THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appellate Case No. 2018-001124

Crystal L. Wickersham; Crystal L. Wickersham, as Personal Representative of the Estate of John Harley Wickersham, Jr.....*Plaintiffs*,

v.

Ford Motor Company .....*Defendant.*

BRIEF OF DEFENDANT FORD MOTOR COMPANY

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INTRODUCTION

In 2011, John Wickersham—who had suffered depression and suicidal thoughts for years—drove his Ford Escape straight through a "T" intersection and crashed into a tree. Wickersham suffered significant facial injuries during the accident. Eighteen months later, Wickersham committed suicide. After his death, Wickersham's wife and estate each filed lawsuits against Ford Motor Company, claiming the airbag system was defective. In the actions, Plaintiffs sought to hold Ford liable, not only for Wickersham's injuries, but also for his suicide. The jury ultimately returned a verdict of $4.65 million against Ford, but also found that Wickersham was 30 percent at fault for his own injuries. The federal district court refused to set the judgment aside or reduce it by 30 percent.

After certification by the United States Court of Appeals for the Fourth Circuit, this Court agreed to consider two questions of South Carolina law. First, does South Carolina recognize an "uncontrollable impulse" exception to the general rule that suicide breaks the causal chain for wrongful death claims? The answer is *no*. No court in South Carolina has ever adopted an uncontrollable impulse exception. Nor is such an exception appropriate, because this Court in *Scott v. Greenville Pharmacy*, 212 S.C. 485, 48 S.E.2d 324 (1948), already provided the proper standard for proximate cause in the context of suicide—whether the defendant "may reasonably contemplate that suicide will follow" from the tortious act. *Id.* at 494, 48 S.E.2d at 328. In any event, even if this Court adopted such an exception, this Court should hold that it does not apply when the decedent was

aware of his actions and it should reaffirm that a plaintiff would still need to prove that the suicide (or perhaps the uncontrollable impulse) was foreseeable in order to prevail.

Second, does comparative fault apply to claims for strict liability and breach of warranty in a crashworthiness action when the plaintiff is at fault for causing his enhanced injury, not the initial crash? This Court answered this question *yes* in *Donze v. General Motors, LLC*, 420 S.C. 8, 800 S.E.2d 479 (2017). While holding that comparative fault does not apply in crashworthiness claims when the plaintiff is at fault for the initial crash, this Court noted that comparative fault remained a defense if the plaintiff was a cause of the enhanced injury. Indeed, this result is required by South Carolina law and represents good policy.

STATEMENT OF ISSUES ON APPEAL

In its order of June 27, 2018, this Court agreed to answer the following questions certified to it by the Fourth Circuit:

1. Does South Carolina recognize an "uncontrollable impulse" exception to the general rule that suicide breaks the causal chain for wrongful death claims? If so, what is the plaintiff required to prove is foreseeable to satisfy causation under this exception—any injury, the uncontrollable impulse, or the suicide?

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

STATEMENT OF THE CASE

1. John Wickersham, a pharmacist living in Charleston, had long struggled with mental illness. He was first diagnosed with depression in 1998. (JA955–56; JA1172–73; JA1180–83.)[1] In 2003, he was diagnosed with bipolar disorder and consulted a psychiatrist because his depression had worsened and he was suicidal. (JA957; JA1454–57.) Wickersham also took medication to treat his depression. (JA1454–57.) And in January 2011, Wickersham told his doctor that he did not feel safe and contemplated suicide. (JA1462–63.) The doctor recommended that Wickersham be hospitalized, but Wickersham refused. (*Id.*)

Just a few weeks later, on February 3, 2011, while driving his 2010 Ford Escape home from work in Beaufort County, Wickersham drove straight through a "T" intersection into a tree. (JA823–25.) No other car or individual was involved in the accident. (JA855.) Wickersham severely injured his face during the accident, underwent several surgeries, and eventually lost his left eye. (JA875–95; JA914.)

After the accident, Wickersham struggled with pain management. He visited different doctors, dentists, and pain clinics, but was unable to manage his pain effectively. (JA914–15.) The bills from these medical visits put financial strain on Wickersham and his family. (JA1487–88.) Wickersham also continued to suffer from depression after the accident and was even hospitalized as a result. (JA1297.)

Wickersham also had employment difficulties before and after the accident. Regularly employed as a pharmacist since 1982, in November 2010 Wickersham

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[1] "JA" refers to the Joint Appendix (docket nos. 25-1–25-5) filed with the Fourth Circuit.

quit his job to start a new job in Charleston, but abruptly resigned one month later. (JA1461–62.) Wickersham tried to get his old job back, but it was already filled. (JA1462.) Thus, at the time of the accident, Wickersham was working only part-time. (JA1525.) Wickersham did not return to full-time work after the accident. (JA1487–91.) He briefly tried to work as a pharmacist, but his sole attempt lasted less than two months. (JA1489–91.) His unemployment, combined with his medical bills, led to severe financial difficulties. (JA1499.)

On July 21, 2012, over 18 months after his accident, Wickersham went into his bedroom at noon for his daily five-hour afternoon nap. His wife left the bedroom between 12:30 and 1:00, and at some point thereafter, knowing that he would remain undisturbed for several hours, Wickersham ingested a lethal dose of methadone. When his wife returned at 5:00 to wake him, she found him dead, along with two empty methadone bottles and a suicide note. (JA1509–12; JA1311–12.)

2. After his death, Wickersham's wife, Crystal Wickersham, filed two actions against Ford in the South Carolina Court of Common Pleas in Beaufort County. Ford removed both cases to the federal district court for the District of South Carolina. *See* 28 U.S.C. § 1441(a). Mrs. Wickersham filed one case on her own behalf and the other case as personal representative of her husband's estate (together, "Plaintiffs"). Each complaint brought the same claims for negligence, strict liability, and breach of warranty based on, *inter alia*, allegations that the airbag in Wickersham's Ford Escape was defective. Mrs. Wickersham sought damages for loss of companionship (JA42), whereas Wickersham's estate sought

damages for wrongful death,[2] pain and suffering, lost wages, and medical bills (JA52–54). The cases were not consolidated but were litigated and tried simultaneously.

Ford moved for summary judgment. Primary among its arguments was that South Carolina law required Plaintiffs to prove that it was foreseeable to Ford that a defective airbag would cause Wickersham to die by suicide, and that there was no such evidence. The district court rejected this argument, holding that all South Carolina law required to show that suicide was the proximate cause of Wickersham's death is evidence that Ford's actions led Wickersham to take his life due to an uncontrollable impulse. (JA179–80.) The district court did not require Plaintiffs to prove either that the uncontrollable impulse was foreseeable or that the suicide was foreseeable. (JA555–57; *see* Ford's 4th Cir. Reply Br. 17–18.)

During the two-week trial, Plaintiffs contended that the restraint system in Wickersham's vehicle was defective because the airbag should not have deployed during the accident. Plaintiffs posited that, had the airbag not deployed, Wickersham would not have suffered his severe injuries. (JA1890–95.) Plaintiffs also alternatively argued that the airbag deployed too late. (JA1901.)

Ford presented evidence that the airbag was not defective, that the computer program used to determine if the airbag should deploy was correct and that the airbag deployed at the proper time. The accident itself was severe and included two

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[2] In this brief, Ford refers collectively to Mrs. Wickersham's and Wickersham's estate's claims seeking damages resulting from Wickersham's death as Plaintiffs' claim for wrongful death.

collisions, each of which was processed by the airbag computer program: Wickersham's car initially hit a 10-inch curb while traveling at 42 mph, causing the car to become airborne; eventually it hit a tree 45 feet from the road. (JA1717–18.) Ford also presented evidence that Wickersham was injured because he was out of position in his seat during the crash, leaning over into the passenger seat, and the accident caused his face to impact the car's gearshift. (*See, e.g.*, JA1707–09.)

The jury returned a verdict for Plaintiffs. (JA364.) It found that the airbag was defective and that Ford was liable for strict liability, negligence, and breach of warranty. The jury awarded Plaintiffs a total of $4.65 million in compensatory damages—$1.9 million for the personal injury claims and $2.75 million for the wrongful death claim. The jury also found that Wickersham was 30 percent at fault for his injuries. (*Id.*)

The district court then entered judgment for Plaintiffs. (JA368–69.) However, despite the jury's comparative fault finding, the district court refused to reduce the damages awarded. Ford then moved to alter or amend the judgment, for judgment as a matter of law, and for a new trial. (JA392–573.) *See* Fed. R. Civ. P. 50(b), 59(a) and (e). The district court denied all motions. (JA719.) Ford appealed to the United States Court of Appeals for the Fourth Circuit, which then certified the two legal questions at issue to this Court.

ARGUMENT

I. South Carolina law does not and should not recognize an uncontrollable impulse exception.

South Carolina's wrongful death statute imposes three requirements for recovery: (1) the death of a person; (2) a wrongful or negligent act by the defendant; and (3) causation. *See* S.C. Code Ann. § 15-51-10. Further, under any products liability theory, a plaintiff must prove that the product defect was the proximate cause of the plaintiff's injury. *Bray v. Marathon Corp.*, 356 S.C. 111, 116, 588 S.E.2d 93, 95 (2003); *Rife v. Hitachi Constr. Mach. Co.*, 363 S.C. 209, 215, 609 S.E.2d 565, 569 (Ct. App. 2005); *see* S.C. Code Ann. § 15-51-10. Generally, establishing proximate cause requires proof of (1) causation-in-fact and (2) legal cause, which is foreseeability. *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006).

"[F]oreseeability is considered the touchstone of proximate cause, and it is determined by looking to the natural and probable consequences of the defendant's act or omission." *Id.* (internal quotations omitted). "Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach." *Parks v. Characters Night Club*, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001). "The law requires only reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability. One is not charged with foreseeing that which is unpredictable or that which could not be expected to happen." *Woody v. S.C. Power Co.*, 202 S.C. 73, 24 S.E.2d 121, 125 (1943); *see also Young v. Tide Craft, Inc.*, 270 S.C. 453, 463, 242

S.E.2d 671, 675–76 (1978) (explaining that "liability cannot rest on mere possibilities. The actor cannot be charged with 'that which is unpredictable or that which could not be expected to happen.'"). "Where the injury complained of is not reasonably foreseeable there is no liability." *Crolley v. Hutchins*, 300 S.C. 355, 357, 387 S.E.2d 716, 717 (Ct. App. 1989).

In South Carolina, suicide is generally considered an intervening act that breaks the chain of causation in wrongful death actions. *Scott*, 212 S.C. at 495, 48 S.E.2d at 328. This is consistent with the traditional American rule that suicide typically breaks the chain of causation. *See, e.g.*, *Johnson v. Wal-Mart Stores, Inc.*, 588 F.3d 439, 443 (7th Cir. 2009) ("[T]he traditional rule describe[s] suicides as intervening acts that break the causal chain because of their presumptively unforeseeable nature. Most other jurisdictions utilize the same approach."); C.T. Drechsler, Annotation, *Civil Liability for Death by Suicide*, 11 A.L.R.2d 751, § 2[b] (1950) ("Where an action is brought under a wrongful death statute the general rule is that suicide constitutes an intervening force which breaks the line of causation from the wrongful act to the death and therefore the wrongful act does not render defendant civilly liable" in an action "brought under a wrongful death statute."). This rule is "practically unanimous." *Civil Liability for Death by* Suicide, *supra,* § 4[a].

Plaintiffs argue that South Carolina law recognizes an exception to the general rule that allows a plaintiff to establish causation if the accident caused the decedent to suffer from an uncontrollable impulse to commit suicide. But as the

Fourth Circuit acknowledged in its order certifying this question, South Carolina courts have *never* recognized this exception. (Cert. Op. 9.) In fact, there is no need for South Carolina to do so because South Carolina law is already clear that the general rule may be overcome if there is a showing that the suicide—not just any injury—was reasonably foreseeable to the defendant.

Even if this Court does adopt an uncontrollable impulse exception, it should follow the majority approach and hold that if the decedent planned the suicide and understood his actions, the exception does not apply. And even under an uncontrollable impulse exception, a plaintiff still must show that either the uncontrollable impulse or the suicide was foreseeable, not just that *some* injury was foreseeable.

A. South Carolina does not recognize an uncontrollable impulse exception to the general rule that suicide breaks the causal chain for wrongful death claims.

South Carolina law is consistent with the general common-law rule that suicide breaks the chain of causation. *Scott*, 212 S.C. at 495, 48 S.E.2d at 328. However, no South Carolina court has *ever* recognized an uncontrollable impulse exception to this general rule. Rather, South Carolina law permits an exception to the general rule when the suicide itself was reasonably foreseeable to the defendant. This Court should retain that principle and reject the indeterminate uncontrollable impulse exception.

1. This Court established the governing legal principles in *Scott v. Greenville Pharmacy*. In *Scott*, a pharmacy was sued for wrongful death due to the suicide of a

customer. In response to a request for something to help him sleep, the pharmacy provided the decedent with barbiturate capsules without any labels and continued to provide the barbiturates to the decedent for the following year. *Id.* at 487–88, 48 S.E.2d at 325. The decedent became addicted to the drug, deteriorated mentally and physically, and eventually committed suicide while under the drug's influence. *Id.* The plaintiff alleged that providing the decedent with the drugs was unlawful and a proximate cause of his suicide. *Id.* at 488–89, 48 S.E.2d at 325–26.

This Court rejected the claim. It held that, as a matter of law, the wrongful act of providing the decedent with the drugs was not a proximate cause of his death. The Court began by noting that "[i]n every case of this character the inquiry is: Was the injury a natural and probable consequence of the wrongful act, and ought it to have been foreseen in the light of the attendant circumstances?" *Id.* at 493, 48 S.E.2d at 328. While it recognized that each case must be decided on its own facts, the Court rejected the notion that suicide is a foreseeable consequence of providing a customer with barbiturates:

> All that can be said is that the respondent's unlawful act could have produced a condition of mind out of which the tragedy might have resulted. However, so many elements may enter into a suicide that it is impossible to say that it was the natural and probable consequence of the negligence. In order to reach such a conclusion, we would have to eliminate entirely all those elements of feeling, temperament, disposition, emotional disorders, background and lack of self-control, which might of themselves have been sufficient to bring about the tragic result, even though the person committing suicide had not been under the influence of a drug.

Id. at 494, 48 S.E.2d at 328.

According to *Scott*, the *possibility* that an individual who purchased the drugs could die from suicide did not make it foreseeable. While "some suicides may result from the excessive use of drugs, such as, barbiturates, yet, as a vast majority of the people who use this form of drug do not commit suicide, it could not be said that he who sells the drug may reasonably contemplate that suicide will follow." *Id.* Indeed, this Court continued, "[t]he law requires only reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability. One is not charged with foreseeing that which is unpredictable or that which could not be expected to happen." *Id.* at 494–95, 48 S.E.2d at 328.

The South Carolina Court of Appeals has more recently applied this rule. In *Crolley v. Hutchins*, the court considered a claim for negligence brought against a bar that served the plaintiff while he was intoxicated; the plaintiff was then arrested and attempted to end his life while in custody. Applying *Scott*, the court held that the plaintiff could not recover for the attempted suicide because it was not foreseeable. 300 S.C. at 357–58, 387 S.E.2d at 717–18. "One does not expect a person to attempt suicide as a natural and probable result of being served a drink while intoxicated. The only inference to be drawn from the evidence is that the attempted suicide was an act which [the defendant] could not reasonably have foreseen and anticipated when he last served Crolley." *Id.* at 357–58, 387 S.E.2d at 718.

2. Under *Scott* and *Crolley*, in order to establish the defendant's liability for damages resulting from suicide, the suicide itself must be a reasonably foreseeable

consequence of the defendant's tortious action. *Scott* is explicit on this score, framing the question as: "Can it be reasonably said that his *tragic end* was a natural and probable consequence of the sale to him of the barbiturate capsules, and should it have been foreseen in the normal course of events?" *Scott*, 212 S.C. at 494, 48 S.E.2d at 328 (emphasis added). More pointedly, this Court explained that the defendant was liable only if it could "reasonably contemplate that *suicide* will follow" the sale of drugs. *Id.* (emphasis added).

Crolley similarly turned on the foreseeability of the *suicide*. The Court of Appeals rejected liability for the defendant because "[o]ne does not expect a person to attempt suicide as a natural and probable result of being served a drink while intoxicated." 300 S.C. at 357, 387 S.E.2d at 718.

South Carolina is far from unique in permitting liability for suicide only if the suicide itself was reasonably foreseeable. *See, e.g.*, *Tucson Rapid Transit Co. v. Tocci*, 414 P.2d 179, 186 (Ariz. Ct. App. 1966) (holding that the plaintiff must prove that the defendant could "have foreseen that his act in striking the rear-end of the plaintiffs' car would cause a deliberate suicide attempt"); *Edwards v. Tardif*, 692 A.2d 1266, 1269 (Conn. 1997) ("Conversely, suicide will not break the chain of causation if it was a foreseeable result of the defendant's tortious act."); *Appling v. Jones*, 154 S.E.2d 406, 411 (Ga. Ct. App. 1967) (holding that the intervening act of suicide must have been a foreseeable consequence of the negligence); *Turcios v. DeBruler Co.*, 32 N.E.3d 1117, 1128 (Ill. 2015) ("[A] plaintiff must plead facts demonstrating that the suicide was foreseeable, *i.e.*, that it was a likely result of the

defendant's conduct"); *Scoggins v. Wal-Mart Stores, Inc.*, 560 N.W.2d 564, 567 (Iowa 1997) ("[I]n order to find Wal-Mart liable for Chad's death, the suicide must have been foreseeable to Wal-Mart when it sold the ammunition."); *Stolarski v. DeSimone*, 922 N.Y.S.2d 151 (N.Y. App. Div. 2011) (holding that a tortfeasor may be held liable for suicide that is the result of a tortfeasor's negligent conduct, provided the suicide is a foreseeable consequence of the tortfeasor's acts); *White v. Lawrence*, 975 S.W.2d 525, 530 (Tenn. 1998) ("[T]he crucial inquiry is whether the defendant's negligent conduct led to or made it reasonably foreseeable that the deceased would commit suicide. If so, the suicide is not an independent intervening cause breaking the chain of legal causation.").

Therefore, based on *Scott*, not only does South Carolina not recognize an uncontrollable impulse exception, there is no *need* to apply such an exception. A plaintiff already has a means to overcome the general rule that suicide breaks the chain of causation: prove that the act of suicide itself was reasonably foreseeable. And, in any event, the uncontrollable impulse exception is an inadequate substitute. As the Missouri Supreme Court recently explained, "the irresistible impulse test is unclear," and state courts applying the general concept have disagreed about the particular contours of the doctrine. *See Kivland v. Columbia Orthopaedic Grp., LLP*, 331 S.W.3d 299, 309 (Mo. 2011) (en banc).

To be sure, the *Scott* proximate cause standard differs somewhat from the typical foreseeability standard. Generally, "while foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, the plaintiff

need not prove that the defendant have contemplated the particular event which occurred." *Baggerly*, 370 S.C. at 369, 635 S.E.2d at 101 (emphasis omitted). But the general standard makes no sense in the context of suicide. As *Scott* recognized, suicide is different and generally breaks the chain of causation. 212 S.C. at 495, 48 S.E.2d at 328. If all that was necessary was to show that *some* harm was foreseeable to prove causation for suicide, this standard would be regularly met and the exception would swallow the rule. Thus, this Court has held that the general rule that suicide breaks the chain of causation is overcome only if the suicide itself is foreseeable.

The facts here provide an example. It is undisputed that it is foreseeable that some injury could occur from a defective airbag. Indeed, this is true for most automotive defects. If the foreseeability of any injury was all that was required to prove that suicide was foreseeable, suicide would be foreseeable from *any* defective automotive component. In other words, the general rule that suicide breaks the chain of causation would be meaningless because some injury would always be foreseeable. This cannot be, and is not, the law.

This Court should therefore answer the first certified question no.

B. The uncontrollable impulse exception, if recognized, does not apply to volitional conduct and the suicide must be foreseeable.

As explained above, this Court should not recognize an uncontrollable impulse exception. If the Court does so, however, the Court should make clear that the exception is limited in two important respects: (1) it does not apply if the

decedent knew the consequences of his actions, and (2) the plaintiff must still prove—as he or she must prove in *every* tort case—foreseeability.

Most states have derived their uncontrollable impulse exception from the Restatement (Second) of Torts § 455 (1965). *See, e.g., Sindler v. Litman*, 887 A.2d 97, 109 (Md. Ct. Spec. App. 2005). That section states:

> If the actor's negligent conduct so brings about the delirium or insanity of another as to make the actor liable for it, the actor is also liable for harm done by the other to himself while delirious or insane, if his delirium or insanity
>
> > (a) prevents him from realizing the nature of his act and the certainty or risk of harm involved therein, or
> >
> > (b) makes it impossible for him to resist an impulse caused by his insanity which deprives him of his capacity to govern his conduct in accordance with reason.

Restatement (Second) of Torts § 455. Therefore, based on this exception, a plaintiff must show that the negligent conduct caused delirium or insanity in another that either

> prevented the decedent from realizing the nature of the act of suicide or resulted in the decedent's having an uncontrollable impulse to commit suicide, in the sense that the decedent could not have decided against and refrained from killing himself, and because of such uncontrollable impulse, the decedent committed suicide.

Sindler, 887 A.2d at 113.

Should this Court adopt this exception, it should likewise adopt the majority view that if the decedent planned the suicide and knew what he was doing, the exception does not apply. And, in any event, the Court should reaffirm that foreseeability under the uncontrollable impulse exception requires the plaintiff to

prove that either the uncontrollable impulse or the suicide was foreseeable, not just that some injury was foreseeable.

1. The uncontrollable impulse exception does not apply if the decedent was cognizant of his actions.

If this Court adopts the uncontrollable impulse exception set forth in § 455 of the Restatement, it should likewise hold that the exception does not apply if the decedent chooses to die by suicide.

While many courts have adopted the uncontrollable impulse exception, "the majority of courts have found that if the evidence shows the decedent planned the suicide and knew what he was doing, no irresistible impulse existed, even when it is clear that the decedent committed suicide as a result of injuries." *Kivland*, 331 S.W.3d at 309. For example, in *Tate v. Canonica*, 5 Cal. Rptr. 28 (Ct. App. 1960), the court held "that where the negligent wrong only causes a mental condition in which the injured person is able to realize the nature of the act of suicide and has the power to control it if he so desires, the act then becomes an independent intervening force and the wrongdoer cannot be held liable for the death." *Id.* at 40; *see also Rodriguez v. Admiral Lee Towing Inc.*, 103 F.3d 124 (5th Cir. 1996) (same); *Porter v. Murphy*, 792 A.2d 1009, 1015 (Del. Super. Ct. 2001) (adopting the standard set forth in California in *Tate*); *City of Richmond Hill v. Maia*, 800 S.E.2d 573, 577–78 (Ga. 2017) (holding that the uncontrollable impulse exception requires a showing that the suicide "was accomplished without conscious volition to produce death"); *Pastell v. Am. Fam. Mut. Ins. Co.*, 823 N.W.2d 35, 43 (Iowa 2012) (holding that a decedent who "acted with calculation" and "understood the consequences of his acts" did not

act with an uncontrollable impulse); *Sindler*, 887 A.2d at 113 ("But if the suicide is during a lucid interval, when he is in full command of his faculties but his life has become unendurable to him, it is agreed that his voluntary choice is an abnormal thing, which supersedes the defendant's liability."); *McMahon v. St. Croix Falls Sch. Dist.*, 596 N.W.2d 875, 880 (Wis. Ct. App. 1999) ("In contrast, when suicide results from a 'moderately intelligent power of choice,' even if the choice is made by a disordered mind, the suicide is a new and independent cause of death that immediately ensues."). Treatises also agree. *See, e.g.*, W. Page Keeton, *et al.*, Prosser and Keeton on Torts § 44, at 311 (5th ed. 1984) ("[I]f one is sane, or if the suicide is during a lucid interval, when one is in full command of all faculties, but life has become unendurable by reason of the injury, it is agreed in negligence cases that the voluntary choice of suicide is an abnormal thing, which supersedes the defendant's liability.").

This limitation on the uncontrollable impulse exception is also consistent with the Restatement (Second) of Torts, which explains:

> [T]he fact that the actor's negligence causes harm to another which subjects him to recurrent attacks of extreme melancholia does not make the actor liable for death or other harm which the other deliberately inflicts upon himself during a lucid interval in an effort to terminate his life because of his dread of the increasingly frequent recurrence of these attacks.

Restatement § 455 cmt. d.

This Court should likewise adopt this rule. It is consistent with *Scott* itself, which ruled against the plaintiff because "the allegations of the complaint lack much of describing Scott as being without mind or lacking in volition." 212 S.C. at

492, 48 S.E. at 327. The rule makes it clear that it is not enough for a plaintiff to show that the defendant's conduct started a chain of circumstances that led to the suicide. *See Sindler*, 887 A.2d at 112. It ensures that a defendant is held liable for a suicide only when the decedent had no control over his or her actions as a result of the defendant's tortious conduct.

2. Foreseeability requires the plaintiff to prove that the uncontrollable impulse or the suicide was foreseeable.

Finally, if this Court adopts the uncontrollable impulse exception, it should also reaffirm that a plaintiff is required to prove that the suicide or the uncontrollable impulse—not simply some injury—was foreseeable.

As an initial matter, while the certified question this Court agreed to answer presumes there is a difference between a standard that requires foreseeing suicide and one that requires foreseeing an uncontrollable impulse to die by suicide, Ford believes that any difference between these two standards is illusory. As a practical matter, foreseeing whether an action will cause an individual to have an uncontrollable impulse to die by suicide would not require anything different from foreseeing an actual suicide. If an individual has an uncontrollable impulse to die by suicide, by definition a suicide attempt will be foreseeable.

In any event, the correct standard is one that requires foreseeing the suicide. This is the only standard that is consistent with this Court's holding in *Scott*, which required that the *suicide*—and not just any *injury*—be reasonably foreseeable to the defendant. *See* 212 S.C. at 495, 48 S.E.2d at 328. Indeed, this standard makes sense because suicide generally is not foreseeable and breaks the chain of causation. *Id.* It

is also consistent with the standard established in many other states that apply the uncontrollable impulse exception. *See, e.g.*, *Tucson Rapid Transit Co.*, 414 P.2d at 186 (holding that even when an uncontrollable impulse exception exists, the plaintiff is still required to prove that the defendant "should have foreseen that his act in striking the rear-end of the plaintiffs' car would cause a deliberate suicide attempt"); *Edwards*, 692 A.2d at 1269 (same).

To be sure, this is not the normal foreseeability standard. But as explained above, it is necessary in the context of suicide to ensure that the general rule—that suicide breaks the chain of causation—is not rendered meaningless. *Scott* dictates that suicide is treated differently. Because there is a general rule that suicide breaks the chain of causation, any exception to this rule must of necessity be limited.

II. Comparative fault in causing enhanced injuries applies to claims for strict liability and breach of warranty in a crashworthiness case.

At trial, one of Ford's primary defenses was that Wickersham was out of position in his seat, and that this was a proximate cause of his injuries because it allowed him to contact the gearshift during the collision. The jury agreed with Ford's defense and found that Ford proved that "John Harley Wickersham was at fault in his use of the 2010 Ford Escape restraint system, and that John Harley Wickersham's fault was a proximate cause of his injuries...." (JA365.) The jury then determined that Wickersham was 30 percent at fault and Ford was 70 percent at fault. (*Id.*) However, the district court refused to reduce the jury award by 30 percent. (JA368–69.) On appeal, the Fourth Circuit has now requested that this

Court clarify South Carolina law on this issue: whether comparative fault applies to claims for strict liability and breach of warranty in a crashworthiness case when the comparative fault caused or contributed to the enhanced injury, not the initial crash. The Court should answer yes.

A. *Donze* held that comparative fault applies to strict liability and breach of warranty claims when the plaintiff's actions were a cause of the enhanced injuries.

In a crashworthiness case, a car manufacturer may be held liable for enhanced injuries that were caused by a defective product, even if it was not responsible for the accident itself. *Mickle v. Blackmon*, 252 S.C. 202, 230, 166 S.E.2d 173, 185 (1969). This Court has previously recognized the crashworthiness doctrine, finding that because "an automobile manufacturer knows with certainty that many users of his product will be involved in collisions," *id.*, a manufacturer has a duty to take reasonable precautions that avoid or minimize injuries incurred in a crash. *Donze*, 420 S.C. at 14, 800 S.E.2d at 481. "The doctrine applies if a design defect, not causally connected to the collision, results in injuries greater than those that would have resulted were there no design defect." *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548, 565 (D.S.C. 1999), *rev'd in part on other grounds*, 269 F.3d 439 (4th Cir. 2001).

Just last year, this Court addressed the issue of comparative fault in a crashworthiness case in *Donze*. In that case, the plaintiff and his friend were driving in a Chevrolet pickup truck after smoking synthetic marijuana. The truck failed to stop at a stop sign and collided with another vehicle. The resulting collision

caused a fire that badly burned the plaintiff. The plaintiff filed a crashworthiness case under theories of strict liability and breach of warranty against General Motors. He did not claim that GM was responsible for causing the initial accident, but instead alleged that a defect in the gas tank caused enhanced injuries—the burns. GM argued that the plaintiff's comparative negligence in causing the *initial* accident limited its liability for the *enhanced* injuries. *Donze*, 420 S.C. at 10–11, 800 S.E.2d at 480.

The Court held that comparative fault principles do not apply in these circumstances. *Id.* at 17–20, 800 S.E.2d at 484–85. It reasoned that "the crashworthiness doctrine itself divides and allocates fault to a manufacturer for damages it alone caused, so it would be incongruous to allow comparative negligence to apply" to a plaintiff's fault in causing the initial collision. *Id.* at 19, 800 S.E.2d at 485. "[T]he enhanced injuries are a subsequent and separate event, the sole cause of which is the manufacturer's defective design" and, "[t]herefore, any negligence on the part of the plaintiff in causing the initial collision is irrelevant." *Id.* at 12, 800 S.E.2d at 481.

While the situation in *Donze* concerned comparative fault when the plaintiff's negligence was a proximate cause of the initial accident, the Court briefly addressed the question presented here, when the comparative fault is a proximate cause of the enhanced injury. The Court "note[d] . . . that comparative negligence related to the defective component itself—tying a door shut for example—could still be a defense, if a factual basis existed." *Id.* at 20 n.4, 800 S.E.2d at 485 n.4 (alterations and

internal quotation marks omitted). Indeed, the Court (*id.* at 17–20 & n.4, 300 S.E.2d at 484–85 & n.4) expressly adopted the rationale in *Jimenez*, which acknowledged that comparative fault as to the enhanced injuries remains a viable defense under South Carolina law, *see Jimenez*, 74 F. Supp. 2d at 566 n.11. And Justice Kittredge's concurring opinion emphasized that the Court's holding that comparative negligence does not apply to crashworthiness cases governs only when the comparative negligence caused the initial crash, and not when the plaintiff's fault was a proximate cause "of the so-called 'enhanced injuries.'" *Donze*, 420 S.C. at 24, 800 S.E.2d at 487–88.

Donze also suggests that comparative fault applies to strict liability and breach of warranty claims. After all, the plaintiff in *Donze* asserted *only* these two claims. *Id.* at 10, 800 S.E.2d at 480. If, as Plaintiffs argued to the Fourth Circuit in this case, comparative fault *never* applied to strict liability and breach of warranty claims, this Court presumably would have resolved the case on that straightforward basis, rather than engaging in its detailed analysis of the crashworthiness doctrine.

Donze answers the question that the Fourth Circuit certified here: comparative fault *does* apply in a crashworthiness case when the plaintiff alleges claims of strict liability and breach of warranty and the jury finds that the plaintiff's actions caused his own enhanced injuries. This Court need look no further.

B. Comparative fault applies when the plaintiff's actions are a cause of the enhanced injuries.

Even if (as the federal district court believed, *see* JA752) footnote 4 of *Donze* simply meant to leave this question open, the Court should nonetheless conclude that comparative fault applies here for two reasons. *First*, *Donze*'s rationale for not applying comparative fault principles when the plaintiff caused the *initial* crash does not pertain here, where the jury found that Wickersham caused his own *enhanced* injuries. And, *second*, South Carolina law requires application of comparative fault even though this case involves strict liability and breach of warranty claims.

1. Comparative fault applies when the plaintiff is a cause of the enhanced injury and *Donze*'s rationale for rejecting comparative fault is not applicable.

In *Donze*, this Court held that comparative fault principles do not apply to the cause of the initial crash because "any negligence by the plaintiff or another defendant which may have contributed to the initial crash is entirely irrelevant." 420 S.C. at 20, 800 S.E.2d at 485. The Court reasoned that "[b]ecause a collision is foreseeable as a result of the design defect, the triggering factor of the accident is simply irrelevant." *Id.* at 18, 800 S.E.2d at 484 (quoting *Jimenez*, 74 F. Supp. 2d at 566). "In other words, because an underlying accident is presumed in crashworthiness cases, a manufacturer's liability is predicated on whether the injuries were enhanced by a defect in the automobile, not on the precipitating cause of the collision." *Id.* at 17–18, 800 S.E.2d at 484. Thus, the negligence in causing the accident is irrelevant. *Id.* at 17, 800 S.E.2d at 484.

This reasoning simply does not apply here. The cause of the initial accident is not at issue. Rather, only the cause of the enhanced injury is relevant. And it is a basic principle of proximate cause that there can be multiple proximate causes of an injury. *See infra*, at pp. 29–30. While the crashworthiness doctrine contemplates that the injured person may cause the initial accident, it does not presume that he will cause his enhanced injuries. Indeed, the cause of the enhanced injury is far from "irrelevant"; rather, it is the main issue in crashworthiness litigation. In fact, in this case, the district court instructed the jury to determine whether "the defect was *a* proximate cause of John's Wickersham's injuries" and whether "Mr. Wickersham's fault was *a* proximate cause of his own injuries." (JA675 (emphasis added).)

The rationale in *Donze* for why comparative fault does not apply to the cause of an initial accident thus has no relevance to the cause of the enhanced injury itself.

2. Comparative fault related to the enhanced injury applies to claims for strict liability and breach of warranty.

This Court should also apply comparative fault here for four additional reasons. *First*, South Carolina law provides that comparative fault applies to breach of warranty and strict liability claims. The legislature could have but did not exclude certain types of cases. *Second*, it makes sense to treat strict liability and breach of warranty the same as negligence. *Third*, applying comparative fault here is consistent with ordinary principles of proximate cause. And, *finally*, applying comparative fault is consistent with tort policy.

a. In 1991, this Court "join[ed] the vast majority of our sister jurisdictions" and adopted comparative negligence because it "is the more equitable doctrine." *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 244, 399 S.E.2d 783, 784 (1991). This Court later recognized that "South Carolina's system is essentially a comparative fault system." *Berberich v. Jack*, 391 S.C. 278, 292, 709 S.E.2d 607, 614 (2011). Under this system, "each party's relative fault in causing the plaintiff's injury will be given due consideration." *Id.* at 292–93, 709 S.E.2d at 614–15.

The South Carolina legislature codified the comparative fault system in 2005 when it adopted the Contribution Among Tortfeasors Act, S.C. Code Ann. § 15-38-15. This Act effectively requires application of comparative fault to all claims for personal injury. In doing so, the legislature did not exclude strict liability and warranty claims.

Section 15-38-15(A) applies "[i]n 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." The Act requires a jury to determine the "fault" of all of the defendants in such an action and the "fault (comparative negligence), if any, of [the] plaintiff." § 15-38-15(A). Section 15-38-15(C) further provides that the jury "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.'" § 15-38-15(C).

The plain language of the Act thus dictates that comparative fault applies to strict liability and breach of warranty claims when the enhanced injury was proximately caused by the plaintiff. A strict liability and breach of warranty claim is "an action to recover damages from personal injury [or] wrongful death," § 15-38-15(A), and thus the Act applies to these claims. Indeed, the statute does not limit comparative fault only to claims for negligence. The plain language of the Act therefore requires a jury to determine the fault of all parties, including the plaintiff, and apportion damages accordingly. "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Paschal v. State Election Comm'n*, 317 S.C. 434, 436–37, 454 S.E.2d 890, 892 (1995); *see also id.* ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning . . . and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope.").

b. Even if the Act does not govern, the Court should still apply comparative fault. In South Carolina, a plaintiff bringing a product liability case may assert theories of negligence, strict liability, and breach of warranty. *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 538, 462 S.E.2d 321, 325 (Ct. App. 1995). Regardless of the theory, 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 prove an additional element—that the product manufacturer was negligent in some respect. *Id.*

There is no justification for allowing a defendant who was negligent to assert the defense of comparative fault, while denying the defense to one who was not negligent. Indeed, every defendant who is found to be negligent in a products liability case must of necessity also be liable for strict liability and breach of warranty. Allowing comparative fault to apply only to negligence and not strict liability and warranty claims would create the perverse result that a defendant who has committed negligence on top of the elements for strict liability and breach of warranty could assert comparative fault while a non-negligent defendant could not. No public policy supports reducing the liability of negligent defendants but not the liability of defendants who are less blameworthy. *See, e.g.*, *West v. Caterpillar Tractor Co.*, 547 F.2d 885, 887 (5th Cir. 1977) (holding that allowing comparative fault to apply to product liability claims under 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"); *Fiske v. MacGregor*, 464 A.2d 719, 728 (R.I. 1983) ("Ironically defendant manufactures 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.").

Moreover, in 1991 this Court adopted comparative fault for a fundamental reason: it is "the more equitable" manner of allocating fault in the State's tort system. *Nelson*, 303 S.C. at 244, 399 S.E.2d at 784. This Court has never held that the application of the principle is limited only to *some* areas of tort law. But failure to apply comparative fault to strict liability and breach of warranty claims would effectively exempt the entirety of products liability law from this Court's comparative fault regime. As noted, because negligence requires a plaintiff to allege every element of a strict liability and breach of warranty claim, the latter claims will *always* be present in every products liability complaint, and therefore comparative fault will *never* apply. There is no justification for adopting such a significant exception from the comparative fault principle.

Indeed, courts in other states routinely hold that comparative fault applies not only to negligence claims, but also claims requiring proof of lessor degrees of fault, such as strict liability and breach of warranty. *See, e.g.*, *Daly v. Gen. Motors Corp.*, 144 Cal. Rptr. 380, 388 (1978) ("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"); *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)); *see also* 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.* § 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 cmt. b (2000) ("Most states now apply their comparative-responsibility system to strict products liability."); Restatement (Third) of Torts: Products Liability § 17, cmt. a (1998) ("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).

c. The Court should also hold that comparative fault applies here because it is consistent with ordinary principles of proximate cause.

"To show proximate cause, a plaintiff must show both causation in fact and legal cause." *Roddey v. Wal-Mart Stores E., LP*, 415 S.C. 580, 590, 784 S.E.2d 670, 675–76 (2016). Causation in fact is established by proving "that the injury would not have occurred 'but for' the defendant's negligence, and legal cause by establishing foreseeability." *Id.* There can also be more than one proximate cause of the same injury. *Id.*; *see also Gray v. Barnes*, 244 S.C. 454, 463, 137 S.E.2d 594, 598 (1964) (same); *Gibson v. Gross*, 280 S.C. 194, 196, 311 S.E.2d 736, 738 (Ct. App. 1983) (same); Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26, cmt. c (2010). Indeed, courts have repeatedly held that proof that a vehicular defect was one cause of an injury has no tendency to prove that the driver did not also cause those same injuries. *See, e.g., 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."); *General Motors Corp. v. Lahocki*, 410 A.2d 1039, 1050 (Md. 1980) ("Contee would have us hold that because the injuries . . . came as a result of [a defect], this relieves Contee of any obligation. This argument fails to recognize that there may be more than one proximate cause of injuries."). And it is generally recognized that the same causation standard applies to both defendant's and plaintiff's negligence. *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 168 (2007); Restatement (Second) of Torts § 465(2) (1965). Fundamentally, it is the role of juries to determine all of the proximate causes of an injury and then to apportion fault to those responsible entities.

The facts here provide a perfect example of why comparative fault should apply. The jury found that Wickersham's conduct proximately caused his injuries and was responsible for 30 percent of them. Refusing to apply comparative fault would allow Wickersham to hold Ford liable for 100 percent of the injuries when Ford was in fact only 70 percent responsible, thereby completely absolving Wickersham of his own fault in causing his injury by being out of position. This is highly inequitable and inconsistent with general tort principles.

Indeed, there is no justification for allowing plaintiffs to avoid responsibility for their own negligent acts that cause an enhanced injury. For example, suppose that in *Donze* the plaintiff could have escaped from the truck with only minimal

burns, but before the accident he negligently welded the doors shut and thus was trapped in the vehicle. There is no conceivable rationale in tort policy to hold the manufacturer fully liable for all of the plaintiff's injuries in such circumstances, or to permit such a plaintiff to escape the consequences of his own negligence. So too here, there is no basis to relieve Wickersham of responsibility for causing his own injuries.

d. Finally, applying comparative fault here does not undermine the goals of product liability law. As the California Supreme Court explained, when adopting comparative fault for strict liability claims:

> The foregoing goals [of protecting defenseless victims of defects and spreading the cost of compensation], we think, 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. Such a result would directly contravene the principle . . . that loss should be assessed equitably in proportion to fault.

Daly, 144 Cal. Rptr. at 386–87.

Further, applying comparative fault will not reduce a manufacturer's incentive to make safe products. This is so for two reasons. First, the manufacturer will remain liable to some extent even when the plaintiff's own conduct has

contributed to his injury, so "[t]he manufacturer's . . . incentive to avoid and correct product defects remains." *Id.* at 737–38. Second, "a manufacturer, in a particular case, cannot assume that the user of a defective product upon whom an injury is visited will be blameworthy." When a user is "free of fault, . . . the manufacturer's incentive toward safety both in design and production is wholly unaffected." *Id.*

The Court should answer the second certified question yes.

CONCLUSION

The Court should answer the first certified question *no* because *Scott* establishes the standard for proving foreseeability when an alleged wrongful death was caused by suicide. Even if the Court adopts an uncontrollable impulse exception, it should still (1) hold that the plaintiff cannot recover if the decedent was cognizant of his actions and (2) reaffirm that the plaintiff must prove that the suicide or the uncontrollable impulse itself was foreseeable.

The Court should answer the second certified question *yes* and hold that comparative fault applies in crashworthiness cases to claims for strict liability and breach of warranty when the issue is the cause of the enhanced injury.

August 29, 2018 By: _____

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AUG 29 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appellate Case No. 2018-001124

Crystal L. Wickersham; Crystal L. Wickersham, as Personal Representative of the Estate of John Harley Wickersham, Jr.....*Plaintiffs*,

v.

Ford Motor Company .....*Defendant.*

CERTIFICATE OF COUNSEL

The undersigned certifies that the BRIEF OF DEFENDANT FORD MOTOR COMPANY complies with Rule 211(b), SCACR, as well as the South Carolina Supreme Court's Order dated April 15, 2014.

August 29, 2018 By: _____

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PROOF OF SERVICE

I certify this 29th day of August 2018 that I have served a copy of the BRIEF OF DEFENDANT FORD MOTOR COMPANY upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

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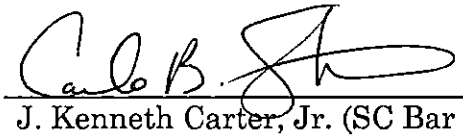
By: 

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