS or any other person found related to the accident. (9-13-16 Tr. pp. 287-91, 297-98; 9-15-16 Tr. pp. 679-80, 686). Viewing the evidence regarding the alleged glass in a light most favorable to the Newberns, they testified they did not have a drinking glass in the vehicle, no other pieces of the supposed glass were found, and Dr. Eiseman and Mr. Lewis testified that an airbag and not a glass shard caused Mr. Newbern's injuries. (9-14-16 Tr. pp. 437-40, 445, 571, 577, 595, 607-08). The Newberns' presented ample evidence that an airbag, not a piece of glass, blinded Mr. Newbern. However, Ford misses the point that this is immaterial because, whether the airbag struck his eye directly or blew a glass into his eye, no injury would have occurred but for the airbag deployment. Ford failed to respond to Appellants' assertion that under either Ford's glass theory or Appellants' theory, Mr. Newbern's injuries would not have occurred but for the airbag deployment. (Br. of App. p. 4). At the very least, the existence and effect of a glass piece should be resolved by the jury and not on a directed verdict motion.

Finally, the Newberns do not characterize the lower court's decision on the directed verdict motion as "knee-jerk or nebulous." (Br. of Resp't pp. 25-26). Rather, it is undisputed that the lower court, in making its ruling, did not state a specific basis for granting the motion. (9-16-16 Tr. p. 819 lns. 16-18). While the parties and the court did discuss the motion at length during two days of trial, that does not mean the court ruled on every topic discussed. Every question that the court asks during a motion argument does not automatically become a basis for the ruling. The discussions centered on the status of Mr. Krishnaswami's testimony and the elements of proof for design defect negligence and strict liability claims, all discussed in the Newberns' briefs.

ARGUMENT

Central to a decision on any directed verdict motion is that the evidence must be liberally viewed in a light most favorable to the non-moving party and that the Court cannot determine credibility issues or resolve conflicts in the testimony or evidence. *Erickson v. Jones St. Publrs., LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006); *Donevant v. Town of Surfside Beach*, 414 S.C. 396, 406, 778 S.E.2d 320, 326 (Ct. App. 2015); *Estate of Carr v. Circle S Enters.*, 379 S.C. 31, 38-39, 664 S.E.2d 83, 86 (Ct. App. 2008). If the evidence in this case is viewed in a light most favorable to the Newberns, the directed verdict motion should have been denied.

As an initial matter, it is telling and significant that Ford fails to respond to the following points in the Newberns' initial brief:

- "[C]ounsel for Ford elicited expert testimony from Krishnaswami on cross-examination" (Br. of App. pp. 7, 27);
- "Counsel for Ford even questioned [Krishnaswami] on cross-examination to speak on behalf of Ford" *Id.* at p. 6;
- "Ford did not take the time to manufacture a safe system because it was behind on the production schedule" *Id.* at p. 18; and
- "Ford elicited testimony about Krishnaswami's education, work, background and experience", and could not duplicate this testimony in its case-in-chief, thus there is evidence of his expert qualifications. *Id.* at p. 27, 27 n.9.

As stated in Appellants' Initial Brief and discussed further below, the Newberns presented sufficient evidence of their strict liability and negligence design defect claims, and the lower court erred in granting a directed verdict.

I. Expert Testimony is Not Required to Prove a Product Liability Claim in South Carolina

Ford does not dispute that a product liability claim may be proven without expert testimony but, instead, argues that a "complex", "highly technical" product liability claim requires proof by expert testimony. (Br. of Resp't pp. 27-31). This is an incorrect reading of the *Graves* decision,

as explained below. Ford cites to no case in which the proffered testimony for proof of a design defect was that of the defendant, as occurred in this case. A plaintiff may rely on testimony of an adverse witness testifying as the defendant's corporate representative, whether or not qualified by the Court as an expert, to present proof of its claim.

Ford's reliance on *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010), and *Graves v. CAS Medical Systems*, 401 S.C. 63, 735 S.E.2d 650 (2012), is misplaced. *Watson* is factually inapplicable to this case. In *Watson*, the trial court qualified two of the plaintiffs' witnesses as experts. 389 S.C. at 442-43, 699 S.E.2d at 173. On appeal, the Supreme Court found the experts unqualified and one witness's testimony unreliable and, therefore, excluded their testimony. *Id.* at 447-53, 699 S.E.2d at 175-79. "[I]n the absence of any admissible evidence" on the product liability claim, the Court entered judgment in the defendant's favor. *Id.* at 453, 699 S.E.2d at 179. In this case, there was no objection to Krishnaswami's testimony and there is no issue on appeal regarding its exclusion. Rather, the Court must determine whether the admitted evidence, viewed in a light most favorable to the Newberns, was sufficient to submit the case to the jury.

Graves is also inapplicable. Like *Watson*, it involved the exclusion of testimony, rather than a determination of whether admitted testimony was sufficient. *Graves*, 401 S.C. at 75-80, 735 S.E.2d at 656-58 ("Without the testimony of their experts, however, the Graves have no direct evidence of whether the monitor was unreasonably dangerous because there is no identification of a specific design flaw."). After the exclusion of the plaintiff's expert witnesses' testimony, the question became "whether the record contains sufficient circumstantial evidence of a defect required to survive summary judgment." *Id.* at 79, 735 S.E.2d at 658. In *Graves*, the plaintiffs

needed expert testimony because the only other evidence was circumstantial evidence[1] of the plaintiff's testimony that the product did not perform as design. *Id.* at 80, 735 S.E.2d at 658-59. Here, the Newberns have more than circumstantial evidence. They presented direct evidence[2] from Ford, through Krishnaswami. Therefore, *Graves* is neither applicable to nor dispositive of whether the lower court should have granted a directed verdict.

Ford incorrectly states that expert testimony is required for a design defect claim "involving scientific and technical issues involving automobiles." (Br. of Resp't p. 29). It discusses *Graves* to support that proposition. However, in *Graves*, the Supreme Court expressly stated "We take this opportunity to correct the circuit court's erroneous holding that a plaintiff cannot use circumstantial evidence to prove a design defect claim." 401 S.C. at 79-80, 735 S.E.2d at 658 ("In this case, however, we need not determine what quantum of circumstantial evidence of a design defect is necessary to withstand summary judgment because the lack of expert testimony is nevertheless dispositive of the Graves' claim."). As discussed above, expert testimony was required in *Graves* only because there was no other direct evidence and insufficient circumstantial evidence of a design defect claim. In *5 Star, Inc. v. Ford Motor Co.*, 408 S.C. 362, 759 S.E.2d 139 (2014), a Supreme Court opinion issued after *Graves*, the Court addressed a design defect claim involving a cruise control deactivation switch. *Id.* at 365, 759 S.E.2d at 141. It restated the law in a product liability automotive design defect claim that "a negligence claim may be established . . . by circumstantial evidence . . . ." *Id.* at 370, 759 S.E.2d at 143. There is no bright

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[1] "Circumstantial evidence immediately establishes collateral facts from which the main fact may be inferred, and is typically characterized by inference or presumption." *State v. Salisbury*, 343 S.C. 520, 524 n.1, 541 S.E.2d 247, 248 n.1 (2001).

[2] "Direct evidence is evidence based on actual knowledge and proves a fact without inference or presumption." *State v. Stuckey*, 347 S.C. 484, 500 n.8, 556 S.E.2d 403, 411 n.8 (Ct. App. 2001) (internal quotation marks omitted).

line rule requiring expert testimony in a product liability automotive design defect claim. Rather, each case is evaluated based on the evidence presented.

Our Courts have held numerous times that a plaintiff was not required to present testimony from a witness qualified by the Court as an expert when the defendant itself testified on a topic usually testified to by an expert. Ford refutes that this is possible but does not cite to a single authority for that blanket proposition. (Br. of Resp't pp. 32-33). In addition to the cases cited in the Newberns' Initial Brief[3] regarding a property owner testifying as to land value, although that is usually done by an expert, our Courts have also permitted a defendant-attorney and defendant-physician to testify in malpractice actions without being formally qualified as an expert. In *Mali v. Odom*, 295 S.C. 78, 367 S.E.2d 166 (Ct. App. 1988), the plaintiffs sued Odom, a practicing attorney, for legal malpractice regarding a property closing. *Id.* at 79-80, 367 S.E.2d at 168. Odom appealed from a jury verdict in favor of the plaintiffs and argued, in part, that they "did not establish by expert testimony the standard of care owed by Odom." *Id.* The Court of Appeals disagreed and held that, although the plaintiffs did not present any expert testimony, the interrogatory answers of Odom established the standard of care and, thus, rendered expert testimony unnecessary. *Id.* at 80-81, 367 S.E.2d at 168-69. "[A]dditional expert testimony was not required because Odom himself, a practicing lawyer, established the applicable standard of care." *Id.* at 81, 367 S.E.2d at 168 (citing *Stallings v. Ratliff*, 292 S.C. 349, 351-54, 356 S.E.2d 414, 416-17 (Ct. App. 1987) (citing to testimony from the defendant-physician in a medical malpractice action as sufficient proof of the standard of care and finding expert testimony on breach not required because the jury was competent to infer from his and the plaintiff's conflicting testimony whether a duty was breached)).

[3] *See* Br. of App. pp. 28-29 (citing *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981); *Doty v. Parkway Homes Co.*, 295 S.C. 368, 370, 368 S.E.2d 670, 671 (1988)).

The same result is warranted in this case. The Newberns were not required to present testimony by an expert qualified by the Court because the defendant itself, Ford, provided testimony as to the design defect, unreasonably dangerous nature of the product, and feasible alternative designs.

Underlying Ford's arguments about expert testimony is that it simply did not realize the purpose of the Newberns' decision to call Krishnaswami as an adverse witness. However, this misreading by Ford is not a basis to grant a directed verdict. It did not object to the evidence and, therefore, waived any objection to the testimony. *See, e.g., State v. Perez,* 334 S.C. 563, 566, 566 n.2, 514 S.E.2d 754, 755, 755 n.2 (1999) (holding the defendant waived his objection because he "never objected to the failure of the trial judge to administer the oath to the interpreter" and although "the administration of the oath to a witness is fundamental to give the witness's testimony binding force, in the absence of a timely objection, unsworn testimony does not constitute a nullity"). That the Court was not asked to formally qualify Krishnaswami as an expert does not relieve Ford of its obligation to object. (Br. of Resp't p. 34). In addition to failing to object, Ford also represented that Krishnaswami would "be able to answer any questions that opposing counsel has", inviting and challenging the Newberns to ask Krishnaswami the questions Ford now complains about. (9-13-16 Tr. p. 279 lns. 12-14). As the Newberns pointed out in their Initial Brief, and Ford does not refute, Ford also asked Krishnaswami questions that called for expert testimony and waived any objection to his testimony by doing so. *See, e.g.*, 9-14-16 Tr. pp. 469, 506-08, 513. The Newberns did not waive anything; the testimony they presented was admitted into evidence.

"A directed verdict on liability is properly denied where there is any evidence, direct or circumstantial, justifying submission of the issue to the jury." *Holtzscheiter v. Thomson Newspapers,* 332 S.C. 502, 513, 506 S.E.2d 497, 503 (1998). In this case, Krishnaswami's

testimony as Ford was admitted without objection. The lower court should have denied the motion for a directed verdict and allowed the jury to consider and weigh the evidence.

II. Krishnaswami Testified as Ford's Corporate Representative and His Answers Bind Ford as Party Admissions

It is indisputable that Krishnaswami testified as Ford's corporate representative. As such, his testimony binds Ford as party admissions.

Ford notes the lower court stated it did not view Krishnaswami as a party. (Br. of Resp't p. 37). That the lower court made such a statement does not mean Krishnaswami did not testify as Ford. Rather, the lower court erred in that view and, thus, erred in granting the directed verdict motion. Krishnaswami could not have testified as anything other than a corporate representative or expert because he was never designated or deposed as any other type of witness. As noted above, Krishnaswami was deposed twice as a corporate representative and once as an expert. (9-13-16 Tr. pp. 340-42). Counsel for the Newberns questioned Krishnaswami about his status as a corporate representative and expert at the beginning of his testimony, specifying the capacity in which he testified.

Ford incorrectly places emphasis on the Newberns calling Krishnaswami as an "adverse witness." (Br. of Resp't pp. 8). That the Newberns used the language "adverse witness" does not foreclose that Krishnaswami testified as a corporate representative and expert. A witness is generally called to the stand by name and not by a capacity such as "Mr. Smith as corporate representative (or fact witness or expert witness or party)." The calling of Krishnaswami as an "adverse witness" was done for the proper purpose of establishing that the Newberns' counsel could use leading questions, which the lower court instructed the jury prior to his testimony. (9-13-16 Tr. pp. 339 ln. 18 – 340 ln. 3); *see also* Rule 611(c), SCRE ("When a party calls a hostile

witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions".).

Ford knew the Newberns called Krishnaswami as its corporate representative because that is what Ford represented to the lower court. "During the lunch hour [the Newberns' counsel] informed us that he plans on calling Mr. Krishnaswami, ***Ford's corporate representative***, that we have presented fully. We are going to have Mr. Krishnaswami here. He has given three depositions in the case. We intend to call him. He's the technical airbag guy." (9-13-16 Tr. p. 324 lns. 12-18) (emphasis added). Once Ford represented to the lower court that the Newberns called Krishnaswami as Ford, the Newberns did not need to restate it and proceeded to question him as Ford throughout his testimony. (9-13-16 Tr. p. 385 lns. 13-15). Indeed, Krishnaswami could not have testified as a fact witness because, he "was not personally involved in the 2009 sensor at that time" for the Ford Focus. (9-14-16 Tr. p. 514 lns. 18-24, 515 lns. 16-17, 518 lns. 9-17; Br. of Resp't p. 13).

During his testimony, Krishnaswami used the word "we" at least 195 times to refer to Ford. (9-13-16 Tr. pp. 350-406; 9-14-16 Tr. pp. 469-546). He answered questions on behalf of Ford

throughout his direct testimony[4] and cross-examination by Ford.[5] To the extent the lower court's ruling is based on a finding that Krishnaswami did not testify as Ford, it is incorrect and should be reversed.

Testifying as Ford, Krishnaswami could and did making binding admissions of elements of the Newberns' claims. It is noteworthy that Ford's argument section on this issue does not cite to a single authority. (Br. of Resp't pp. 37-38). It argues, without citation, that the provisions of Rule 30(b)(6) do not apply because they govern a deposition rather than a trial. *Id.* The fallacy of this argument is evident by the fact that Ford ignores the Newberns' citation to Rule 32(a)(2), SCRCP. (Br. of App. p. 25). As that rule clearly states, "[a]t trial . . . any part or all of a deposition . . . may be used against any party who was present," and, specifically, the "deposition . . . of a person designated under Rule 30(b)(6) . . . may be used by an adverse party for any purpose." Rule

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[4] *See, e.g.*, 9-13-16 Tr. p. 369 lns. 10-15 ("Q. So does ***Ford*** have the ability to say wait a minute, this guy is not wearing a belt, why would I do that? A. ***Yes. We*** do have an ability to do that. Q. And ***did you*** do that in this case? A. Yes." (emphasis added)); 9-13-16 Tr. p. 376 lns. 10-14 ("Q. . . . ***Ford understands*** the principle between those two, the difference between the two? A. Meaning the occupant to the interior and the vehicle to the surrounding, ***yes***." (emphasis added)); 9-13-16 Tr. p. 377 lns. 6-10 ("Q. So in the second collision ***Ford is aware*** that airbags can actually cause injuries and ***it does not want*** that to happen unnecessarily? A. In the general sense, ***yes, we*** have to be careful on how and where ***we*** deploy." (emphasis added)); 9-13-16 Tr. p. 378 lns. 6-11 ("Q. In that circumstance ***does Ford say*** well, look, because other people negligently run into cars, we don't have a responsibility to provide protection for the second crash? A. I ***don't think that's our intent*** to say that, no." (emphasis added)); 9-13-16 Tr. p. 407 lns. 10-13 ("Q . . . So ***Ford knows*** that can happen, that a late deployment can cause an injury? A. Well, ***yes***." (emphasis added)); 9-14-16 Tr. p. 542 ln. 25 – 543 ln. 5 ("Q. ***So does Ford have an opinion*** what happens if somebody is driving 25 miles an hour and your brakes are put on, what happens to their bodies? A. Their bodies would move forward because you are braking . . . ." (emphasis added)).

[5] *See, e.g.*, 9-14-16 Tr. p. 469 lns. 14-18 ("Q. . . . ***what does Ford use*** to determine what you are going to get in a crash? A. Based on the crash tests that ***we*** do, extensive crash tests ***we*** do from low speed to moderate to high speed crashes." (emphasis added)); 9-14-16 Tr. p. 479 lns. 3-10 (. . . "[I]t is important for ***us to understand where we*** are going to sell the vehicle. Then ***Ford has its own*** internal guidelines that ***we*** place on top of the vehicle. ***We*** like to see some guidelines . . . ." (emphasis added)).

32(a)(2). There is no difference in the effect of a corporate representative's testimony at a deposition versus at trial. The witness is still speaking on behalf of the corporate defendant and, as such, binds the defendant. Under Ford's logic, no one testifying as Ford could ever bind it, making a corporation subject to a different standard than an individual.[6] This would defeat a purpose of having a Rule 30(b)(6) designee.

Finally, Krishnaswami did admit elements of the Newberns' claims. Ford's argument to the contrary asks this Court to violate the standard of review for a directed verdict motion by viewing the evidence in a light most favorable to it rather than most favorably to the Newberns. *Estate of Carr v. Circle S Enters.*, 379 S.C. 31, 38-39, 664 S.E.2d 83, 86 (Ct. App. 2008). Krishnaswami, as Ford, admitted, *inter alia*, the following:

- "Yes, and I would agree with" the statement that "even though there is a crash that causes a safety device to work, that the safety device still has to work properly, and it is Ford's responsibility to do that." (9-13-16 Tr. p. 378 lns. 12-17). Ford agreed that it "has a responsibility to provide safe sensing devices, . . . occupant restraint devices in its vehicles." (9-14-16 Tr. p. 548 lns. 12-15).

- " . . . Ford is aware that airbags can actually cause injuries and it does not want that to happen unnecessarily . . . [it] ha[s] to be careful on how and where [it] deploy[s]" an airbag. (9-13-16 Tr. p. 377 lns. 6-10; p. 403 lns. 3-6).

- "According to your [Ford's] own ***policy*** . . . [it does] not want to deploy an airbag when it is not necessary." (9-14-16 Tr. p. 548 lns. 19-24; 9-13-16 Tr. p. 382 lns. 10-14) (emphasis added). Ford agreed "Yes", it would "be unreasonably dangerous to provide a person with a system that will deploy airbags when they are not needed." (9-14-16 Tr. pp. 548 ln. 25 – 549 ln. 3).

- "There are soft tissue injuries that can happen from airbag deployment", including "potential injury to eye", and "other things that normally are in cars can be thrown back into people's faces." (9-13-16 Tr. pp. 401 ln. 18 – 402 ln. 14; 9-14-16 Tr. p. 525 lns. 4-13).

- Ford conducted crash test 15978 as part of its testing to come up with calibration specifications for airbag deployment and non-deployment. Crash test 15978 is a 25-mile-

[6] Corporate defendants frequently request (and get) the Court to instruct the jury that there is no distinction between an individual and a corporation in the eyes of the law. If that is true, then a corporate representative testifying on behalf of a corporation may bind the corporation in the same way that an individual defendant is bound by his or her testimony.

per-hour, 30-degree right front angle crash into a barrier wall and is the crash test closest to the Newberns' crash. (9-13-16 Tr. p. 367 lns. 4-25, p. 390 lns. 17-23; 9-14-16 Tr. p. 516 lns. 9-15).

- Ford specified to Bosch to calibrate the restraint system to not deploy (or suppress) the airbag in crash test 15978. (9-13-16 Tr. pp. 380 ln. 21 – 381 ln. 1).

- Ford "did not meet the target with this calibration" and, instead, Bosch provided a calibration report showing the restraint system would deploy an airbag in a crash such as the Newberns' crash. (9-13-16 Tr. p. 381 lns. 12-15, p. 362 lns. 6-9).

- When Ford learned Bosch could not meet its specifications, Ford did not make any physical changes to the vehicle in an attempt at another calibration run because "that process of packaging . . . happens much earlier than the second process . . . about when the targets start coming." *Id.* at p. 362 lns. 10-20.

- Ford then "decided to take the exception" to the calibration specifications. *Id.* at pp. 362 ln. 21 – 363 ln. 5. At the time Ford accepted the exception to its calibration specifications, it was "already behind [production] for the one point sensor" restraint system. (9-14-16 Tr. pp. 520-521).

- Ford accepted the calibration to deploy where it previously specified a nondeployment "for a different reason" other than it helped somebody in the car, "[i]t wasn't because that somebody in that car that's belted needed it."[7] (9-13-16 Tr. pp. 385 ln. 24 – 386 ln. 4; 9-14-16 Tr. p. 516 lns. 9-15).

- Ford has "the technology to not deploy the airbag for a belted person" and has "the technology to set [deployment threshold] to a higher threshold." (9-13-16 Tr. p. 385 lns. 3-6).

- Ford was "capable of doing that [designing a system to deploy an airbag only when it is needed] . . . capable of doing that technologically and economically in 2009." (9-13-16 Tr. p. 403 lns. 8-18; 9-14-16 Tr. p. 548 lns. 3-11).[8]

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[7] Krishnaswami made this admission on behalf of Ford right after counsel for the Newberns specified "I am talking about Ford, I know this isn't you . . . ." (9-13-16 Tr. p. 385 lns. 14-15).

[8] Krishnaswami answers this question "Yes" and then qualifies it with "I believe we have done it here." (9-13-16 Tr. p. 403 lns. 17-18). However, a qualification cannot be used to grant Ford's directed verdict motion because the Court cannot weigh the evidence and must view it in a light most favorable to the Newberns. *See Fletcher v. Med. Univ. of S.C.*, 390 S.C. 458, 467 n.5, 702 S.E.2d 372, 376 n.5 (Ct. App. 2010) (stating a witness's "qualified no" answer to a question "is not fatal to the Fletcher's claim at the directed verdict stage").

- "[I]nstead of accepting deployment in a crash if you do not want the airbag to deploy," Ford could have tested other sensor locations up front, "go to those and may possibly find a way to make the thing actually work across the board." (9-14-16 Tr. p. 534 lns. 9-18).

This recitation of some of Krishnaswami's testimony demonstrates that he did admit elements of the Newberns' claims on behalf of Ford. To the extent the lower court's ruling was based on a finding to the contrary, it was in error and should be reversed based on a viewing of the evidence in a light most favorable to the Newberns.

III. Under South Carolina law, a Manufacturer is an Expert

Ford does not dispute that a manufacturer is held to the standard of an expert. (Br. of Resp't pp. 35-36). Rather, it takes issue with being deemed an expert because it is the manufacturer of the product at issue. However, the two are one in the same. Under established South Carolina law that our Courts have charged to juries for years, a manufacturer is deemed to be an expert in its field. Therefore, in this case, Ford's designated corporate representative on the design of the product at issue is an expert. The Newberns do not assert that every corporate representative is an expert on any issue but that a corporate representative designated by a manufacturer under Rule 30(b)(6) as the most knowledgeable person about a topic is an expert on that topic when he or she testifies as the manufacturer.

> The standard language used to charge a jury says that a manufacturer is an expert.
>
> In determining whether the legal standard of care has been satisfied, a manufacturer is held to the skill of an expert in its business and to an expert's knowledge of the materials and processes in its industry. Manufacturers have a duty to possess expert knowledge in the field of their products and to exercise reasonable care in placing the product in the market, which duty must be met by inspection and testing.

Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil* 454-55 (South Carolina Bar 2002) (citing *Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 259 S.C. 346, 191 S.E.2d 774 (1972)). In *Carolina Home Builders*, the Supreme Court affirmed the use of a jury charge "that a manufacturer . . . is held to the skill of an expert in his business, and to an expert's

knowledge of the materials and processes in his industry," where the defendant-manufacturer's "chief engineer testified." 259 S.C. at 358-59, 191 S.E.2d at 779.

Ford's assertion that it being deemed an expert would "lead to absurd results" is unfounded. (Br. of Resp't pp. 35-36). Rather, it would be an absurd result if a manufacturer is not an expert in the design of a product it designed, manufactured, and sold to consumers. Presumably Ford considers itself an expert in automotive manufacturing. Ford's suggestion that it could call any company employee to be deemed an expert regardless of their actual qualifications and knowledge is absurd and would violate the Rules of Civil Procedure. (Br. of Resp't pp. 35-36). Under Rule 30(b)(6), a corporation is required to produce a person knowledgeable about the topics specified. Rule 30(b)(6), SCRCP ("The persons so designated shall testify as to matters known or reasonably available to the organization."). It would be against Ford's interests in defending a case to designate a corporate representative who knew nothing about the specified topic. There is no requirement that a defendant-manufacturer "retain or call technical or engineering expert witnesses." (Br. of Resp't p. 35). In this case, for example, Ford uses its employee, Krishnaswami, as an expert.

The law that a manufacturer is an expert in its field does not eviscerate Rule 702, SCRE. (Br. of Resp't p. 36). Ford's argument to the contrary misses a critical point—the qualifications and reliability at issue would be those of Ford Motor Company, not of the individual witness, because the witness is not testifying as himself or herself but as Ford. Under South Carolina law, Ford, as a manufacturer, is an expert in the design and manufacture of its vehicles.

Nothing prohibits a plaintiff from relying on the defendant's testimony for part of its burden of proof. (Br. of Resp't p. 36). Rather, South Carolina law provides that a party may seek and obtain testimony from an adverse party, and the only purpose of obtaining testimony is to

prove a party's case. Rules 30(b)(6) and 32(a)(2), SCRCP; Rule 801(d)(2), SCRE; Rule 611(c), SCRE ("When a ***party calls*** a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." (emphasis added)). Krishnaswami testified as Ford, the manufacturer of the product at issue, and, as such, testified as an expert under South Carolina law.

Finally, Ford incorrectly focuses on the Newberns' decision to not call Mr. Nranian as a witness. A party is not required to call every designated expert witness. In this case, the Newberns obtained the necessary testimony and evidence from Krishnaswami and did not need to prolong their case-in-chief by calling Mr. Nranian. The Newberns conveyed their intent to use Ford to prove their case in the opening statement: "You'll know from their own words and documents. They have requirements that airbags do not go off when they are not needed." (9-13-16 Tr. p. 247 lns. 9-11). The Newberns acted properly in calling Ford in their case-in-chief and reserving the ability to call Mr. Nranian as a rebuttal witness.

IV. Appellants Presented Evidence of All Elements of Strict Liability and Negligent Design

Appellants incorporate the proof of the strict liability and negligent design causes of action stated in their initial brief. Much of Ford's argument on this issue asks the Court to violate the standard of review by weighing the evidence or viewing the evidence in a light most favorable to Ford. The evidence presented at trial and described in Appellants' briefs demonstrates sufficient proof of the elements of strict liability and negligent design. Appellants respond below to particular arguments and misstatements made in Ford's brief. (Br. of Resp't pp. 39-45).

Ford falsely states that Appellants "in their opening brief don't mention the risk-utility analysis or point to any trial evidence on it." (Br. of Resp't p. 40). Appellants Brief contains a Facts section entitled "Evidence of Design Defect and Feasible Alternative Designs that Would

have Prevented Mr. Newbern's Injuries" (Br. of App. pp. 7-13), and Argument sections on "Evidence of Design Defect", "Evidence of Feasible Alternative Designs", and "Evidence the feasible Alternative Designs Would Have Prevented Mr. Newbern's Injuries." *Id.* at pp. 16-22; *Accord* Br. of Resp't p. 25 ("This [risk-utility] inquiry required the plaintiffs to present evidence of a reasonable alternative design and point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous." (internal quotation marks omitted)).

"For a plaintiff to successfully advance a design defect claim, he must show that the design of the product caused it to be unreasonably dangerous." *Branham v. Ford Motor Co.*, 390 S.C. 203, 218, 701 S.E.2d 5, 13 (2010) (internal quotation marks omitted). The risk-utility test is a means of showing a product is unreasonably dangerous by "point[ing] to a design flaw in the product and show[ing] how his alternative design would have prevented the product from being unreasonably dangerous." *Id.* at 225, 701 S.E.2d at 16; *see also id.* at 219, 701 S.E.2d at 13 (noting "[i]mplicit in Ford's argument" for the exclusive use of the risk-utility test in a design defect case "is the contention that a product may only be shown to be defective and unreasonably dangerous by way of a risk-utility test, for by its very nature, the risk-utility test requires a showing of a reasonable alternative design"). "This presentation of an alternative design must include consideration of the costs, safety and functionality associated with the alternative design." *Id.* at 225, 701 S.E.2d at 16.

The evidence shows that the restraint system as designed was unreasonably dangerous. Ford's policy is to deploy an airbag only when necessary because "it [would] be unreasonably dangerous to provide a person with a system that will deploy airbags when they are not needed." (9-14-16 Tr. pp. 548-49). Yet, Ford designed and manufactured a vehicle with a restraint system

it knew would deploy an airbag not because it was needed for occupant protection but so the system would operate a certain way in other crashes. (9-13-16 Tr. pp. 385 ln. 13 – 386 ln. 4; 9-14-16 Tr. p. 516 lns. 9-15).

The Newberns presented evidence of three feasible alternative designs, including evidence of the risk-utility factors of cost, safety, and functionality. *See* Br. of App. pp. 19-22. Ford could have set a higher threshold for the crash severity required for airbag deployment. (9-14-16 Tr. pp. 469-70). Ford testified it had "the technology to set [deployment threshold] to a higher threshold" so that, if the airbag has not deployed in a certain amount of milliseconds after a crash event begins, it does not deploy unless the event reaches a greater severity. (9-13-16 Tr. p. 385 lns. 3-6). This ensures the airbag is deployed only when it is needed for occupant protection. *See* 9-14-16 Tr. p. 601; Sled Test Video (showing little "if any" safety benefit to Mr. Newbern from airbag deployment in sled crash test). Ford could have redesigned the path taken by the signals between the crash sensors and the restraint control module, enabling the module to make a more accurate determination of the severity of a crash and whether an airbag is needed. (9-13-16 Tr. pp. 396, 360-65). The calibration software is located in the module and controls whether and when to deploy an airbag. (9-14-16 Tr. pp. 474-75). Improving the signals between the crash sensors and the module enables the software to make more accurate determinations of crash severity. Finally, Ford could have put the crash sensors in different locations and obtained more data to calibrate the system to work as intended. (9-14-16 Tr. p. 534). Ford sought to save money by using a one-sensor system and only had data points from the one-sensor design and the two-sensor design with locations on the left and right. *Id.* at p. 521 lns. 8-19. Ford testified that, when it receives a noncompliant calibration report, it was "an option" to "look at other sensor positions . . . and then

run back through the calibrations" to make a system deploy only when needed. *Id.* at pp. 531 ln. 25 – 532 ln. 14.

The fact that Krishnaswami, as Ford, testified that Ford had the ability and means to use all of these alternative designs is evidence they are feasible. (9-13-16 Tr. p. 403 lns. 8-18; 9-14-16 Tr. pp. 531-32, 548 lns. 3-11). However, rather than using any of these alternative designs, and contrary to its own design process, Ford simply accepted the noncompliant calibration that it knew would deploy airbags unnecessarily. The Newberns presented ample evidence of the risk-utility analysis between Ford's manufactured design and the feasible alternatives. Ford's design used a calibration that deployed an airbag in 5 crash modes that it specified as non-deployment events. (Calibration Report p. 12 (referring to test numbers SB15910, SB15907, SB15980, SB15978, and SB15891)). Ford accepted this defective design with full knowledge of the hazards of deploying an airbag unnecessarily. The feasible alternative designs would have deployed an airbag only when needed for occupant protection. A restraint system that deploys an airbag when needed has less risk and greater utility than a system that deploys an airbag unnecessarily.

Whether Appellants presented sufficient evidence of a design defect is not dependent on whether the calibration specifications Ford sent to Bosch are requirements or targets. (Br. of Resp't p. 39). Rather, the evidence is that Ford made the decision that an airbag was not needed for a crash such as the Newberns but then accepted a calibration that deployed an airbag. (9-13-16 Tr. pp. 362, 367, 380-81, 390; 9-14-16 Tr. pp. 496-97, 535). Whether the specifications sent to Bosch were requirements does not alter the fact that Ford made the nondeployment determination and then changed its mind not because an airbag was needed for the crash but for the restraint system to work a certain way in other crashes. (9-13-16 Tr. pp. 385-86). Further, whether the specifications were requirements does not alter the fact that Ford violated its own policy and the

accepted industry principle that an airbag should not deploy unless it is needed for occupant protection. (9-14-16 Tr. p. 548 lns. 19-24; 9-13-16 Tr. p. 382 lns. 10-14).

Regardless, viewing the evidence in a light most favorable to the Newberns, Krishnaswami provided at least conflicting testimony on whether the specifications are requirements. He answered questions using the word "requirement" without qualifying his answer and even used the word "requirement" himself. (9-13-16 Tr. p. 350 lns. 10-15, pp. 350 ln. 22 – 351 ln. 4, p. 407 lns. 21-25; 9-14-16 Tr. p. 483 ln. 6). He also testified that "requirements" and "targets" are interchangeable terms. *See* 9-13-16 Tr. p. 356 lns. 24-25; *Id.* at p. 362 lns. 24-25. Whether the specifications were requirements or targets is a disputed issue that must be viewed in a light most favorable to the Newberns.

Ford goes to great lengths to portray its design process as lengthy and thorough. *See, e.g.*, Br. of Resp't pp. 10, 13-14. While that may be Ford's general design process, the Newberns' presented evidence that Ford did not follow it for the design of the 2009 Ford Focus restraint system. For the 2009 Ford Focus, when Ford received the calibration report from Bosch showing five instances in which it could not meet Ford's specifications for airbag nondeployment, Ford did not go back to the drawing board, conduct more tests, or attempt in any way to alter the system. (9-13-16 Tr. p. 362). Counsel for the Newberns asked Krishnaswami about what Ford did when it received the noncompliant calibration: "instead of going ahead and making a new crash path or changing the sensors around, you looked at it, you said well, you know, that's not too bad; is that right?" (9-13-16 Tr. p. 381 lns. 16-19). Krishnaswami does not deny that Ford failed to attempt to correct the system to comply with its specifications. Rather, Ford simply decided "it is good." *Id.* at p. 381 lns. 20-21. No "re-calibrating" and "re-evaluating" occurred for the 2009 Ford Focus restraint system. (Br. of Resp't p. 14). Ford makes this point for the Newberns. In its brief, Ford

states that the specifications sent to Bosch are "soft targets" because the "final design result is" not based on the specifications but on "occupant injury values as recorded in crash test dummies." (Br. of Resp't p. 9 (quoting 9-13-16 Tr. p. 356)). However, it is undisputed that Ford did not conduct any additional crash tests after it received the noncompliant calibration for the 2009 Ford Focus. Therefore, the only "occupant injury values as recorded in crash test dummies" occurred **before** Ford sent the specifications to Bosch. Ford failed to follow its own design process and simply accepted the system as calibrated. That Ford accepted it does not mean it followed its design process in doing so or that the design is safe. Rather, that is an issue that should have been submitted to the jury.

Finally, the Newberns presented evidence of the additional element for proof of a negligence claim that "the defendant (seller or manufacturer) failed to exercise due care in some respect." *Branham*, 390 S.C. at 210, 701 S.E.2d at 9 (internal quotation marks omitted); (Br. of App. pp. 23-24). Ford agreed that its "policy" is to not deploy an airbag unless necessary. (9-14-16 Tr. p. 548 lns. 18-24). "Evidence of a company's deviation from its own internal policies is relevant to show the company deviated from the standard of care, and is properly admitted to show the element of breach." *Roddey v. Wal-Mart Stores East, LP*, 415 S.C. 580, 589, 784 S.E.2d 670, 675 (2016). In addition to evidence that Ford deviated from its own internal policy by manufacturing a vehicle it knew would deploy an airbag unnecessarily and by failing to follow its internal design process, there is also evidence Ford deviated from industry standards. Ford agreed "there's plenty of rule making which – in which everybody agrees that you don't want to deploy airbags unless they are necessary." (9-13-16 Tr. p. 382 lns. 10-14). In a negligence action, "the focus is on the conduct of the seller or manufacturer." *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995). The Newberns presented evidence that Ford's conduct

in manufacturing a vehicle it knew would deploy an airbag when it was not needed for occupant protection and, thereby, posed an unreasonable risk of danger, is a failure to exercise due care.

CONCLUSION

The lower court erred in granting Ford's motion for a directed verdict for the reasons stated in Appellants Steven and Claudia Newberns' briefs. Appellants request this Court reverse the lower court's decision and remand this case for a new trial.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr.

Case No. 2016-002209

Steven Newbern and Claudia Newbern,..... Appellants,

v.

Ford Motor Company,.....Respondent.

PROOF OF SERVICE

The undersigned certifies that a copy of the *Initial Reply Brief of Appellants* has been served upon the counsel of record listed below by mailing a copy of the same, postage prepaid, in the United States Mail, addressed as shown below this 10 day of May, 2017.

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May 10, 2017

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
Post Office Box 11629
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Re: *Steven Newbern and Claudia Newbern v. Ford Motor Company*, Appellate Case No. 2016-002209

Dear Mrs. Kitchings:

Enclosed for filing please find the original and one copy of Appellants Steven and Claudia Newbern's *Initial Reply Brief of Appellants* in the above-referenced case. Also enclosed is proof of service of the Brief.

Please return the file-stamped copy to me in the enclosed self-addressed, stamped envelope. By copy of this letter, I am serving all counsel of record with a copy of the same.

Appellants filed their Initial Brief in a sealed envelope. Since that filing, Ford Motor Company filed a motion to seal Exhibit 50, to which Appellants consented. Appellants conferred with Ford and understand that it is only requesting for Exhibit 50 to be sealed and not the parties' briefs. Therefore, Appellants do not file this brief under seal.

If you have any questions, please do not hesitate to contact me. Thank you.

With kind regards, I am,

BARNES LAW FIRM, LLC

Kathleen C. Barnes

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