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.*

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INTRODUCTION

In their brief, Plaintiffs describe the law not as it is, but as they want it to be. Their argument that this Court adopted the uncontrollable impulse exception in *Scott v. Greenville Pharmacy*, 212 S.C. 485, 48 S.E.2d 324 (1948), is belied by the actual reasoning and holding in that opinion. *Scott* instead is a case about foreseeability, and it allows a wrongful-death plaintiff to recover only when the suicide was foreseeable to the defendant. Even if this Court adopts the uncontrollable impulse exception, it should reaffirm *Scott*'s holding that the plaintiff can recover only if the suicide was foreseeable.

Plaintiffs also fail in arguing that comparative fault principles do not apply to strict liability and breach of warranty claims. Plaintiffs never explain why Ford should be liable for 100 percent of Wickersham's enhanced injuries when the jury found that he was 30 percent at fault for them. Nor do Plaintiffs rebut Ford's reading of the Contribution Among Tortfeasors Act or adequately explain why South Carolina tort policy prohibits application of comparative fault to strict liability and warranty claims.

ARGUMENT

I. South Carolina Law Does Not Recognize an Uncontrollable Impulse Exception.

In its brief, Ford explained that South Carolina does not, and should not, recognize the vague "uncontrollable impulse" exception to the long-standing common-law principle that suicide breaks the chain of causation in wrongful death actions. (Ford Br. 7–14.) As Ford pointed out, this Court previously recognized one

exception to that principle: when the suicide itself was foreseeable. (*Id.*) In response, Plaintiffs argue that (1) this Court previously adopted the uncontrollable impulse exception (Pls.' Br. 5–9), and (2) the uncontrollable impulse exception is the majority rule and is somehow consistent with the principle that suicide breaks the chain of causation. (Pls.' Br. 10–15.) Plaintiffs' arguments are wrong.

A. No South Carolina court has ever adopted the uncontrollable impulse exception.

According to Plaintiffs, this Court adopted the uncontrollable impulse exception in *Scott*. (Pls.' Br. 6–8.) Plaintiffs suggest that this Court adopted the exception when it noted that there were no allegations that the decedent was "incapable of controlling his own conduct" or that the defendant's conduct "brought about a condition or suicidal mania." (*Id.*)

The Court should reject Plaintiffs' fanciful reading of *Scott*. In the 70 years since this Court decided *Scott*, dozens or hundreds of cases and law review articles have discussed the uncontrollable impulse exception—and not a *single* one has categorized *Scott* as adopting that exception. And with good reason: *Scott* does not even address the exception, let alone adopt it.[1] Plaintiffs selectively quote that opinion but ignore this Court's reasoning. As Ford explained (Ford Br. 9–11), rather than addressing whether the decedent suffered from an uncontrollable impulse, this Court indicated that the case turned on foreseeability: "[i]n every case of this

[1] Courts in other states had already discussed the uncontrollable impulse exception by the time of *Scott*, *see, e.g.*, *Long v. Omaha & C.B. St. Ry. Co.*, 187 N.W. 930, 932 (Neb. 1922); *Brown v. Am. Steel & Wire Co.*, 88 N.E. 80, 85 (Ind. Ct. App. 1909), so this Court's refusal to adopt the doctrine, or even mention it, is notable.

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?" *Scott*, 212 S.C. at 493, 48 S.E.2d at 328. In light of the decedent's suicide, the Court asked: "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?" *Id.* at 494, 48 S.E.2d at 328. This Court answered these questions negatively, providing three reasons. First, the Court noted that "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." *Id.* Those elements, the Court explained, include "feeling, temperament, disposition, emotional disorders, background and lack of self-control, which might of themselves have been sufficient to bring about the tragic result." *Id.* Second, the Court found that the defendant could not "reasonably contemplate that suicide will follow" because the "vast majority of the people who use this form of drug do not commit suicide." *Id.* And, third, the Court held that the "line of causation" is broken by "[t]he voluntary willful act of suicide of an injured person, who knows the purpose and physical effect of his act." *Id.* at 495, 48 S.E.2d at 328.

No aspect of this Court's reasoning in *Scott* adopted the uncontrollable impulse exception. Every bit of this reasoning establishes that Wickersham's suicide broke the chain of causation in this case.

The two snippets of language Plaintiffs quote from *Scott* do not change this Court's holding in that case. First, *Scott* mentioned that there was no evidence that

the decedent was "incapable of controlling his own conduct" in the context of rejecting application of "the last clear chance" doctrine, *id.* at 493, 48 S.E.2d at 327–28—a discussion that comes *before* this Court addresses proximate cause. As Ford never asserted the last clear chance defense, this discussion has no application in this case. Second, the Court referred to "a condition of suicidal mania" as the decedent's mental state that resulted in his suicide. *Id.* at 495, 48 S.E.2d at 328. Nothing in the opinion hints that this bare reference relates in any way to the otherwise unmentioned uncontrollable impulse exception.

Plaintiffs' discussion (Pls.' Br. 8) of the court's decision in *Crolley v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989), is misguided for the same reasons. *Crolley* simply quoted the "suicidal mania" language from *Scott*, which as just discussed has no relationship to the uncontrollable impulse exception. Moreover, as with *Scott*, Plaintiffs ignore the Court of Appeals' actual reasoning in *Crolley*—the suicide was not foreseeable. The Court of Appeals explained: "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 Hutchins could not reasonably have foreseen and anticipated when he last served Crolley." *Id.* at 357–58, 387 S.E.2d at 718. Plaintiffs' contention (Pls.' Br. 8) that *Crolley* "shows application of the uncontrollable impulse exception" therefore is nonsense.

Plaintiffs also assert that *Watson v. Adams*, No. 4:12-cv-03436-BHH, 2015 WL 1486869 (D.S.C. Mar. 31, 2015), shows that the uncontrollable impulse

exception is the law in South Carolina. (Pls.' Br. 8–9.) But this unpublished federal district court case says no such thing. The federal court noted that South Carolina follows the general rule that suicide breaks the chain of causation, and then, citing case law from New Hampshire and Massachusetts, noted that *some* jurisdictions have adopted the uncontrollable impulse exception. Because it held that the plaintiff in that case had not established that the decedent acted under an uncontrollable impulse, the court did not address whether South Carolina had adopted the exception—though the court noted that, "[a]s far as the Court can tell, South Carolina Courts have never permitted a recovery on this basis." *Watson*, 2015 WL 1486869, at *6.

Finally, Plaintiffs contend that the uncontrollable impulse exception "is consistent with South Carolina workers' compensation law," pointing to S.C. Code Ann. § 42-9-60. (Pls.' Br. 9.) This is a puzzling argument. To begin with, the State's workers' compensation law and its tort regime are "seemingly irreconcilable" areas of the law. *Machin v. Carus Corp.*, 419 S.C. 527, 537, 799 S.E.2d 468, 473 (2017). Plaintiffs cite no cases suggesting that South Carolina tort law should be governed by workers' compensation statutes. Moreover, the statute cited by Plaintiffs denies compensation when death resulted from "the *willful* intention of the employee . . . to kill himself . . . ." S.C. Code Ann. § 42-9-60 (emphasis added). Not surprisingly, as Plaintiffs indicate, based on this statutory language, this Court held that compensation remains due when the suicide was "impulsive." Plaintiffs, however,

point to no similar principle applicable to tort claims, either in this Court's cases or the South Carolina Code.

B. Plaintiffs misunderstand the uncontrollable impulse exception.

Plaintiffs contend that "[t]he uncontrollable impulse exception, not Ford's proposed foreseeability exception, is the majority rule" and is supposedly consistent with the principle that suicide breaks the chain of causation. (Pls.' Br. 10–15.) Plaintiffs misstate both Ford's argument and the law.

To begin with, Ford did not "propose[]" a "foreseeability exception." Instead, Ford argued that the Court should adhere to its 70-year-old precedent in *Scott.* There, this Court held that the defendant was liable only if it could "reasonably contemplate that suicide will follow" the tortious actions. *Scott*, 212 S.C. at 494, 48 S.E.2d at 328. Plaintiffs present no argument that this is *not* the law in South Carolina, and no reason why it should not continue to be the law under *stare decisis* principles. "Stare decisis exists to 'insure a quality of justice which results from certainty and stability.'" *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) (quoting *McCall v. Batson*, 285 S.C. 243, 256, 329 S.E.2d 741, 747 (1985)). As Ford explained, *Scott* remains good law and good policy.

Ford's brief also explained how, like *Scott*, courts in many other states allowed a plaintiff to establish proximate cause only if the suicide was foreseeable. (Ford Br. 12–13.) Plaintiffs accuse Ford of "misleading" the Court because the cited cases arose in states that supposedly recognize the uncontrollable impulse

exception. (Pls.' Br. 12–13.) Plaintiffs' accusation fails. Ford cited these cases for the simple point that "South Carolina is far from unique in permitting liability for suicide only if the suicide itself was reasonably foreseeable." (Ford Br. 12–13.) Plaintiffs do not dispute that the cited cases allow recovery only if the suicide was foreseeable. The same principle applies in South Carolina.

Plaintiffs contend that the uncontrollable impulse exception "is the majority rule." (Pls.' Br. 10–12.) Their brief, however, never supports that assertion. In any event, the point is irrelevant. That "numerous jurisdictions" (*id.* at 10) apply the exception does not mean that it is the law in South Carolina. And, under *Scott,* it is not.

Moreover, it is perhaps not surprising that Plaintiffs misstate the causation law of South Carolina and other states, because their brief demonstrates that they misunderstand the basis for the common-law principle that suicide breaks the chain of causation. Plaintiffs describe the voluntariness of a suicide as the only reason that the law treats suicide as an intervening act. (Pls.' Br. 14.) But this is not correct. As this Court noted in *Scott*, the rule that suicide breaks the chain of causation is justified because

> 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 . . . .

212 S.C. at 494, 48 S.E.2d at 328. The voluntariness of suicide is thus just one of several reasons for the general rule. *Scott*'s holding that liability is permitted when

the suicide was foreseeable "addresses" each of these rationales (Pls.' Br. 14), while the uncontrollable impulse exception fails to recognize the complex tapestry of elements that result in suicide, as *Scott* recognized.

Finally, Plaintiffs contend that allowing recovery only when the suicide was foreseeable "would result in liability in which the causal chain is actually more remote," because, by focusing on foreseeability, it would eliminate the need to show that "the defendant's actions caused the suicide." (Pls.' Br. 14–15.) This argument is quite puzzling. Plaintiffs apparently confuse legal cause with causation-in-fact. "Causation-in-fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence, and legal cause is proved by establishing foreseeability." *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006). "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). The general principle that suicide breaks the chain of causation relates to legal cause, as it involves the unforeseeable nature of suicide. *Scott*, 212 S.C. at 494–95, 48 S.E.2d at 328; *see also 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."). Contrary to Plaintiffs' contention, therefore, irrespective of whether this Court adheres to *Scott* or adopts some other rule, a plaintiff must still show that the defendant's tortious act was a but-for cause of the suicide.

II. Under an Uncontrollable Impulse Exception, the Suicide Itself Must Be Foreseeable.

In its brief, Ford explained that even if this Court adopts the uncontrollable impulse exception, it should reaffirm *Scott*'s holding that a plaintiff is required to prove that the suicide or the uncontrollable impulse—not simply *any* injury—was foreseeable. (Ford Br. 18–19.) Plaintiffs respond by insisting that this Court should depart from *Scott* and allow a plaintiff to recover if any injury was foreseeable. Plaintiffs are wrong.

A. In its brief, Ford explained that *Scott* held that the defendant could be liable only if it could "reasonably contemplate that *suicide* will follow" the tortious actions. *Scott*, 212 S.C. at 494, 48 S.E.2d at 328 (emphasis added). Ford explained that this departed from general foreseeability principles, because it was an exception to the common-law rule that suicide breaks the chain of causation. Ford also indicated that if foreseeability could be established if *any* injury were foreseeable, the common-law principle would be rendered practically meaningless. (Ford Br. 18–19.) Plaintiffs respond by misreading *Scott* and contending that legal cause requires proof only that some injury was foreseeable, even if the suicide was not. Mysteriously, Plaintiffs claim that their argument "gives ... full effect" to the principle that suicide breaks the chain of causation. (Pls.' Br. 17–18.) These arguments are nonsense.

First, Plaintiffs misread *Scott*. Plaintiffs argue (Pls.' Br. 17) that *Scott* adopted the general foreseeability standard when it stated that: "In 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 light of the attendant circumstances?" 212 S.C. at 493, 48 S.E.2d at 328. But Plaintiffs are wrong. When this sentence asks "ought *it* to have been foreseen," the Court is referring specifically to "*the* injury" from earlier in the sentence, and "*the* injury" is the *suicide*. By referring to "*the* injury" rather than "*an* injury," the Court specifically required that the suicide be foreseeable. Further, this argument ignores the Court's explanation that the suicide was not foreseeable in that case because "it could not be said that he who sells the drug may reasonably contemplate that *suicide* will follow." *Id.* at 494, 48 S.E.2d at 328 (emphasis added).

Second, it is entirely unclear what Plaintiffs mean when they contend that requiring only that some injury (and not the suicide) be foreseeable "gives ... full effect" to the principle that suicide breaks the chain of causation. Nor do Plaintiffs address, let alone rebut, Ford's assertion that, if the Court adopts Plaintiffs' argument, suicide would nearly always be foreseeable—because *some* injury is a foreseeable result of most automobile defects. Instead, Plaintiffs complain that requiring the suicide to be foreseeable "puts a heightened, unnecessary, and unjustified burden of proof on the plaintiff." (Pls.' Br. 18.) But this argument has it backwards. As *Scott* held, "[t]he voluntary willful act of suicide" represents "a new and independent agency" that breaks the "line of causation," *unless* the suicide itself was foreseeable to the tortfeasor. 212 S.C. at 495, 48 S.E.2d at 328. This is not a "heightened" burden of proof imposed on the plaintiff, but is an *exception* to the common-law no-recovery rule that allows some plaintiffs to recover. The standard

that Plaintiffs ask this Court to adopt would radically change South Carolina proximate-cause law by essentially eliminating the principle that suicide breaks the chain of causation. The Court should reject that effort.

B. Plaintiffs also argue that requiring a showing that the suicide itself be foreseeable "undermines the established principles" that a treating physician's negligence is foreseeable and that a defendant takes the plaintiff as he finds him. (Pls.' Br. 18–20.) But this argument is wrong for several reasons. First, Plaintiffs do not offer any explanation for why *Scott*'s requirement that the suicide be foreseeable would undermine the "presumed foreseeability" (*id.* at 19) in these two narrow contexts. Indeed, the doctrines have coexisted for 70 years since this Court decided *Scott.* Moreover, no South Carolina case—nor, as far as Ford can tell, any other case—has ever held that suicide should be "presumed foreseeab[le]" as the law does with physician negligence and an egg-shell plaintiff. Nor do Plaintiffs advance any reason why such a presumption in the context of suicide represents sensible tort policy.

Finally, Plaintiffs oddly point out that Ford never disputed that the general foreseeability principle applied to "pain and mental suffering up to the point of death." (Pls.' Br. 19–20.) That is true, but it hardly supports Plaintiffs' argument. As Ford has stated many times, under *Scott* the foreseeability standard changes for injuries arising from suicide because suicide breaks the chain of causation.

C. Plaintiffs argue that *Scott*'s foreseeability requirement incorrectly "treats mental injury differently than physical injury." (Pls.' Br. 20–21.) Nonsense. If the

Court adopts Ford's arguments, the mental and physical injuries suffered before the suicide would be treated exactly the same, and the mental and physical injuries suffered after the suicide also would be treated exactly the same. Contrary to Plaintiffs' suggestion, therefore, under Ford's arguments "mental injuries are subject to the same burden of proof as physical injuries." (Pls.' Br. 21.) A suicide by the injured party, however, represents an intervening cause as to *both* physical and mental injuries incurred after the suicide.

D. Plaintiffs contend (Pls.' Br. 22) that "suicide following a physical injury has occurred for decades," so apparently they believe that suicide should be a foreseeable result of physical injuries generally. Plaintiffs, however, cite nothing to support their argument that because something happened in the past, it is foreseeable in the future. Further, *Scott* itself refutes this argument:

> While it may be true that 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.

212 S.C. at 494, 48 S.E.2d at 328. Moreover, Plaintiffs' citation of five cases over a 60-year period is a far cry from showing that suicide following a physical injury is a common event. Nor do Plaintiffs cite a single products liability case, let alone a case involving suicide allegedly caused by an automobile defect. If it were common for suicide to result from a physical injury caused by a defective product, Plaintiffs surely could point to at least one, if not many, such cases.

E. Finally, Plaintiffs misunderstand Ford's argument about the meaning of "irresistible impulse." (Pls.' Br. 22–25.) As Ford explained (Ford Br. 16–18), "the

majority of courts have found that if the evidence shows that 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 the injuries." *Kivland v. Columbia Orthopaedic Grp., LLP*, 331 S.W.3d 299, 309 (Mo. 2011) (en banc). Plaintiffs' lengthy discussion of this issue never demonstrates that the Missouri Supreme Court's description of the majority rule is wrong. This Court should adopt that rule.

III. Comparative Fault in Causing Enhanced Injuries Applies to Claims for Strict Liability and Breach of Warranty in a Crashworthiness Case.

In its brief, Ford argued that comparative fault principles apply to enhanced injuries in a crashworthiness case, including claims of strict liability and breach of warranty. (Ford Br. 19–32.) In response, Plaintiffs concede that comparative fault generally applies to damages related only to the enhanced injuries in a crashworthiness case. (Pls.' Br. 27 n.7, 36–37.) But Plaintiffs contend that comparative fault is not applicable to strict liability and breach of warranty claims in *any* context, including a crashworthiness case. (Pls.' Br. 26–40.) Plaintiffs are incorrect.

A. Comparative fault applies to strict liability and breach of warranty claims.

Plaintiffs' principal argument is that strict liability and breach of warranty are statutory causes of action, with statory defenses that do not include comparative fault, and therefore comparative fault does not apply. (Pls.' Br. 28–33.) Plaintiffs' argument is unavailing for several reasons.

1. Much of Plaintiffs' brief improperly relies on cases and commentary discussing *contributory* negligence. *See, e.g.*, Pls.' Br. 28–29 & n.8 (quoting and citing *Wallace v. Owens-Illinois, Inc.*, 300 S.C. 518, 523, 389 S.E.2d 155, 157–58 (Ct. App. 1989); *Imperial Die Casting Co. v. Covil Insulation Co.*, 264 S.C. 604, 609, 216 S.E.2d 532, 534 (1975); Restatement (Second) of Torts § 402A cmt. n (1965); *id.* § 524 cmt. a). But this case involves *comparative* fault, not *contributory* negligence. This Court has rejected the doctrine of contributory negligence and has adopted comparative fault. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 244, 399 S.E.2d 783, 784 (1991). Indeed, Plaintiffs repeatedly cite the Restatement (Second) of Torts, which was published in 1965 and does not even mention comparative fault, much less take a position on whether it applies in a strict liability context. The cases and commentary Plaintiffs rely on thus have no application to when *comparative* fault applies.

In fact, in many jurisdictions that apply the Second Restatement (and its comments), comparative fault can reduce the damages with respect to strict liability claims. For example, the West Virginia Supreme Court applied comment n—which provides that the plaintiff's failure to discover or guard against a defect is not a viable defense—to strict liability and warranty claims, but held that the defendant may cite *other* acts of negligence by the plaintiff to reduce its liability. *See Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854, 863 (W. Va. 1982); *see also Busch v. Busch Const., Inc.*, 262 N.W.2d 377, 393 (Minn. 1977) (applying the

comparative fault statute in actions brought on a "[Restatement §] 402A theory"); *Sandford v. Chevrolet Div. of Gen. Motors*, 642 P.2d 624, 626 (Or. 1982) (same).

Seeking to take advantage of comment n, Plaintiffs contend that "Ford's comparative negligence defense that Mr. Wickersham was out-of-position is an argument that he should have guarded against the possibility of a defective airbag." (Pls.' Br. 29.) This is plainly wrong. Ford did not argue to the jury that Wickersham was injured by an airbag defect because he was out of position; rather, it argued that his face hit the gear shift because he was out of position, and that he suffered injuries unrelated to the impact with the airbag. (*See, e.g.*, JA1707–09.) That the jury found Wickersham 30 percent at fault for his injuries demonstrates that they agreed with Ford.

2. Plaintiffs also misconstrue the Contribution Among Tortfeasors Act, S.C. Code Ann. § 15-38-15. (Pls.' Br. 30–31.) As Ford explained, the Act applies to all claims for personal injury, including strict liability and breach of warranty. (Ford Br. 25–26.) Plaintiffs' attempts to avoid the Act's application fail.

At the outset, Plaintiffs contend (Pls.' Br. 30–31) that this Court "rejected" application of the Act to strict liability and warranty claims in *Donze v. Gen. Motors, LLC*, 420 S.C. 8, 800 S.E.2d 479 (2017). But in *Donze* this Court did not address—or even cite—the Act at all in its discussion of whether comparative fault applied to the cause of the initial accident in a crashworthiness case. Instead, this Court cited the Act only in its discussion of whether "South Carolina's . . . strong public policy against impaired driving . . . should bar Donze from recovering in this

case." *Id.* at 20–23, 800 S.E.2d at 485–87 (citing S.C. Code Ann. § 15-38-15(F)). The Court thus left open the question of the Act's application.

Moreover, Plaintiffs contend that the Act applies only to actions with more than one defendant. (Pls.' Br. 31.) This argument is meritless. Ford's brief carefully parsed the text of § 15-38-15 and demonstrated that it applies comparative fault principles to strict liability and warranty claims. (Ford Br. 25–26.) Plaintiffs ignore—rather than rebut—Ford's analysis, and instead rely on one snippet of the Act taken out of context. Ignoring the text of the statute does not make it disappear. And Plaintiffs' argument is contrary to the Act's plain language. The Act applies to "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." § 15-38-15(A). The Act then 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). To be sure, the Act includes an exception to joint and several liability in certain circumstances when "indivisible damages are determined to be proximately caused by more than one defendant," § 15-38-15(A), but nothing in the Act limits it only to such circumstances.

Plaintiffs also contend that the Act "refers to 'comparative negligence" each time it refers to the plaintiff," thus demonstrating that "comparative negligence of a plaintiff is a defense to a negligence action." (Pls.' Br. 31–32.) This argument is doubly wrong. First, *Plaintiffs in this case filed a negligence action*; the jury's verdict includes negligence, strict liability, and breach of warranty claims. (JA364.) Plaintiffs present no reason that, having chosen to pursue a negligence claim in addition to others, they are not bound by comparative fault principles. Moreover, it is entirely unclear why Plaintiffs believe that the Act's references to the plaintiff's "comparative negligence" limits application of the doctrine only to the defendant's negligence. If the legislature intended to limit the Act in this way, it surely would have said so directly.

Retreating from the statutory text, Plaintiffs contend that the Act did not "change the law" that comparative fault is applicable only to negligence cases. (Pls.' Br. 31.) But there is no such "law"; this Court has never held that comparative fault applies only to negligence claims. (Ford Br. 28.) The one case Plaintiffs cite from this Court states only that comparative fault applies in negligence cases—it does not limit its application to negligence cases. *See Berberich v. Jack*, 392 S.C. 278, 286, 709 S.E.2d 607, 611 (2011). And while *dicta* in the Court of Appeals' decision in *Ritter & Assocs., Inc. v. Buchanan Volkswagen, Inc.*, 405 S.C. 643, 748 S.E.2d 801 (2013), does suggest that the application of comparative fault is limited, that case involved applying comparative fault to a *breach of contract claim*, not a strict

liability or breach of warranty claim. *Id.* at 651, 748 S.E.2d at 805. The *dicta* in *Ritter & Associates* therefore simply does not apply here.

Further, citing *Berberich*, 392 S.C. at 293, 709 S.E.2d at 615, Plaintiffs rely on the fact that comparative fault does not apply to intentional torts. (Pls.' Br. 32–33.) This argument is a *non sequitur*; that comparative fault principles do not apply to a *different* set of claims says nothing about their application to strict liability and warranty claims. Moreover, *Berberich* actually demonstrates the broad reach of comparative fault principles, explaining that South Carolina law views each party's culpability on the whole and permits "comparison of ordinary negligence with heightened forms of misconduct such as recklessness, willfulness, and wantonness." 392 S.C. at 292, 709 S.E.2d at 614. This discussion supports Ford, not Plaintiffs.

Finally, Plaintiffs contend (Pls.' Br. 32–33) that comparative fault "does not apply to strict liability in other areas of the law," citing *Harris v. Anderson Cty. Sheriff's Office*, 381 S.C. 357, 673 S.E.2d 423 (2009), and *Wallace v. A.H. Guion & Co.*, 237 S.C. 349, 117 S.E.2d 359 (1960). Neither case, however, addresses comparative fault; indeed, this Court decided *Wallace* many decades before it even adopted comparative fault.

B. Strict liability and breach of warranty claims are not "no fault" claims.

Plaintiffs argue that comparative fault could not apply to strict liability and breach of warranty claims in a crashworthiness action because these claims do not require a finding of fault. (Pls.' Br. 33–36.) Plaintiffs assert that there are important

differences between the claims that justify refusing to apply comparative fault to strict liability and warranty claims. (*Id.*) But Plaintiffs' arguments are meritless.

First, Plaintiffs are flatly wrong in contending that strict liability and breach of warranty are "no-fault" claims. Plaintiffs confuse strict liability and breach of warranty with *absolute* liability. With absolute liability, a defendant is subject to liability for causing a plaintiff's harm regardless of wrongdoing. *See* John C.P. Goldberg, *Inexcusable Wrongs*, 103 Calif. L. Rev. 467, 506 (2015) (noting that absolute liability is a product liability regime that "truly detached liability from wrongdoing"). But "[s]trict liability is not equivalent either to absolute liability or to insurance of the safety of the product's user." *Bragg v. Hi Ranger*, 319 S.C. 531, 543, 462 S.E.2d 321, 328 (Ct. App. 1995). As scholars recently explained:

> The defendant who sells a defective product that injures a consumer violates a standard of conduct. . . . The standard is "do not injure a consumer by sending into commerce a dangerously defective product." . . . A seller faces no liability when its sound product causes an injury to a consumer; there is no wrong in selling a sound product even if it injures someone. Sellers instead are charged with a duty to protect consumers against dangers associated with defective products, and their failure to do so renders their conduct wrongful.

John C.P. Goldberg & Benjamin C. Zipurksy, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 Fordham L. Rev. 743, 772 (2016) (emphasis omitted); *see also* William C. Powers, *The Persistence of Fault in Products Liability*, 61 Tex. L. Rev. 777, 777–79 (1983) (explaining that fault remains the essence of liability under both design defect and breach of warranty theories). While these strict liability claims do not require proof of negligence—"what makes products liability *strict* is that a plaintiff can prevail without proof of seller carelessness," Goldberg &

Zipurksy, *supra*, at 772—they do require fault, namely in this case that the product suffered a design defect.[2] *See, e.g.*, *Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197, 202–03 (Ill. 1983) (applying comparative fault to strict liability because it is not a no-fault claim); *Daly v. Gen. Motors Corp.*, 575 P.2d 1162, 1166 (Cal. 1978) (noting that strict liability is not absolute liability because it requires a finding of a "defect").

The value of a strict liability claim, as opposed to a negligence claim, is that it relieves the plaintiff of the obligation to identify the defendant's negligent action during the design or manufacturing process; rather, the plaintiff need focus solely on what is wrong with the product itself. *See Bragg*, 319 S.C. at 540–41, 462 S.E.2d at 326 ("The focus here is on the condition of the product, without regard to the action of the seller or manufacturer."). These claims are easier for a plaintiff to prove than negligence, but they are still fault-based theories of liability because the jury has to assess whether the design choice was reasonable. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 218, 701 S.E.2d 5, 13 (2010) ("For a plaintiff to successfully advance a design defect claim, he must show that the design of the product caused it to be 'unreasonably dangerous.'"). Because reasonableness underlies a strict

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[2] Plaintiffs therefore err in stating that "under strict liability, a manufacturer is responsible for the harm caused by its product." (Pls.' Br. in Reply to Alliance of Auto. Mfrs. Amicus Br. 5.) In fact, a manufacturer is responsible for harm caused only by its *defective* product. Similarly, Plaintiffs err in contending that Ford's argument is inconsistent with § 402A's policy that "'the burden of accidental injuries caused by products intended for consumption be placed on those who market them.'" (*Id.* at 5–6 (quoting Restatement (Second) of Torts § 402A cmt. c (1965)).) That policy applies only to a "product in a *defective condition unreasonably dangerous* to the user." Restatement § 402A(1) (emphasis added).

liability claim, there are no "logical differences" (Pls.' Br. 35) that prevent application of comparative fault to strict products liability claims.

Second, Plaintiffs' reliance on *Donze* for this point (Pls.' Br. 33) is misguided. In *Donze*, the Court addressed whether the plaintiff's fault in causing the *initial* accident should reduce his recovery for his enhanced injuries. 420 S.C. at 19–20, 800 S.E.2d at 485. As Ford explained, this rationale does not apply when—as here—the injured party's fault contributed to the enhanced injuries. (Ford Br. 23–24.) Moreover, Plaintiffs rely (Pls. Br. 33 n.10) on *Smith v. Smith*, 278 N.W.2d 155 (S.D. 1979), but that case did not involve comparative fault; rather, it held that *contributory* negligence was not a defense to strict liability. *Id.* at 160.

Third, Plaintiffs contend that because punitive damages are recoverable only in a negligence action, comparative fault should be unavailable for strict liability and warranty claims. (Pls.' Br. 35–36.) Plaintiffs argue that if comparative fault is applied to strict liability, it would "essentially eliminate the cause of action" because a plaintiff "would have no logical basis for pursuing strict liability as opposed to negligence." (Pls.' Br. 35.) This argument is untenable. As explained above, a strict liability claim relieves the plaintiff of the burden of identifying how the defendant was unreasonable in its design or manufacturing process, instead allowing the plaintiff to focus solely on whether the design of the product was unreasonable. *See Bragg*, 319 S.C. at 540–41, 462 S.E.2d at 326 ("The focus here is on the condition of the product, without regard to the action of the seller or manufacturer."). Plaintiffs therefore will surely continue to assert and litigate strict liability claims. Indeed, as

Ford noted (Ford Br. 28), many states apply comparative fault to such claims, and Plaintiffs present no evidence that the strict liability claims have been "eliminated" in those states.

Finally, Plaintiffs' argument that comparative fault cannot apply to breach of warranty because it is based in contract and not tort (Pls.' Br. 36) is a red herring. A breach of warranty claim in a crashworthiness case—the type of cause of action at issue here—is a claim for personal injury, not economic loss based in contract. This Court need not address whether comparative fault would apply in a claim for purely economic loss when the only injury is to the product itself.

C. Plaintiffs misconstrue *Donze*.

In its brief, Ford explained how in *Donze* this Court held that comparative fault applies when the plaintiff's fault was a proximate cause of the enhanced injury, even for strict liability and breach of warranty claims. (Ford Br. 20–22.) Plaintiffs contend that Ford misinterprets *Donze*. (Pls.' Br. 36–39.) Plaintiffs are incorrect.

First, Ford does not misread *Donze*'s footnote 4. Plaintiffs argue that this footnote merely states that comparative fault could apply to a negligence claim, but does not apply to a claim for strict liability or breach of warranty. (Pls.' Br. 36–37.) But nowhere does the Court limit footnote 4 to negligence. Nor would that make any sense, as the plaintiff in *Donze* asserted claims only for strict liability and breach of warranty, and the certified question this Court addressed was expressly limited solely to those claims.

Second, Ford's brief explained that if comparative fault did not apply to strict liability and warranty claims, *Donze* would presumably have been decided on that straightforward basis. (Ford Br. 22.) Plaintiffs contend that this result is implausible because that would have left unanswered whether a plaintiff's fault in causing the initial collision would have reduced the defendant's fault for enhanced injuries. (Pls.' Br. 37–38.) True enough, but courts typically resolve a case on the narrowest grounds possible. *See Kershaw Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 393, 396 S.E.2d 369, 371 (1990). Further, this Court had such flexibility in answering the certified question before it. *See Howell v. United States Fid. & Guar. Ins. Co.*, 370 S.C. 505, 508, 636 S.E.2d 626, 627 (2006) ("In answering a certified question raising a novel question of law, the Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right.").

Third, Plaintiffs misconstrue Justice Kittredge's concurrence, contending that it applies only when injuries caused by the first and second collision are not divisible. (Pls.' Br. 38.) Not so. Justice Kittredge explained that *Donze*'s holding was limited "to true crashworthiness cases where it is established as a matter of law that the plaintiff's comparative fault *was not* a proximate cause of the 'enhanced injuries.'" 420 S.C. at 24–25, 800 S.E.2d at 487–88 (concurring opinion). Nowhere does his opinion discuss indivisible damages.

D. Applying comparative fault related to the enhanced injuries is not inconsistent with South Carolina's public policy.

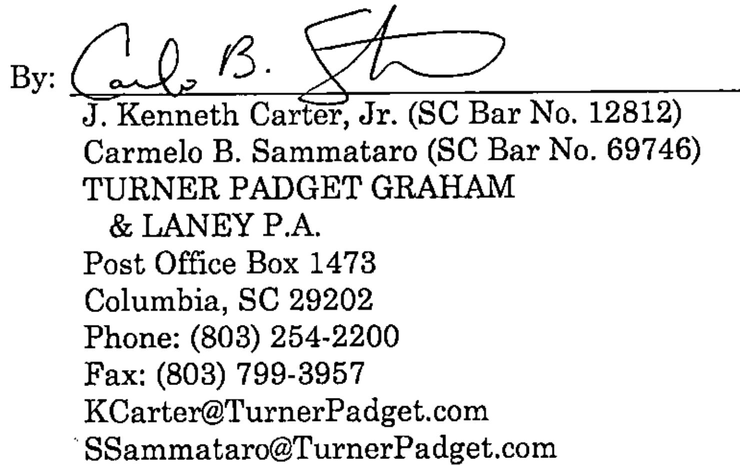
Finally, Plaintiffs argue that applying comparative fault to claims for strict liability and breach of warranty is inconsistent with the public policy adopted by the South Carolina General Assembly. (Pls.' Br. 39–40.) According to Plaintiffs, comparative fault cannot apply because the General Assembly adopted strict liability and breach of warranty liability as a means to "protect consumers by permitting a plaintiff to recover without proving negligence." (Pls.' Br. 39.) But application of comparative fault to such claims does nothing to change what a plaintiff must prove to establish liability. As Ford's brief explained, the public policy behind imposing strict liability for manufacturers is not affected in any way by allowing comparative fault. (Ford Br. 31–32.)

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 chose to die by suicide 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.

November 15, 2018

By: 

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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*,

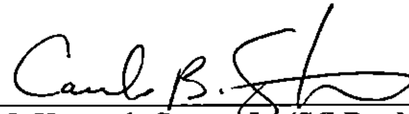
v.

Ford Motor Company, ... *Defendant.*

CERTIFICATE OF COUNSEL

The undersigned certifies that the REPLY 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.

November 15, 2018

By: 

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PROOF OF SERVICE

I certify this 15th day of November 2018 that I have served a copy of the REPLY 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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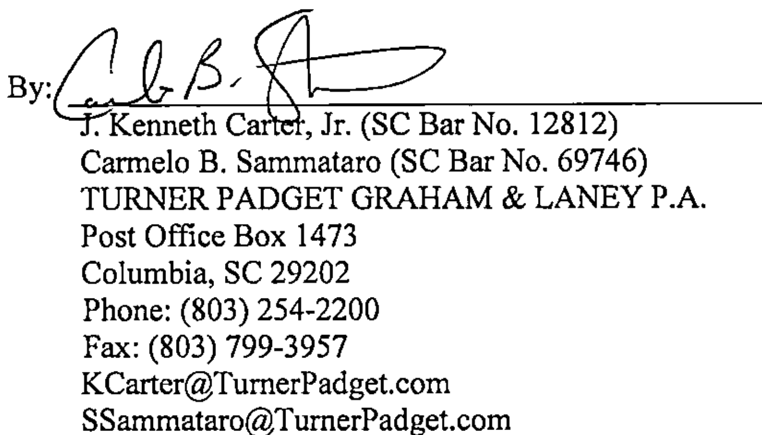
By: 

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