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.

# FINAL BRIEF OF APPELLANTS

BARNES LAW FIRM, LLC
Kathleen Chewning Barnes
SC Bar No. 78854
kbarnes@barneslawfirmsc.com
Post Office Box 897
Hampton, SC 29924
Phone: 803-943-4529

Raymond O. Bodiford
121 South Orange Ave., Suite 1150
Orlando, FL 32801
Phone: 407-423-9728
Fax: 407-648 1899

LAW OFFICES OF STEPHEN E. VAN GAASBECK
Stephen E. Van Gaasbeck
19815 Helotes Creek Road
Helotes, TX 78023
Phone: 210-924-9294
Fax: 210-260-4021

YARBOROUGH APPLEGATE LLC
William Applegate
291 East Bay St., Second Floor
Charleston, SC 29401
Phone: 843-972-0150
Fax: 843-277-6691

***Attorneys for Appellants***

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## STATEMENT OF ISSUES ON APPEAL

I. Whether the lower court erred in granting Ford's directed verdict motion when Appellants presented sufficient evidence of strict liability and negligent design to submit the case to the jury?

II. Whether Krishnaswami's testimony, as Ford's Rule 30(b)(6) corporate representative, constitutes party admissions that bind Ford and make further evidence unnecessary?

III. Whether Krishnaswami testified as an expert because he testified as the manufacturer who is deemed an expert by law and provided expert testimony without objection?

## STATEMENT OF THE CASE

This is a crashworthiness product liability action involving the restraint system in a 2009 Ford Focus. The action arises out of a motor vehicle accident in which Appellant Steven Newbern's front passenger airbag deployed unnecessarily and resulted in the loss of his right eye, facial fractures, and a sternum fracture. On May 17, 2013, Steven and Claudia Newbern ("Appellants") filed a complaint against Ford Motor Company and Stephen Ronald McGee,[1] the at-fault driver of the vehicle that hit Appellants' Ford Focus. On March 29, 2016, Appellants filed an Amended Complaint to conform to the evidence revealed in discovery. (R. pp. 32-35). Appellants asserted strict liability and negligence causes of action against Ford. *Id.* On April 15, 2016, Ford filed an Answer to Plaintiff's Amended Complaint.

From September 12, 2016, to September 16, 2016, a jury trial took place with the Honorable J.C. Nicholson presiding. Appellants called Ford's corporate representative and designated airbag design expert, Ramaniyam Krishnaswami, as an adverse witness in Appellants' case in chief. (R. p. 396 lns. 18-19). At the close of Appellants' evidence, Ford made a motion for a directed verdict, principally arguing Appellants did not prove a design defect and presented no expert testimony on defect or feasible alternative design. (R. pp. 740-46). Appellants asserted,

[1] Appellants settled their claim against McGee, and he was dismissed with prejudice.

*inter alia*, that the testimony of Ford's corporate representative, viewed in a light most favorable to them, established a design defect and a feasible alternative design such that no further evidence, expert or otherwise, was necessary. (R. pp. 747-52, 768-70).

On September 16, 2016, the lower court granted Ford's motion for a directed verdict. (R. p. 775). On September 26, 2016, Appellants timely filed a Motion for a New Trial. (R. pp. 66-84). On September 28, 2016, the lower court signed a Form 4 Order denying Appellants' Motion. (R. p. 6). Appellants timely served a Notice of Appeal on October 28, 2016. (R. p. 1).

## FACTS

### I. The Defective Airbag Deployment and Loss of Mr. Newbern's Right Eye

On the evening of December 28, 2012, the Newberns left their home in West Ashley, South Carolina, to go to the movie theatre. (R. p. 348, 681). Mrs. Newbern drove her 2009 Ford Focus, and Mr. Newbern rode in the front passenger seat. When Mrs. Newbern approached an intersection, Mr. McGee failed to yield the right-of-way, turned left in front of her, and hit the right front passenger side of the Newberns' Ford Focus. (R. pp. 685-86). Mr. McGee's vehicle continued on for approximately ten feet and hit another vehicle. (R. p. 357 lns. 21-23). The Newberns' driver and passenger airbags deployed. (R. p. 358).

Within thirty seconds after the collision, Mr. Newbern could no longer see. (R. p. 692 lns. 22-24). When Mr. Newbern unlatched his seatbelt, he felt a "crunching sensation" in his chest and "knew something was broken." (R. p. 688 lns. 5-7, 13). Emergency Medical Services personnel transferred Mr. Newbern to the trauma center at the Medical University of South Carolina (MUSC). (R. p. 361). He was in and out of consciousness during the ambulance ride and received morphine injections. (R. pp. 695-97). Mrs. Newbern testified that Mr. Newbern's face was "basically destroyed. Looked like his eye was almost out." (R. p. 362 lns. 11-15). Mr. Newbern underwent surgery to attempt to save his right eye. (R. p. 701). When he came home from the

hospital, Mrs. Newbern had to do everything for him, including "feed him, take him to the bathroom, shower him because he couldn't see anything." (R. pp. 378-79).

After the initial surgery, Mr. Newbern's left eye, on which he relied completely, began to constantly water and became extremely sensitive to light. (R. p. 705). These issues resulted in a referral to Dr. Andrew Eiseman, an ophthalmic plastic and reconstructive surgeon with a subspecialty in eye socket trauma. (R. p. 477). He was qualified as an expert in ophthalmology, including surgical and plastic reconstructive ophthalmology. (R. p. 490). Dr. Eiseman removed Mr. Newbern's right eye to relieve his pain and minimize the risk of developing sympathetic ophthalmia disorder in which the body attacks the noninjured eye. (R. pp. 491-92).

During the surgery to remove Mr. Newbern's right eye, Dr. Eiseman placed an artificial implant into the eye socket and then reattached the eye muscles to it so the artificial eye would have some movement. (R. p. 493). Dr. Eiseman performed a separate procedure to remove scar tissue that caused problems with the artificial eye. (R. p. 505). Mr. Newbern suffers from eyelid droop and has reduced peripheral vision on the right side. (R. pp. 505-06). He underwent additional surgery to address his facial fractures. In that operation, "they had to rebreak those [facial bones] to reconstruct [his] sinus cavity." (R. p. 706 lns. 12-15). Mr. Newbern now wears safety glasses when he drives because he is afraid of losing his remaining eye. (R. p. 381).

Mr. Newbern is an Air Force veteran who now works for Boeing. (R. pp. 347, 380-81, 672). Prior to the accident, he worked in a flight line position at Boeing, which consisted of making sure the aircraft is ready for its maiden flight, including finishing or redoing factory jobs, initial fueling, and the initial engine run. (R. pp. 676-77). He could not return to full-time work at Boeing for almost two-and-a-half years, and could never return to the flight line position. (R. pp. 382, 715-18).

Mr. Newbern suffered extensive physical and psychological injuries as a result of the defective airbag deployment. He lost his right eye, which caused lost depth perception and peripheral vision. (R. p. 378). Due to his lost vision, Mr. Newbern could no longer participate in his usual activities such as bike riding, target shooting, and going to the movies. (R. pp. 679-80). Driving is also extremely difficult for him now. (R. p. 381). The Newberns incurred $221,402.29 in medical expenses, and Mr. Newbern had $97,222.00 in lost wages. (R. p. 391 lns. 4-13).

The Newberns brought this crashworthiness product liability action against Ford asserting the restraint system in the 2009 Ford Focus is defectively designed and should not have deployed Mr. Newbern's airbag in the collision. (R. pp. 32-35). The Newberns allege the airbag caused the loss of his right eye, facial fractures, and sternum fracture. *Id.*

Ford's theory as to what caused Mr. Newbern's injuries is that he was holding a drinking glass in his hands at the time of the accident and the glass hit him in the face when the airbag deployed. (R. pp. 343-45). Therefore, under either Ford's theory or Appellants' theory, the injuries would not have occurred but for the airbag deployment. *See* R. p. 345 lns. 9-12 (stating Ford "believe[s] that the evidence will show you that [Mr. Newbern's] injury, the nature of his injuries, indicates that the airbag ***alone*** did not cause these injuries" (emphasis added)).

Regardless, Appellants testified there was no drinking glass in the car on the night of the accident and Mr. Newbern only uses an aluminum or plastic drink container in the car. (R. pp. 349-53, 359-60, 683-84, 690). Further, Dr. Eiseman testified he found no glass in the eye, the CT scan showed no glass, and his opinion is that it is "unlikely that broken glass was the culprit in [Mr. Newbern's] injuries." (R. pp. 494-95). In Dr. Eiseman's opinion, "the evidence is strongest to determine that this [injury] was due to blunt trauma" and not a penetrating injury such as glass. (R. pp. 495-97, 502).

## II. Krishnaswami's Testimony as Ford's Corporate Representative and Expert

Krishnaswami testified at trial on behalf of Ford as its corporate representative. Ford's counsel introduced Krishnaswami to the court as "the design engineer for Ford" and stated he would be in attendance during the trial. (R. p. 296 lns. 7-9). The lower court invited Krishnaswami to sit at counsel's table and, after Ford's counsel stated it was crowded, invited him "to come and sit behind the lawyers." (R. p. 296 lns. 10-18).

In its opening statement, Ford introduced Krishnaswami to the jury as its representative.

> In addition [to counsel] today we have Mr. Ram Krishnaswami who is sitting behind me. Mr. Krishnaswami is an engineer with Ford Motor Company. He will be a witness in this case. And he will address a number of things that you have heard about in the opening regarding what Ford did or may not have done, ***what Ford knew or may not have known***.

(R. p. 329 lns. 7-14) (emphasis added). Throughout its opening, Ford referenced the testimony that Krishnaswami would provide on its behalf.

> What the evidence will show you, you will first hear regarding the design and development process at Ford Motor Company. Mr. Krishnaswami is involved in that. He will testify regarding for this platform 2008 to 2011 Focus are basically the same vehicles, there were some changes in that time frame, but in that – before the job one, the first 2008, this was a 2009, but before 2008 Mr. Krishnaswami will talk to you about what testing was done by Ford with regard to the airbag sensing system.
>
> . . .
>
> Mr. Krishnaswami will be able to talk to you at length about the process that went into the design development of the 2008 to 2011 Focus and why we believe it is not defective and it was properly designed and that it operated properly in this crash.
>
> . . .
>
> And again Mr. Krishnaswami will be here and will be able to answer any questions that opposing counsel has.
>
> . . .
>
> We ran, and Ford ran specifically for this because of the allegations in this, a sled test with a dummy seated and we have that and I want to show it to you real quickly.

> . . . Mr. Krishnaswami was responsible for calibrating and arranging that sled test. He will be able to tell you about the forces, what it replicates and how it relates to the forces in this accident and what it tells us or what it shows us about whether a full sized rear seated passenger presents his head or face in the area of the bag deploying.

(R. p. 339 lns. 1-11, p. 340 lns. 7-12, p. 341 lns. 12-14, pp. 341 ln. 21 – 342 ln. 9).

During a break on the first day of trial, Appellants' counsel informed Ford that it planned to call Krishnaswami as an adverse witness in Appellants' case in chief. (R. p. 386). Ford referred to Krishnaswami as "Ford's corporate representative, . . . . [T]he technical airbag guy. He designs airbags." (R. p. 386 lns. 14-19). The lower court ruled that Appellants could call Krishnaswami in their case in chief and Ford could cross-examine him, recall him as a witness later, or both, but could not duplicate his testimony. (R. p. 387).

Appellants called Krishnaswami as an adverse witness. (R. p. 396). Krishnaswami stated that he testified in depositions for this case as a Ford corporate representative and as an expert witness designated by Ford. (R. pp. 398-99). Throughout his testimony as an adverse witness, Krishnaswami testified on behalf of Ford, frequently using the term "we" to refer to the corporation, and answered a question as to Ford's opinion. *See, e.g.*, R. pp. 406 ln. 19 – 407 ln. 21, pp. 408-12, p. 433 ln. 10-14, p. 449, p. 464 lns. 10-13, pp. 534-38, p. 541, pp. 597 ln. 25 – 598 ln. 7. Counsel for Ford even questioned him on cross-examination to speak on behalf of Ford. (R. p. 524 lns. 14-18).

Appellants' counsel specified that his questions were directed to Krishnaswami as Ford's corporate representative. "So you didn't under your initial soft targets or requirements, you, and I am talking about Ford, I know this isn't you . . . ." (R. p. 442 lns. 13-15). Krishnaswami did not deny he was testifying for Ford and counsel for Ford did not object. At no point during Appellants' extensive examination of Krishnaswami eliciting expert opinions did Ford object on the basis that Krishnaswami was not qualified as an expert. On the contrary, counsel for Ford elicited expert

testimony from Krishnaswami on cross-examination. *See, e.g.*, R. pp. 524, 561-63, 568. Finally, the lower court recognized that Krishnaswami testified as an expert when it told him to directly answer Appellants' questions and then "give whatever ***expert*** explanation you want to give." (R. p. 418 lns. 5-14) (emphasis added).

## III. Evidence of Design Defect and Feasible Alternative Designs that Would have Prevented Mr. Newbern's Injuries

Appellants brought this action as a crashworthiness case in which they allege Ford is liable for injuries due not to the collision itself but to Mr. Newbern's interaction with the interior of the vehicle, specifically the airbag, after the collision.[2] Ford understands the principle that every crash has two collisions—the first between the vehicle and another vehicle or object, and the second "is from the occupant into the interior of the vehicle." (R. p. 403). Ford knows that an occupant's impact with an airbag can cause injuries. (R. pp. 403-04,433-34). Ford knows specifically that a deploying airbag can cause eye injuries. (R. p. 580 lns. 4-9). Krishnaswami testified "we [Ford] have to be careful on how and where we deploy" an airbag. (R. p. 434 lns. 9-10).

Ford knows its vehicles will be in crashes and acknowledged it is responsible for ensuring that vehicle safety devices such as airbags work properly rather than cause harm. (R. p. 435 lns. 1-17). Ford agreed it should deploy an airbag only when it is needed (R. p. 460 lns. 3-7). One reason to not deploy an airbag unless it is needed is that a single crash event may involve multiple impacts in which an airbag is not needed for the first impact but is needed for a second, more severe impact. (R. pp. 457-58). "[W]e [Ford] try to preserve the airbag for the event where you need it." (R. p.

[2] "Under the crashworthiness doctrine, liability is imposed not for defects that cause collisions but for defects that cause injuries after collisions occur." *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 452 (4th Cir. 2001), *citing Mickle v. Blackmon*, 252 S.C. 202, 230, 166 S.E.2d 173, 185-87 (1969) (recognizing the crashworthiness doctrine in South Carolina).

457 lns. 8-10). Another reason is to avoid injuries, including eye injuries, that can occur solely from the airbag. (R. pp. 458-59).

For these reasons, Ford's corporate representative and expert admitted that Ford's policy is to deploy an airbag only when it is necessary because "it [would] be unreasonably dangerous to provide a person with a system that will deploy airbags when they are not needed." (R. pp. 603-04). At the time of manufacture of the 2009 Ford Focus, Ford was "technologically and economically" capable of making a system that deployed an airbag only when necessary. (R. p. 460 lns. 8-17).

Ford used Bosch as the component supplier for the airbag crash sensors in the vehicle. (R. p. 407). As part of the development process for the sensors in the restraint system, Ford provided Bosch with its system performance requirements for various crash scenarios or "modes". (R. pp. 404, 411, 441). Ford specifies whether the seatbelt pretensioner,[3] airbag, or both should deploy in a particular crash mode and the timing of the deployment. (R. pp. 406-07, 412-13, 416). Bosch then uses the data Ford collected from the sensors during crash testing to calibrate the crash sensor system in the vehicle according to Ford's specifications. (R. p. 529). Calibration is "the process of tuning the sensor system" in a vehicle. (R. p. 404 lns. 22-23). The results of the calibration process are provided to Ford in a "Calibration report". (R. pp. 413, 416).

Before giving Bosch its specifications, Ford spent significant time and effort to determine what crash modes do and do not require airbag deployment. Some crashes need only a pretensioner, some may need a pretensioner and an airbag, or may need an airbag for an unbelted

[3] A seatbelt pretensioner is available when an occupant is belted, and its function is to remove slack in the seatbelt by tightening it to make the seatbelt performance efficient in a collision. (R. p. 321, p. 425 lns. 17-25, pp. 525-27).

occupant and no airbag for a belted occupant.[4] Ford conducts hundreds of crash tests to get the information it uses to determine when to deploy and not deploy an airbag and within what timeframe after an accident impact it should deploy. (R. pp. 404-07). Ford also has "decades" of "history of collecting crash tests" and data it "accumulated internally" as well as the ability to conduct computer simulations. (R. p. 407). Bosch, as the sensor supplier, inputs the Ford calibration information for a vehicle into an algorithm in the sensor system. However, the calibration requirements provided by Ford, not the algorithm, "is what controls the airbag deployment or non-deployment." (R. p. 412 lns. 2-6).

The crash test Ford conducted that is most similar to the Newberns' collision is a 25 mile-per-hour crash into a rigid barrier wall at a 30-degree front right angle. (R. p. 424, p. 447, pp. 551-52). This is known as crash test 15978. (R. p. 422). The calibration report Ford sent to Bosch specified that, in this crash, a belted occupant should **not** receive an airbag. (R. pp. 437-38). Bosch was not able to achieve this specification and sent back a document showing that a belted passenger in a crash such as Mr. Newbern's would get an airbag.[5] (R. p. 419 lns. 8-9, p. 438). Ford's calibration requirements specified eight frontal barrier calibration collisions for which it did not want a stage one airbag deployment for a belted occupant. (R. under seal p. 20). The calibration report shows that the final calibration accepted by Ford would deploy an airbag unnecessarily in five of the eight collisions. *Id.* (referring to test numbers SB15910, SB15907, SB15980, SB15978, and SB15891).

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[4] The 2009 Ford Focus included technology that allowed the restraint system to know when an occupant was belted or unbelted. (R. p. 426).

[5] Crash test 15978 is listed as number 13 in the final calibration report. (R. under seal pp. 20-21). The chart shows that, for a crash such as the Newberns, Ford did **not** want an airbag to deploy for a belted passenger. This is indicated in the "target" column for the belted passenger by "0.0". *Id.*; R. p. 427.

This final calibration, which Ford accepted, is directly contrary to its non-deployment specification based on decades of data, hundreds of crash tests, and computer simulation. Krishnaswami testified to an "iteration" process that should take place between Ford and a sensor supplier such as Bosch and involve a back-and-forth to result in a safely calibrated restraint system. (R. pp. 411-17). He testified that, upon receiving the noncompliant calibration report, Ford could have conducted further calibration crash tests, moved the crash sensor positions, added more parts, or reinforced a crash path, and then reevaluated the system. (R. pp. 417, 537-38, 587). However, instead of doing this, Ford chose to accept a performance that deviated from its specifications and that it knew would deploy an airbag when it was not needed for occupant protection. (R. pp. 419, 590). Ford did this when it was already months behind production and attempting to implement a cheaper, one-sensor system. (R. pp. 575-76).

The 2009 model Ford Focus uses the same restraint system as the 2008.5 model. During the crash testing for the restraint system development, Ford tested three different frontal locations for crash sensors, "two on the outside and one in the center", that feed information to a sensor in the occupant space of the vehicle. (R. p. 421 lns. 6-8, p. 562). Ford ultimately wanted to use a one-sensor system. (R. p. 421 lns. 3-5). Cost was one of the factors in Ford's decision to change to a one-sensor system. (R. p. 576). Ford started production, what it refers to as "job one", for the 2008 model Ford Focus in June or July 2007. (R. pp. 420, 575). That model has a two-sensor system. (R. p. 421). Ford started production of a two-sensor system because it did not yet have the wiring for the single crash sensor system. (R. p. 575). On November 20, 2007, Ford and Bosch signed their approval of the final front calibration report for the model 2008.5, one-sensor system, and Ford began production shortly thereafter. (R. under seal p. 11; R. pp. 572-75, 420-21). Ford wanted the single crash sensor system implemented in June 2007 and was already behind for the

production when it accepted the Bosch calibration that deployed airbags in scenarios Ford designated as non-deployment. (R. pp. 575-76). The 2008 model, two-sensor system also did not meet Ford's specifications and was set to deploy a belted passenger's airbag in a crash such as the Newberns'. (R. under seal pp. 9-22). In between production of the 2008 and 2008.5 models, Ford chose not to work on the sensor system design to have it deploy an airbag only when needed. (R. p. 422).

Ford sends the calibration specifications to a crash sensor supplier approximately twelve months before it is set to start vehicle production. (R. pp. 536-37). Any exceptions to the calibration specifications that require changes to the vehicle or additional testing delay production. Appellants' model 2009 Ford Focus was distributed by Ford on August 20, 2008, nine months after Ford signed off on the front calibration, single-sensor system. (R. pp. 272-73).

Krishnaswami testified that Ford required airbag deployment for an unbelted occupant in the Newberns' crash scenario and had the technology to not deploy the airbag for a belted person, essentially to set a higher crash threshold for deployment. (R. p. 441 lns. 17-20, p. 442 lns. 3-6). He then admitted, on behalf of Ford, that Ford's choice to accept deployment for a belted occupant in the 15978 crash test scenario "wasn't because that somebody in that car that's belted needed it." (R. pp. 442 ln. 13 – 443 ln. 4). Rather, Ford chose to accept the airbag deployment in a scenario it specified as a nondeployment "for a different reason" other than protection to the occupant, that is to permit performance in another crash scenario. (R. pp. 442 ln. 13 – 443 ln. 1). Ford accepted the noncompliant airbag deployment in the Newberns' crash to maintain performance in another crash scenario. (R. p. 571 lns. 9-15).

Ford admitted the restraint system Bosch produced for the Ford Focus at issue did not meet the requirements Ford sent to Bosch for the restraint system. (R. pp. 413-15). Krishnaswami took

exception to the word "requirement" but nevertheless testified that the "starting targets" Ford gave Bosh were not met and, consequently, Ford accepted a system that did not calibrate to its "targets". *Id.* Ford made "exceptions to the original targets" and accepted Bosch's noncompliant calibration that deployed an airbag in a situation Ford determined it was not needed and knew could cause occupant injury. (R. pp. 419-20, p. 420 lns. 4-5). By way of comparison, the crash test for which Ford specified **no** airbag deployment involved a deceleration of approximately 68 Gs[6] and an acceleration of approximately 56 Gs while the Newberns' crash was much less severe, involving approximately 25 Gs deceleration and 8 Gs acceleration. (R. pp. 455-56). Yet, the airbag still deployed in this less severe crash.

Krishnaswami testified to numerous feasible alternative designs that would have prevented Mr. Newbern's injuries by not deploying the airbag. Ford could have increased the crash severity threshold required for deployment. (R. pp. 441-42, 524-29). Ford could have used alternate locations for crash sensors to get better coverage and enable the restraint system to only deploy an airbag when necessary. (R. pp. 417-22, 586-89). Further, Ford could have changed or reinforced the crash sensor path between the front sensors and the restraint control module ("RCM") that processes the information from the sensors to enable the RCM to make a more precise determination of the crash severity. (R. pp. 417-22, 529-30).

In response to the Newberns' allegations in this case, Ford conducted a "sled test", which is a crash test intended to reproduce the collision at issue and provide Ford information about how an occupant interacts with the interior of the vehicle and how the restraint system operates under specific circumstances. (R. pp. 401-404, 405, 642-44; Sled Test Video submitted on a CD). Ford

[6] A "G" is the unit of measure for deceleration, or the time it takes for a change of velocity to occur. (R. p. 450 lns. 18-19).

used the event data available from the Newberns' collision and input from its engineers to design the sled test. *Id.* The airbag deployed in the sled test. (R. pp. 645-48; Sled Test Video). The video of the sled test shows the path of the airbag and where Mr. Newbern would have been relative to the airbag. (R. p. 644). Appellants' injury causation expert, Paul Lewis, testified that, under the circumstances of the Newberns' crash, deploying the passenger airbag provides little, "if any" safety benefit to Mr. Newbern because there is minimal contact between the test dummy and the airbag, and that minimal contact does not alter the "head kinematics" of the dummy. (R. pp. 605, 648 lns. 14-21; Sled Test Video). In Mr. Lewis's opinion, the airbag deployment did not protect the occupant. (R. p. 612).

## IV. The Court's Decision to Grant Ford's Directed Verdict Motion

After Appellants rested, Ford made a motion for a directed verdict. (R. pp. 739-40). Appellants' counsel informed the Court they were proceeding with negligent design and strict liability causes of action on the theory that the airbag should not have deployed. (R. pp. 741 ln. 6 – 742 ln. 5). Ford argued that Appellants did not present proof of a design defect, feasible alternative design, or that an alternate design would have prevented Mr. Newbern's injuries. (R. pp. 742-46, 758). Ford asserted that Appellants were required to but did not present expert testimony on these issues. (R. pp. 743, 758).

Appellants responded by noting ample evidence of design defect and feasible alternative designs that would have prevented Mr. Newbern's injuries. (R. pp. 748-50, 755-56, 764-68). Appellants rejected Ford's argument that they lacked any necessary expert testimony because Ford designated Krishnaswami as an expert and he testified as Ford, the manufacturer who is deemed an expert. (R. pp. 768-70). Further, Ford, as a party to the litigation, can admit elements of a cause of action and, thereby, eliminate the need for further proof. *Id.*

The Court granted Ford's directed verdict motion but did not state the specific grounds upon which it granted the motion such as, for example, an absence of proof or a finding that Krishnaswami could not admit elements of the causes of action on behalf of Ford. The Court asked questions about the evidence and Mr. Krishnaswami's ability to admit elements of the case but, when ruling, simply said: "I'm going to grant the Defendant's motion for directed verdict on all causes of action." (R. p. 775 lns. 16-18).

On September 26, 2016, Appellants filed a timely motion for a new trial. (R. pp. 66-84). Appellants argued they presented sufficient evidence for a jury to return a verdict in their favor on the strict liability and negligence causes of action. *Id.* Appellants further argued that Krishnaswami's testimony on behalf of Ford constituted admissions by a party such that no further proof, expert or otherwise, was necessary. *Id.* On September 29, 2016, the lower court issued a Form 4 Order denying the motion. (R. p. 6). The Order states: "Plaintiff's Motion for a New Trial filed on September 26, 2016 is denied." *Id.* Appellants appeal from the lower court's decision to grant Ford's directed verdict motion and denial of their Motion for a New Trial. (R. pp. 1-2).

## STANDARD OF REVIEW

"In ruling on a motion for directed verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion and to deny the motion when either the evidence yields more than one inference or its inference is in doubt." *Estate of Carr v. Circle S Enters.*, 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008). "The appellate court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Donevant v. Town of Surfside Beach*, 414 S.C. 396, 406, 778 S.E.2d 320, 326 (Ct. App. 2015) (internal quotation marks omitted). "When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or

to resolve conflicts in the testimony or evidence." *Estate of Carr*, 379 S.C. at 39, 664 S.E.2d at 86. "The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor. If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." *Erickson v. Jones St. Publrs., LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006) (internal citation omitted).

## ARGUMENT

The lower court erred in granting Ford's directed verdict motion because Appellants presented ample evidence, viewed in a light most favorable to them, that would have allowed a reasonable jury to render a verdict in their favor. The case should have been submitted to the jury. Krishnaswami testified as Ford—the defendant in this action—and, as such, his answers bind Ford as admissions. Krishnaswami's testimony, when viewed in a light most favorable to Appellants, is a party admission that, combined with Appellants' other evidence, is sufficient to submit Appellants' case to the jury. This Court should reverse the lower court and remand the case for a new trial.

### I. Appellants Presented Evidence of all Elements of Strict Liability and Negligent Design

In South Carolina, a "car manufacturer must design and produce vehicles that are not in a defective condition unreasonably dangerous to the user." *Branham v. Ford Motor Co.*, 390 S.C. 203, 233, 701 S.E.2d 5, 21 (2010). Appellants presented evidence of all elements of their strict liability and negligent design claims. "Liberally" construing the evidence in the light most favorable to Appellants, it is susceptible to an inference that Appellants' presented sufficient evidence of Ford's liability, and the case should have been submitted to the jury. *Erickson*, 368 S.C. at 463, 629 S.E.2d at 663.

"[T]o find liability under any products liability theory, the plaintiff must show: (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." *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995). "A negligence theory imposes the additional burden on a plaintiff of demonstrating the defendant (seller or manufacturer) failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault." *Branham*, 390 S.C. at 210, 701 S.E.2d at 9 (internal quotation marks omitted).

Ford did not dispute that Appellants presented evidence of the first and third elements. It is undisputed that the airbag deployed and Mr. Newbern lost his right eye and suffered facial and sternal fractures as a result of the airbag deploying. Paul Lewis, Appellants' injury causation expert, testified that, to a reasonable degree of biomechanical engineering certainty, Mr. Newbern's eye injury and facial fractures were caused by blunt force trauma, specifically the airbag, rather than a piece of glass. (R. pp. 618, 624, 642, 654-55). Dr. Eiseman also testified to his opinion that the eye injury was due to blunt force trauma such as an airbag and not glass. (R. pp. 494-97, 502). In Mr. Lewis's opinion, the airbag, rather than the force of the seatbelt in the collision, caused Mr. Newbern's sternum fracture. (R. pp. 649-51, 661).

Appellants also presented evidence that, at the time of the accident, the restraint system was in essentially the same condition as when it left Ford's hands. The Newberns purchased the 2009 Ford Focus new. (R. p. 702 lns. 15-17). Prior to the December 28, 2012 collision at issue in this case, the car was in one rear end collision which resulted in a replaced rear bumper but no alteration of the airbag restraint system. (R. pp. 703-04).

Ford argued in its directed verdict motion that Appellants did not present sufficient evidence of the second *Bragg* element—that the product was defective and unreasonably dangerous. This is incorrect. Appellants presented evidence of a design defect, feasible alternative designs, and that the alternative designs would have prevented Mr. Newbern's injuries. *See Branham*, 390 S.C. at 225, 701 S.E.2d at 16 ("[I]n a product liability design defect action, the plaintiff must present evidence of a reasonable alternative design. The plaintiff will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous.").

### *A. Evidence of Design Defect*

Krishnaswami, as Ford, testified to the design defect in the 2009 Ford Focus restraint system. Ford determined, based on decades of data, crash testing for this system, and computer simulation, that an airbag was not needed for a belted passenger in a collision such as the Newberns'. (R. under seal pp. 9-22; R. pp. 404-07, 437-38). Ford knew that it should not deploy an airbag unless it is needed and that doing so would likely cause injuries. (R. pp. 403-04, 433-35, 460, 580). The restraint system is defective because its calibration deploys an airbag when it is not needed for the passenger's protection and, therefore, will likely cause injury to the passenger. Ford admitted it is "unreasonably dangerous" to manufacture a restraint system that will deploy an airbag when it is not needed. (R. pp. 603 ln. 25 – 604 ln. 3).

The evidence presented is that the restraint system is defective and unreasonably dangerous. Ford's acceptance of the final calibration does not make it safe. Accepting the final calibration provided by Bosch is different from determining that the specifications given to Bosch were wrong. Ford did not do that. Rather, Krishnaswami testified Ford accepted the defective calibration for the Newberns' collision for the purpose of attaining deployment in other types of

collisions, and that Ford did not take the time to manufacture a safe system because it was behind on the production schedule. (R. pp. 442-43, 571, 575-76).

Ford violated its own calibration requirements and internal policy prohibiting airbag deployment unless it is necessary when it chose to manufacture the 2009 Ford Focus with a restraint system calibrated to deploy an airbag in a collision such as the Newberns'. (R. pp. 413-15, 419-20, 457). In some instances Krishnaswami took issue with Appellants' counsel's use of the word "requirements" to describe the calibration requirements given to Bosch. (R. pp. 414-15). However, in other instances, he answered questions using the word "requirement" without qualifying his answer and even used the word "requirement" himself. (R. p. 407 lns. 10-15, pp. 407 ln. 22 – 408 ln. 4, p. 464 lns. 21-25, p. 538 ln. 6). He also testified that "requirements" and "targets" are interchangeable terms. *See* R. p. 413 lns. 24-25 ("Using that hard target as the regular requirement as the case may be . . . ."); p. 419 lns. 24-25 ("Correct, within all other requirements or guidelines or targets that we set forth.").

Further, Krishnaswami never testified that Ford actually changed its position that an airbag was not needed in the Newberns' crash. Rather, he simply said Ford "accepted the end results" of a design that it knew would deploy an airbag in a situation Ford determined did not need an airbag. (R. p. 414 ln. 15). As noted above, the underlying reason for doing so was Ford's deadline for switching from a two- to a one-sensor system and its overdue start of production for the one-sensor system.

Viewing the evidence in a light most favorable to Appellants that Ford acknowledged an airbag was not needed in this crash, deploying an airbag when it is not needed can cause injuries and is unreasonably dangerous, and it knew an airbag would deploy in this crash, the jury could

infer from Ford's testimony and internal documents that the design is defective and unreasonably dangerous.

### *B. Evidence of Feasible Alternative Designs*

Appellants satisfied the feasible alternative design element. The "presentation of an alternative design must include consideration of the costs, safety and functionality associated with the alternative design." *Branham*, 390 S.C. at 225, 701 S.E.2d at 16. Ford admitted this element through Krishnaswami's testimony as its corporate representative.

> Q. So you [Ford] got to do the best you can to not deploy airbags when they shouldn't, would you agree with that?
>
> A. Yes, and we got to also deploy the bags when you need it.
>
> Q. Right. And you do that by making a good system which actually you can do both, not deploy it when it isn't needed and deploy it when it is needed?
>
> A. Yes. I would agree with that and we have it here.
>
> Q. Is Ford capable of doing that, was it capable of doing that technologically and economically in 2009?
>
> A. Yes. And I believe we have done it here.[7]

(R. p. 460 lns. 3-18). On redirect, Appellants' counsel again asked "do you still agree that Ford has the technology to make sure that airbags don't deploy when they are not supposed to?" (R. p. 603 lns. 3-6). Ford answered: "Yes. That's this technology." (R. p. 603 ln. 7). This is an admission by Ford that it is feasible to design a system that does not deploy an airbag unless necessary; and

[7] Krishnaswami admitted Ford was capable of designing a restraint system that did not deploy an airbag unless necessary. This admission is not diluted by his assertion that Ford did that in this case. This is especially true considering Krishnaswami's admission that Ford accepted the noncompliant calibration not because it decided an airbag was needed in Mr. Newbern's collision but because it allowed the system to perform as Ford wanted in another crash scenario. (R. pp. 442-43, 571).

the undisputed evidence is that Ford determined an airbag was not necessary for occupant protection in Mr. Newbern's collision.

A party may admit any element of a claim. *See, e.g.*, Rule 36(b), SCRCP ("Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."). Further, a corporate representative may make a binding admission in the same way that an attorney's statements bind his or her client. *Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 430-31, 717 S.E.2d 765, 779 (Ct. App. 2011) ("'The parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching matters looking to the progress of the trial.'" (quoting *Hall v. Benefit Ass'n of Ry. Emps.*, 164 S.C. 80, 83, 161 S.E. 867, 868 (1932)). Indeed, the argument for a corporate representative's admission binding the party is more compelling than that of an attorney because the corporate representative is the party. Rule 30(b)(6), SCRCP. Ford's admission of the existence of technology that would have allowed a design that only deployed an airbag when necessary is an admission of a feasible alternative design.

Alternatively, if the Court finds Krishnaswami did not admit this element, Appellants presented sufficient evidence of feasible alternative designs. Ford deviated from the design process that Krishnaswami described. Specifically, it chose to simply review and accept the final calibration report without conducting any further testing, altering sensor locations or other parts, or changing the crash severity thresholds to ensure the system deployed an airbag only when necessary.

First, Ford testified that it could have conducted crash testing with crash sensors in different locations to obtain more data and alternate positions for crash sensors to make the system work as Ford specified rather than accepting airbag deployment in non-deployment crash scenarios. (R. p.

589). Ford tested only three sensor locations with the object of reducing cost by changing to a single crash sensor system once the wiring for a single-sensor system arrived. (R. pp. 575-76). Specifically, Ford tested a center position for a single-sensor system and one left and right position for a two-sensor system. (R. pp. 585-86). Therefore, when Ford was unable to produce a safely calibrated restraint system, it did not have data from any other sensor positions to consider in altering the calibration to make it safe and chose not to conduct additional tests in other locations. (R. 586-89).

Second, Ford could have redesigned the system to reinforce the path of the crash signal between the crash sensors and the restraint control module ("RCM"), which gathers information to tell the vehicle whether and when to deploy an airbag. (R. p. 453 lns. 17-22). This would provide a stronger signal from the crash sensor on the front of the vehicle to the occupant compartment where the RCM is located and allow the RCM to make a more precise determination of the crash severity and whether to deploy an airbag. (R. pp. 417-22). The calibration software is implanted into electronic chips in the RCM. (R. p. 529). The RCM receives information from crash sensors and other sensors in the vehicle (such as whether an occupant is belted or their weight), and the RCM uses that information to determine whether and when to deploy an airbag. (R. pp. 529-30).

Third, Krishnaswami testified Ford has "the technology to set it to a higher threshold", meaning it could increase the crash severity required for airbag deployment. (R. p. 442 lns. 3-6). The fact that Ford had the technology to design a system with a higher threshold is evidence that it is feasible. *See Wickersham v. Ford Motor Co.*, 2016 U.S. Dist. LEXIS 89064, *12 (D.S.C. July 9, 2016) (noting in an order denying Ford's motion for summary judgment that "[t]he fact that this approach [raised threshold] was used in the past certainly suggests that it is feasible from a cost, safety, and functional perspective").

The alternative designs would all result in a restraint system that only deploys an airbag when it is needed. Krishnaswami testified as to the feasibility of these designs, specifically that Ford had the technology to make sure airbags do not deploy unless necessary, when it manufactured the Newberns' 2009 Ford Focus. (R. p. 603 lns. 3-11). He further admitted that it was economical for Ford to design a system that only deployed an airbag when necessary. (R. p. 460 lns. 14-17). Therefore, there is evidence of the cost, safety and functionality of the alternative designs.

### *C. Evidence the Feasible Alternative Designs Would Have Prevented Mr. Newbern's Injuries*

Finally, Appellants presented evidence that their feasible alternative designs would have prevented Mr. Newbern's injuries. It is undisputed that, under both parties' theory of the case, the airbag caused Mr. Newbern's injuries. Ford conceded in its opening statement that the airbag caused Mr. Newbern's injuries. (R. p. 345 lns. 9-15). It maintained only that the alleged drinking glass somehow contributed to the facial injuries. *Id.* Regardless, the glass alone could not have caused the eye injuries without the airbag deployment to force the alleged glass into Mr. Newbern's face. *See Small v. Pioneer Mach.*, 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997) ("The defendant's conduct can be a proximate cause if it was at least one of the direct, concurring causes of the injury."). Therefore, without the airbag deployment, Mr. Newbern would not have suffered the loss of his eye or facial or sternal fractures. In other words, proof that Appellants' alternative design would not have deployed the airbag is proof that the alternative design would have prevented Mr. Newbern's injuries.

### *D. Evidence Ford Failed to Exercise Due Care*

Rather than follow its own design process or implement any of the known, available alternative designs discussed above, Ford chose to manufacture a product it knew posed an

unreasonable danger to occupants such as Mr. Newbern to speed up production time. Krishnaswami testified that Ford may not make physical changes to a vehicle if it receives a noncompliant calibration because "that process of packaging" the vehicle takes place before Ford knows if Bosch can meet its calibration specifications. (R. p. 419). Ford rushed to get the one-sensor system into production and, in doing so, knowingly used an unreasonably dangerous restraint system likely to deploy an airbag unnecessarily in five frontal crash modes, including a crash such as Mr. Newbern's. "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). Krishnaswami testified that Ford could have followed its design process to result in a safe design. (R. pp. 417-19). However, it refused to do so to save time and money. Refusing to change a vehicle in the face of known danger in a design is evidence of a failure to exercise due care and, viewed in the light most favorable to Appellants, is sufficient for a jury to return a negligence verdict in Appellants' favor.

Appellants presented evidence that, viewed in a light most favorable to them, a verdict in their favor is reasonably possible. Therefore, the lower court erred in granting Ford's directed verdict motion.

## II. Krishnaswami Testified as Ford and His Testimony Constitutes Party Admissions of Elements of Appellants' Case

To the extent the lower court's ruling was based on an inability of Krishnaswami to admit elements of the case on behalf of Ford, it is in error. Krishnaswami testified as Ford's corporate representative, designated by Ford to speak on its behalf under Rule 30(b)(6), SCRCP. (R. p. 398). Ford admitted, as it must, in its directed verdict motion, that Krishnaswami testified as "Ford's corporate representative." (R. p. 743 lns. 22-23). Therefore, Krishnaswami's testimony binds Ford

and constitutes an admission by a party. Krishnaswami could, and did, admit elements of Appellants' causes of action, thereby eliminating the need for any further proof. Admissions of a party in testifying are not only evidence but make further evidence against him unnecessary.[8]

Rule 30(b)(6), SCRCP, requires that, when requested, a party that is "a public or private corporation or a partnership or association or governmental agency", "designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf." Further, "[t]he persons so designated shall testify as to matters known or reasonably available to the organization." Rule 30(b)(6), SCRCP. A Rule 30(b)(6) corporate representative's testimony is an admission by a party. Rule 801(d)(2), SCRE (defining "admission by party-opponent" as "the party's own statement in either an individual or a representative capacity . . . or a statement by a person authorized by the party to make a statement concerning the subject"). "Essentially, in a Rule 30(b)(6) deposition, there is no distinction between the corporate representative and the corporation." *Rosenruist-Gestao E Servicos LDA v. Virgin Enters.*, 511 F.3d 437, 445 (4th Cir. 2007) (internal quotation marks omitted).

"The deposition of a party or of anyone who at the time of taking the deposition was . . . a person designated under Rule 30(b)(6) . . . to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party ***may be used by an adverse party for any purpose***." Rule 32(a)(2), SCRCP (emphasis added).

> Rule 32(a)(2) reflects the proposition that the deposition of a party is an admission of that party and ***can be used for any purpose including substantive evidence***. A party may be bound by its representative. Thus, the deposition of . . . one designated to testify on behalf of the party under Rule 30(b)(6) . . . may be used against the adverse party ***for any purpose***.

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[8] The Rules of Civil Procedure specifically provide that admissions can eliminate the need for further evidence. Under Rule 16(a), SCRCP, the court may direct the parties to consider "[t]he possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof." Rule 16(a)(3), SCRCP.

James F. Flanagan, South Carolina Civil Procedure § 32.A.2 (emphasis added).

There is no difference in a corporate representative testifying under oath at a deposition and under oath in open court. The effect of a corporate representative's testimony is the same—he is the party and may bind the company and admit any element of a claim.

It is obvious from the substance of Krishnaswami's testimony that the lower court and the parties knew and understood him to be testifying as Ford. The lower court invited Krishnaswami to sit at counsel table as Ford. (R. p. 296). Appellants' counsel specified that his questions were directed to Krishnaswami as Ford's corporate representative. (R. p. 442 lns. 13-15). Counsel for Ford did not object, and Krishnaswami did not qualify his answers as being his own, but answered as Ford.

Moreover, counsel for Ford stated numerous times that Krishnaswami was its corporate representative and he would speak on behalf of Ford.

> "[Krishnaswami] will address a number of things that you have heard about in the opening regarding what Ford did or may not have done, what Ford knew or may not have known." (R. p. 329 lns. 11-14).
>
> ". . . Mr. Krishnaswami, Ford's corporate representative . . . ." (R. p. 386 lns. 14-15).
>
> "Mr. Krishnaswami, while Ford's corporate representative . . . ." (R. p. 743 lns. 22-23).

Based on these statements, Ford cannot dispute that Krishnaswami testified as Ford and it is bound to his testimony. "Acts by an attorney are binding on clients through principles of agency law." *Collins v. Bisson Moving & Storage*, 332 S.C. 290, 303, 504 S.E.2d 347, 354 (Ct. App. 1998) (granting a directed verdict based on an attorney's opening statement that constituted admissions of liability); *accord Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 430-31, 717 S.E.2d 765, 779 (Ct. App. 2011) ("'The parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching matters looking to the progress of the trial.'" (quoting *Hall v.*

*Benefit Ass'n of Ry. Emps.*, 164 S.C. 80, 83, 161 S.E. 867, 868 (1932)). If a party is bound by its attorney's statements in open court, then surely it is also bound by its own statements made by a designated corporate representative.

Finally, in its opening statement to the jury, Ford built its case on Krishnaswami's testimony by repeatedly referencing him and even specifically challenged Appellants to ask Krishnaswami questions. (R. p. 341 lns. 12-14 ("Mr. Krishnaswami will be here and will be able to answer any questions that opposing counsel has.")). Ford should not be permitted to set up Appellants to question its corporate representative about the case and then attempt to abandon and diminish his testimony. Krishnaswami testified on behalf of Ford, and it is bound to his admissions and testimony.

## III. Krishnaswami Testified as an Expert Without Objection

Even if the Court disagrees that Krishnaswami's testimony as Ford is sufficient to establish elements of Appellants' case, there are numerous, independent bases to find that Krishnaswami testified as an expert. Ford did not and cannot argue that Krishnaswami was not qualified to give opinions as to defect and alternative design because Ford designated Krishnaswami as its expert. Rather, Ford complained that, because Appellants did not ask for Krishnaswami to be qualified, his testimony is insufficient to prove a design defect and feasible alternative design. This is incorrect.

As an initial matter, Ford waived the ability to argue that Krishnaswami did not provide expert testimony. *Cogdill v. Watson*, 289 S.C. 531, 537, 347 S.E.2d 126, 130 (Ct. App. 1986) ("The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object."). Appellants' counsel asked Krishnaswami questions throughout his testimony that called for expert testimony and Ford failed to object. *See, e.g.*, R. pp. 407-22, 426-35, 437-61.

Ford even asked Krishnaswami questions that called for expert testimony. (R. pp. 524, 561-63, 568). The effect of Ford's failure to object should not be improperly bootstrapped to a motion for a directed verdict. Ford elicited testimony about Krishnaswami's education, work background, and experience,[9] in addition to asking him expert questions. (R. pp. 512-19, 524, 561-63, 568). Ford made a deliberate, tactical choice to build up Krishnaswami in the jury's eyes rather than object to the expert nature of his testimony. Therefore, Ford should not now be permitted to argue that Krishnaswami did not testify as an expert.

Krishnaswami testified as Ford, a manufacturer held to be an expert under South Carolina law. A manufacturer is held to the skill of an expert in its field and is charged with an expert's knowledge in its industry. *See Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972) (affirming use of a jury instruction stating "that a manufacturer 'is charged with a duty to keep abreast and aware of current standards and scientific knowledge in his industry. He 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.'"); *Humphries v. Mack Trucks, Inc.*, 1999 U.S. App. LEXIS 25522, *4 (4th Cir. 1999) ("In addressing the alleged negligence as to the original deck plate design, the district court correctly held Mack Trucks to the standard of an expert in the field of heavy truck manufacturing." (citing *Carolina Home Builders*)).[10] Therefore, Krishnaswami, testifying as Ford, testified as an expert. (R. pp. 769-70).

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[9] The lower court ruled that Ford could not duplicate Mr. Krishnaswami's testimony when it called him in their case. (R. p. 387). Ford put into evidence during Appellants' case all of Krishnaswami's testimony necessary to ask the court to qualify him as an expert and could not duplicate it later.

[10] *See accord Hopper v. Crown*, 646 So. 2d 933, 944 (La. App. 1 Cir. 1994) ("In performing the manufacturer's duty to warn or to adopt an alternative design, the manufacturer is held to the knowledge and skill of an expert." (internal quotation marks omitted)); *Eaves v. Hyster Co.*, 614 N.E.2d 214, 216 (Ill. App. Ct. 1st Dist. 1993) ("Illinois law holds a manufacturer to the degree of

That the Court did not qualify Krishnaswami as an expert is irrelevant under the circumstances of this case. As noted above Krishnaswami, as Ford, is a party and is deemed an expert by operation of law. There are other instances in which a witness may provide expert testimony without being formally qualified by the Court to do so. *See, e.g.*, *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981) ("We have established that a property owner, who is familiar with his property and its value, may give his estimate as to its value or the damage inflicted upon it even though he is not otherwise an expert."); *Doty v. Parkway Homes Co.*, 295 S.C. 368, 370, 368 S.E.2d 670, 671 (1988) ("It is proper for an owner to estimate the reasonable value of his household goods in an action to recover damages."). Further, Ford chose to permit and elicit his expert testimony without objection.

Alternatively, while it is Appellants' position that Krishnaswami's testimony proves both defect and feasible alternative design because he is a party and an expert, who testified as such without objection, Appellants also assert that expert testimony is not required to prove a design defect product liability case. Rather, our Supreme Court has held "[a]ny fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of the facts." *Graves v. CAS Med. Sys.*, 401 S.C. 63, 79-80, 735 S.E.2d 650, 658 (2012) (explaining in a product liability case,

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skill and knowledge of an expert."); *Baroldy v. Ortho Pharmaceutical Corp.*, 760 P.2d 574, 588 (Ariz. Ct. App. 1988) ("Arizona law requires the manufacturer of a product in a strict liability case to be treated as having the skill of an expert concerning its product."); *Westinghouse Electric Corp. v. Nutt*, 407 A.2d 606, 611 (D.C. 1979) ("A manufacturer is held to the degree of knowledge and skill of experts. This standard imposes upon the manufacturer the duty of an expert to keep abreast and informed of the developments in his field, including safety devices and equipment used in his industry with the type of products he manufacturers." (internal citation and quotation marks omitted)).

"[w]e take this opportunity to correct the circuit court's erroneous holding that a plaintiff cannot use circumstantial evidence ***to prove a design defect claim***." (emphasis added)).[11]

The undisputed evidence in this case is that Ford determined, based on decades of crash testing data, crash testing and computer simulation in this case, and all of its internal knowledge, that a crash such as the Newberns' did not require an airbag for a belted passenger. Contrary to that determination reached after months of work and based on its own knowledge, Ford accepted a calibration of its restraint system that would deploy an airbag, which Ford knew could cause harm to someone such as Mr. Newbern. "A manufacturer may not avoid negligence liability by turning a blind-eye to the obvious." *5 Star, Inc. v. Ford Motor Co.*, 408 S.C. 362, 371, 759 S.E.2d 139, 144 (2014).

## CONCLUSION

Appellants Steven and Claudia Newbern request this Court reverse the lower court's decision to grant Ford's motion for a directed verdict and remand this case for a new trial.

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[11] *Accord 5 Star, Inc. v. Ford Motor Co.*, 408 S.C. 362, 370, 759 S.E.2d 139, 143-44 (2014) ("[A] negligence claim may be established, as here, by circumstantial evidence showing that, through the exercise of reasonable diligence, Ford should have known of the design flaw in the deactivation switch.").

Respectfully submitted,

Kathleen C. Barnes

BARNES LAW FIRM, LLC
Kathleen Chewning Barnes
SC Bar No. 78854
kbarnes@barneslawfirmsc.com
Post Office Box 897
Hampton, SC 29924
(803) 943-4529

Raymond O. Bodiford
121 South Orange Ave., Suite 1150
Orlando, FL 32801
Phone: 407-423-9728
Fax: 407-648 1899
***Attorneys for Appellants***

LAW OFFICES OF STEPHEN E. VAN GAASBECK
Stephen E. Van Gaasbeck
19815 Helotes Creek road
Helotes, TX 78023
Phone: 210-924-9294
Fax: 210-260-4021

YARBOROUGH APPLEGATE LLC
William Applegate
291 East Bay St., Second Floor
Charleston, SC 29401
Phone: 843-972-0150
Fax: 843-277-6691

August 1, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas



The Honorable J.C. Nicholson, Jr.

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Appellate Case No. 2016-002209

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

v.

Ford Motor Company,.....Respondent.

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CERTIFICATE OF COUNSEL

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The undersigned certifies that the *Final Brief of Appellants* and *Final Reply Brief of Appellants* comply with Rule 211(b), SCACR. Pursuant to Rule 211(b)(2), SCACR, Appellants corrected an error on page 26 of the Final Brief of Appellants. The word "insufficient" in the first sentence of Argument section III. is changed to "sufficient."

[*Signature block appears on the following page.*]

August 1, 2017

Kathleen C. Barnes

Kathleen Chewning Barnes, SC Bar No. 78854
BARNES LAW FIRM, LLC
P.O. Box 897
Hampton, SC 29924
803-943-4529

Stephen E. Van Gaasbeck
LAW OFFICES OF STEPHEN E. VAN GAASBECK
19815 Helotes Creek road
Helotes, TX 78023
Phone: 210-924-9294
Fax: 210-260-4021

Raymond O. Bodiford
121 South Orange Ave., Suite 1150
Orlando, FL 32801
Phone: 407-423-9728
Fax: 407-648 1899

William Applegate
YARBOROUGH APPLEGATE
291 East Bay St., Second Floor
Charleston, SC 29401
Phone: 843-972-0150
Fax: 843-277-6691
**Attorneys for Appellants**