THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certified Questions from the United States Court of Appeals for the Fourth Circuit

Appellate Case No. 2018-001124

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

v.

Ford Motor Company. ..... Defendant

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT FORD MOTOR COMPANY

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INTEREST OF THE AMICUS CURIAE

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] These companies seek to contribute to the improvement and reform of the law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries and various facets in the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as amicus curiae in both state and federal courts, including this court, in support of its members and presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it effects product risk management.

This case is of importance to PLAC because Plaintiff seeks to exclude product liability claims from South Carolina's comparative fault regime. PLAC's membership has an interest in ensuring that plaintiffs who engage in conduct which causes or contributes to their own injuries bear their fair share of responsibility for those injuries no matter the cause of action. Additionally, PLAC believes that South Carolina's modified comparative fault system should be administered fairly in all products liability actions by enabling juries to weigh all proximate causes of an injury in apportioning fault among parties. Finally, PLAC's membership supports any public policy which discourages the

[1] See https//PLAC.com/PLAC/AboutPLACAmicus

reckless and irresponsible use of products or contributes to injuries in which a defendant manufacturer had no role.

PLAC's amicus brief urges this Court to find that South Carolina's comparative fault law applies to all causes of a plaintiff's injuries, including product-based causes.

STATEMENT OF ISSUES ON APPEAL

PLAC addresses only the second question posed by the United States Court of Appeals for the Fourth Circuit and certified by this Court:

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

PLAC believes that in order to answer this question, the court must consider two subsidiary questions (a) does comparative negligence apply in all product liability cases, and; (b) if not, does a legitimate policy reason exist to draw a distinction among various product liability plaintiffs including those claiming enhanced injury.[2]

[2] PLAC is mindful of Justice Kittredge's concurrence in *Donze v. General Motors Corp.*, 420 S.C. 8, 23-24, 800 S.E.2d 479, 487-488 (2017).

STATEMENT OF THE CASE

While PLAC concurs with the Statement of the Case set forth in Ford Motor Company's final brief, two facts are worthy of restating. First, Ford presented evidence and the jury found that Wickersham suffered enhanced injuries as a result of his own fault—namely being out of position in his seat during the crash and leaning over into the passenger seat which caused his face to impact the vehicle gear shift.

Second, all three product liability theories, strict liability, breach of warranty and negligence, were submitted to the jury. The jury returned a verdict on all counts and found Wickersham thirty percent (30%) negligent. However, the District Court refused to reduce the verdict notwithstanding the findings on the negligence cause of action, which was never dismissed.[3]

[3] This is a different fact pattern from *Donze* in which negligence was never alleged.

INTRODUCTION

South Carolina's comparative fault system should be applied to all product liability claims, including strict liability and breach of warranty claims in enhanced injury cases. Indeed, Plaintiff's brief acknowledges "the answer to the question [2] applies equally to all product liability actions." (See Pl. Br., p. 26). Injuries from products should not be treated differently from the other but-for causes of the same injury by being excluded from comparative fault.

A jury found that Plaintiff's enhanced injuries occurred in part because of Wickersham's fault in being out of position and striking the gear shift. Ford played no role in Wickersham being out of position. Product liability cases are filed and litigated in South Carolina on a regular basis in which the plaintiff's fault that caused or contributed to their injury is prohibited from being considered by the jury. Yet, given the evolution of South Carolina tort law to comparative fault and evolving interpretations of strict liability, public policy favors the application of comparative fault. It is unfair to exempt a certain category of plaintiffs from the consequences of their actions. Public policy dictates that a product liability plaintiff should be subject to the same defenses no matter the theory. It is simply contrary to public policy to follow a standard which allows a negligent defendant to access better defenses to a plaintiff's fault than a defendant who is not negligent but who may be strictly liable or may have breached an implied warranty.

This analysis leads to the conclusion that Question 2 should be answered in the affirmative and PLAC respectfully urges this Court to join with the majority of the states and apply comparative fault to all product liability claims, including enhanced injury claims.

ARGUMENT

I. THE EVOLUTION OF SOUTH CAROLINA LAW DICTATES THAT COMPARATIVE FAULT SERVE AS A DEFENSE TO ALL PRODUCT LIABILITY CAUSES OF ACTION

"To paraphrase John Locke, nothing is less powerful than an idea whose time is gone." *Langley v. Boyter,* 284 S.C. 162, 183, 325 S.E.2d 550, 562 (Ct. App. 1984) (abolishing the doctrine of contributory negligence) *quashed on administrative grounds by* 286 S.C. 85, 332 S.E.2d 100 (1985). Such is the case with plaintiffs' argument advancing a prohibition of comparative fault as a defense to all product liability actions.

In South Carolina, a plaintiff pursing a product liability claim must show the following, *no matter the theory*: (1) that he was injured by the product; (2) the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant; and (3) that the injury occurred because the product was in a defective condition reasonably dangerous to the user. *Branham v. Ford Motor Co.*, 390 S.C. 203, 210, 701 S.E.2d 5, 8-9 (2010). These elements apply equally to breach of warranty, negligence and strict liability. Over time, this Court has continually interpreted and refined the breadth and scope of strict liability, consistent with developments across the country. The evolution of the law of South Carolina recognizes and allows for such an expansion even here, where strict liability was legislatively enacted. *See Branham*, 390 S.C. at 220, 701 S.E.2d at 14 (holding that the General Assembly has expressed "no intention to foreclose court consideration or developments in product liability law"). Likewise, the law of comparative fault has evolved in South Carolina.

Notwithstanding the evolution of both areas of law in South Carolina, the trial court disregarded comparative fault's application to strict liability and breach of warranty

product claims, (as well as the negligence cause of action), even though *Donze* foresaw its application and the prohibition's underlying premise's "time has gone."

A. The Majority of States Allow Comparative Fault as a Defense to *All* Product Liability Actions.

Respectfully, prohibition of the application of comparative fault in all product liability actions involving enhanced injury cases is anachronistic. The overwhelming majority of courts around the country apply their comparative fault schemes to all product liability theories. While this majority of courts follow Restatement (Second) of Torts section 402A in product liability cases, they have rejected its limited all or nothing scheme with respect to the plaintiff's contributory negligence, and instead apply comparative fault to product liability theories.[4]

An early decision reaching this conclusion is from the California Supreme Court in *Daly vs. General Motors*, 575 P.2d 1162 (1978). The *Daly* opinion recognized that the fatal flaw to arguments against comparative fault were overblown semantics. For example, the court rejected the oft-made argument that comparative fault and strict liability are inhospitable to one another, like "apples and oranges" or "oil and water." *Id.*

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[4] *See Elliot v. Sears, Roebuck and Co.,* 229 Conn. 500, 642 A.2d 709 (Conn. 1994); *West v. Caterpillar Tractor Co.,* 336 So.2d 80 (Fla. 1980); *Kaneko v. Hilo Coast Processing,* 654 P. 2d 343 (Haw 1982); *Vannoy v. Uniroyal Tire Co.*, 726 P. 2d 648 (Idaho 1985); *Coney v. J. L. G. Industries, Inc.,* 97 Ill. 2d 104, 454 N.E. 2d 197(Ill. 1983); *Forsythe v. Coats Co.,*230 Kan. 553, 639 P. 2d 43 (Kan. 1982); *Bell v. Jet Wheel Blast,* 462 So. 2d 166 (La. 1985); *Austin v. Raybestos Manhattan, Inc.,* 471 A. 2d 280 (Me. 1984); *Brisboy v. Fibreboard Corp.,* 418 N.W. 3d 650 (Mich. 1988); *Jack Frost, Inc. v. Engineered Bldg. Components Co.,* 304 N.W. 2d 346 (Minn. 1981); *Thibault v. Sears, Roebuck Company,* 118 N.H. 802, 395 A.2d 843 (N.H. 1978); *Jaramillo v. Fisher Controls Co., Inc,* 698 P. 2d 887 (N.M. Ct. App. 1985); *Day v. General Motors Corp.* 345 N.W.2d 349 (N.D. 1984); *Sandford v. Chevrolet Division,* 642 P. 2d 624 (Or. 1982); *Fiske v. MacGregor,* 464 A. 2d 719 (R.I. 1983); *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 691-92 (Tenn. 1995); *Duncan v. Cessna Aircraft Co.,* 665 S.W.2d 414 (Tex. 1984); *Mulherin v. Ingersoll-Rand Co.,* 628 P. 2d 1301 (Utah 1981); *Lundberg v. All-Pure Chemical Co.,* 777 P.2d 15 (Wash. App. 1989); *Star Furniture Co. v. Pulaski Furniture co.,* 297 S.E.2d 854 (W. Va. 1982); *Dippel v. Sciano,* 37 Wis. 2d 443, 155 N.W.2d 55 (Wis. 1967); *Keltner v. Ford Motor Co.,* 748 F.2d 1265 (8th Cir. 1984) (based on Arkansas law); *Trust Corp. of Montana v. Piper Aircraft Corp.,* 506 F.Supp. 1093 (D. Mont. 1981) (based on Montana law).

at 1167. In adopting comparative fault as a defense, the court recognized the goals of strict liability would not be frustrated:

> The cost of compensating the victim of a defective product albeit proportionally reduced, remains on defendant manufacturer, and will through him, be "spread among society". However, we do not permit plaintiff's own conduct relative to the product to escape unexamined and as to that share of plaintiff's damages which flows from his own fault, we discern no reason of policy why it should...be borne by others.

Id. at 1168-69.

The court examined the policy reasons behind strict liability and said that the principle justification for it, easing the plaintiff's burden of proof, would not be compromised by the adoption of comparative fault; at the same time, making a plaintiff bear the cost of his own fault would promote fairness and equity:

> However in this evolving area of tort law in which new remedies are judicially created and old defenses judicially merged, impelled by strong considerations of equity and fairness we seek a larger synthesis. If a more just result follows from the expansion of comparative principals we have no hesitancy in seeking it, mindful always that the fundamental and underlying purpose of lie was to promote the equitable allocation of law among parties legally responsible in proportion to their fault.

Id. at 1167. The problems the opposition raised were "more shadow than substance." *Id.* at 1169 (rejecting the opposition's argument that application of comparative fault in strict liability cases would reduce the manufacturers' incentive to produce safe products and noting that the manufacturers' liability under strict liability remains and it will only be lessened to the extent the trier finds that the victim's conduct contributed to the injury).

Eighteen years later the Tennessee Supreme Court addressed an identical issue in *Whitehead vs. Toyota Motor Corp*, 897 S.W.2d 684 (1995). Like South Carolina, Tennessee followed Restatement 402A's construct of strict liability. Following the rationale of *Daly*, the *Whitehead* court concluded comparative fault was a defense to

strict liability generally, and specifically found comparative fault was a defense to enhanced injury claims. 897 S.W.2d at 693. In doing so, the court preserved the protection that strict liability was intended to provide to a consumer by taking into account the balance of the manufacturer's responsibility versus a plaintiff's responsibility for their own wellbeing: "'The principal of protecting a defense is likewise preserved, for plaintiff's recovery will be reduced only to the extent that his own lack of reasonable care contributed to his injury.'" *Id.* (quoting *Daly*, 575 P.2d 1162 at 1169).

Alaska has also considered the broader application of comparative negligence in strict liability cases. In *Smith v. Ingersoll-Rand Co.*, 14 P.3d 990, 996 (Alaska 2000), the Alaska Supreme Court concluded that comparative negligence is a defense to strict liability in tort, and is not limited to situations where the plaintiff uses the product with knowledge of the defective condition, misuse or assumption of risk, i.e., the Restatement 402A limitations, but also extends to those cases involving "other types of comparative fault, including a plaintiff's ordinary negligence. *Id.* (examining the Uniform Comparative Fault Act's definition of contributory fault, adopted by Alaska in its Tort Reform Act).

These courts and others have concluded that fairness, to both plaintiffs and defendants, dictates that courts should consider all of the factual and legal causes of a plaintiff's injuries. There is nothing unique about South Carolina law that requires a different result.

B. The Basis for Prohibiting the Application of Comparative Fault in All Products Liability Causes of Action has Been Eroded.

The evolution of South Carolina from contributory negligence to a comparative fault system, in conjunction with the evolution of South Carolina's product liability law,

has eroded any basis to prohibit comparative fault as a defense to all product liability actions.

i. Contributory Negligence and its Principles are No Longer the Law of South Carolina.

The South Carolina jurisprudence as to a plaintiff's fault has evolved significantly since 1974. In *Nelson v. Concrete Supply*, 303 S.C. 243, 399 S.E.2d 783 (1991), South Carolina joined the majority of states adopting comparative fault as law. In so doing, the *Nelson* court incorporated the Court of Appeals' 1984 *Langley* decision. *Id.* ("For an exhaustive analytical discussion of the history and merits of comparative negligence, we refer the bench and bar to the opinion of Chief Judge Sanders in [*Langley*].").

In *Langley*, Chief Judge Sanders' well-reasoned decision abrogating contributory negligence relied in large part on policy reasons which still ring true today. At a basic level, the court found that the doctrine of contributory negligence was unfair. *Langley*, 284 S.C. at 183, 325 S.E.2d at 562 ("It is contrary to the basic premise of our fault system to allow a defendant, who is at fault in causing an accident, to escape bearing any of its cost, while requiring a plaintiff, who is no more than equally at fault or even less at fault, to bear all of its cost."). Moreover, the court noted that "verdicts rendered on [a comparative fault] basis will come closer to 'speaking the truth' than do those rendered on the all-or-nothing basis required by the doctrine of contributory negligence." *Id.* at 184, 325 S.E.2d at 563. (noting there is something "fundamentality wrong with a rule of law which is so contrary to the convictions of ordinary citizens").

The doctrine evolved further in *Berberich v. Jack*, 392 S.C. 278, 292, 709 S.E.2d 607, 614 (2011), wherein this Court concluded that South Carolina's system is "essentially a comparative *fault* system." (emphasis added). In rejecting the former rule

that a plaintiff's ordinary negligence could not be a defense to reckless conduct, the *Berberich* court held that "each party's relative fault in causing the plaintiff's injury will be given due consideration." *Id.* at 292-93, 709 S.E.2d at 614-615. While *Berberich* concerned only negligence and gross negligence in a slip and fall case, its import lies in its recognition of the law's evolution, as the court noted that the former rule was meant to ameliorate the "harshness" of the all or nothing result of contributory negligence and that since *Nelson*'s rejection of the contributory doctrine, "the need for this concept has been eliminated."[5] *Id.* at 293, 709 S.E.2d at 615.

As explained in *Langley*, the "fundamental reason" courts around the United States moved to comparative fault is to give effect to society's cumulative belief that "persons are responsible for their acts to the extent their fault contributes to an injurious result." Gail D. Hollister, *Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Tort Suits in Which Both Plaintiff and Defendant Are at Fault*, 46 Vand. L. Rev. 121, 128 (1993). The same should be true in a strict liability setting.

ii. Because Contributory Negligence is no Longer the Law in South Carolina, Use of its Principles to Thwart Application of Comparative Fault in Strict Liability Actions is Unfair and Inconsistent in the Face of The Restatement (Third) of Torts Evolution.

The evolution of product liability law here and across the nation is likewise noteworthy. The General Assembly adopted strict liability in 1974 via the Defective Products Act, S.C. Code Ann. sections 15-73-10 through 15-73-30. In so doing, it

[5] Our appellate courts have likewise found the absolute defenses of assumption of risk and last clear chance obsolete and inconsistent with South Carolina's comparative fault scheme. *See Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 71, 508 S.E.2d 565 (1998) (abolishing absolute defense of assumption of risk) and *Senn v. Sun Printing Co.*, 295 S.C. 169, 367 S.E.2d 456 (Ct. App. 1988) (subsuming last clear chance doctrine into comparative negligence). These decisions reflect the evolution of our laws and the need for consistent evolution when outdated defenses are obsolete and inequitable.

adopted "nearly verbatim" the language of the American Law Institute's Restatement (Second) of Torts, section 402A. *See* § 15-73-10 (mirroring section 402A language regarding liability of seller for defective product). The comments to section 402A were expressly adopted as legislative intent. S.C. Code Ann. § 15-73-30. The intended effect of the statute was to relieve a plaintiff of the requirement of proof of negligence and to render immaterial the demonstration of due care by the defendant. *E.g. Bragg v. High-Ranger, Inc.* 319 S.C. 531, 539, 540, 462 S.E.2d 321, 326 (Ct. App. 1995); *Madden v. Cox*, 284 S.C. 574, 328 S.E.2d 108, 112 (Ct. App. 1985). But, that only tells one side of the story of fault—the fault of the defendant. *Donze, Jimenez,* and the Fourth Circuit's Order at issue implore this Court to examine the other side of the coin—i.e., the comparative fault, if any, of a plaintiff in a products liability case.

In addition to the courts around the country that have recognized comparative fault as a defense, *supra*, the Restatement (Third) of Products Liability, recognized by this court in *Branham*, likewise embraced comparative fault as a defense to strict liability. The modern "trend in products liability has been in the direction of adopting a more fault based approach, and the Restatement (Third) of the Law of Torts: Products Liability reflects this shift". Hubbard, F. Patrick and Robert L. Felix, The South Carolina Law of Torts, 4th ed. (2011). The Restatement (Third) was first adopted in 1997 and abolished the contributory negligence prohibition of section 402A. In section 17, "Apportionment of Responsibility Between or Among Plaintiffs, Sellers and Distributors of Defective Products and Others," the following principal was adopted:

> (a) A plaintiff's recovery of damages for harm caused by a product defect may be reduced if the conduct of the plaintiff combines with the product defect to cause the harm and the plaintiff's conduct fails to conform to the generally applicable rules establishing appropriate standards of care.

The comments to section 17 recognized comparative fault has swept the United States and contributory negligence is antiquated "as the Ivory-Billed Woodpecker of the common law." *Langley,* 325 S.E.2d at 562. Indeed, the same body which found contributory negligence largely inapplicable to strict liability in section 402A has now, in conjunction with the evolution of product liability law, rejected that rule in its Restatement (Third) of Products Liability.

iii. There is No Longer a Basis for the Limitation of Consideration of Plaintiff's Fault Found in Comment n.

The opponents to application of comparative fault primarily rely on comment n to Restatement (Second) of Torts 402A, entitled Contributory Negligence, to advance their arguments. Comment n to section 402A, entitled "Contributory Negligence," rejects contributory negligence, accepts the assumption of risk concept and is silent on the issue of comparative negligence. The Restatement's rejection of contributory negligence is undoubtedly a reaction to the rather harsh result of the "all-or-nothing" approach that *Langley* rebuffed in 1984 and that *Nelson* categorically rejected in 1991.

Nevertheless, like other jurisdictions, South Carolina's product liability law must evolve in consideration and conjunction with its evolution in the field of comparative fault. Furthermore, two points undermine the credibility of comment n.'s import in today's landsacpe. First, contributory negligence has not been the law of South Carolina for twenty seven (27) years, rendering comment n. irrelevant and archaic. Indeed, there is no concern today that a plaintiff will be punished unduly as the modified comparative fault system in South Carolina ameliorates such worry.

Second, the express language of comment n makes clear that it never intended to foreclose consideration of all fault of a plaintiff:

> Since the liability with which this Section deals is not based upon the negligence of the seller, but is strict liability the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of the risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Restatement (Second) of Torts § 402A cmt. n (1974).

The legal landscape of 1974 when the General Assembly adopted 402A is vastly different from today. Courts today rightfully do not limit the relevance of plaintiff's fault as did comment n.

iv. Judicial Change is Warranted Because the General Assembly has Permitted Courts' Development of Product Liability Law.

A concern raised in *Langley* and Plaintiffs here, is the notion of judicial versus legislative changes. *Langley* considered numerous points regarding deference to the General Assembly and concluded that such deference was not appropriate under the circumstances, ultimately opining that a judicial change was necessary. More recently, the *Donze* decision expressed hesitation for judicial change with respect to the application of comparative negligence in crashworthiness cases based upon theories of strict liability and breach of warranty because the causes of action and their defenses are statutory constructs. *Id.* at 19, 800 S.E.2d at 485 ("If the General Assembly intends for comparative negligence to constitute a defense under either of these theories, it is unquestionably capable of amending these statutory schemes accordingly.").[6]

[6] PLAC submits that the General Assembly has signaled that comparative negligence should constitute a defense to these theories. In the Contribution Among Tortfeasors Act, the General Assembly instructs that

While the *Donze* court's concerns are surely legitimate, the evolution of the law of South Carolina recognizes and allows for such an expansion even here, where strict liability was legislatively enacted. In *Branham v. Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (2010) the Court held that the General Assembly has expressed "no intention to foreclose court consideration or developments in product liability law." This pronouncement of the Court is consistent with the evolution of tort law in this state since the adoption of comparative fault, and this Court's ever-evolving interpretation of S.C. Code Section15-73-10, et. seq.[7]

The *Branham* court, while acknowledging that the comments to section 402A formed the basis of the very test it then rejected in favor of the Restatement (Third) of Torts' risk-utility test, found that the General Assembly had "foresight" in looking to the American Law Institute for guidance and expressing "no intention to foreclose court consideration of developments in products liability law." *Id.* at 220, 701 S.E.2d at 14. In other words, the court concluded that its holding would not infringe upon the legislative function and that its adoption of the Restatement (Third) would actually be in line with legislative intent.

This Court should act now as it has acted before in *Branham* and adopt Restatement (Third) of Products Liability section 17 based on the foresight of the General

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in actions for personal injury, wrongful death or to recover economic or noneconomic loss resulting from "tortious conduct" and concerning multiple defendants and indivisible damages, joint and several does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault as compared to the total of the fault of all defendants and "the fault (comparative negligence), if any, of plaintiff." S.C. Code Ann. §15-38-15. The General Assembly further instructs that the apportionment should include the "determin[ation of] the percent of fault, if any, of plaintiff and the amount of recoverable damages under applicable rules concerning "'comparative negligence.'" The General Assembly's incorporation of comparative fault of the plaintiff into this Act, while making no distinction is made among causes of action or theories of pleading, suggests that comparative fault is applicable to all product liability theories. Indeed, this very scenario occurred in the trial court.

[7] The *Branham* court did away with the Consumer Expectations Test of Restatement 402A, replacing it with the Risk Utility Test, a majority rule of common law and adopted by Restatement (Third) Product Liability.

Assembly in looking to the American Law Institute for guidance, at least with respect to the scenario expressly predicated in Question 2 before it.

II. PUBLIC POLICY, IN CONJUNCTION WITH THE INCONSISTENT OUTCOME IN THE CASE AT BAR, DICTATES THAT COMPARATIVE NEGLIGENCE WHICH CAUSED THE PLAINTIFF'S ENHANCED INJURIES SHOULD BE ASSESSED BY A JURY, REGARDLESS OF THE PRODUCT LIABILITY THEORY

As set forth above, the position advocated herein by PLAC is neither unique nor confined to a particular part of the country. Indeed, the vast majority of states that have considered this issue have adopted comparative fault beginning in 1978 and continuing to this day. Additionally, the very body which created section 402A has since abandoned its position with respect to contributory negligence and now recognizes comparative fault as a defense to products liability claims. In a state whose economy is led by global product manufacturers, including automobile manufacturers, common sense and public policy dictate that South Carolina follow the majority, to ensure South Carolina is not an outlier in products liability law.

A. Application of Comparative Fault to All Product Liability Theories Maintains the Purpose of Strict Liability, While Simultaneously Promoting Fairness and Equality for Both Parties

Despite the opposition's assertions to the contrary, the application of comparative fault to strict liability and breach of warranty claims does not conflict with the stated purposes behind the implementation of strict liability. Comparative fault focuses on acts or omissions by a plaintiff which caused or contributed to his injuries. This in no way ameliorates the manufacturers' responsibilities under strict liability, as the plaintiff still need only show that the manufacturer distributed a defective or unreasonably dangerous

product to hold a manufacturer strictly liable. Instead, it simply forces the jury to consider what impact, if any, the plaintiff's acts had on his resulting enhanced injury. To allow otherwise rewards some defendants and punishes others, while at the same time rewarding some plaintiffs and punishing others. This is the very concern Justice Kittredge expressed in *Donze* that the majority's "apparent categorical rule may be applied to preclude a manufacturer from asserting a valid defense, which in my judgment would implicate due process considerations." *Donze*, 420 S.C. at 24, 800 S.E.2d at 487 (Kittredge, J., concurring).

Indeed, absolving a plaintiff of his own malfeasance based on the tort he alleges is contrary to logic. It also advanced the wrong public policies. *See Kaneko v. Hilo Coast Processing*, 654 P.2d 343, 352 (H.I. 1982) ("[J]urisdictions that are in favor of the merger [at strict products liability and comparative negligence] argue that fairness and equity are more important than sematic consistency.").

Given that all South Carolina product liability theories share common elements, there is no principled basis to allow comparative fault principles as to one theory and not another. To be sure, if the plaintiff's position were to be accepted, then a strict liability plaintiff would not have his liability reduced based on his fault, but a plaintiff who brought a negligence claim can potentially have his verdict reduced.[8] There is no public policy that would support reducing the liability of negligent parties but not the liability of

[8] *See, e.g., Webb v. Navistar Int'l Transp. Corp.*, 692 A.2d 343, 348-49 (1996) (Under the 'all or nothing' framework, some plaintiffs receive windfalls because they collect damages for injuries caused by their own negligence in addition to damages for injuries caused by the product defect. On the other hand, some plaintiffs receive nothing because the court or jury has determined that their negligence constitutes misuse, assumption of risk or an intervening cause, concepts often difficult distinguish. Applying principles of comparative liability will reduce the total damages awarded to some plaintiffs but will also extend recoveries to some plaintiffs formerly barred from any recovery; thus, recoveries will be more equitably distributed among plaintiffs.").

parties held liable "without fault." As discussed *infra*, it is even less tenable to reject a reduction when the jury has found the defendant liable under all three theories.

As stated by one court, were this inconsistent application to stand, "[i]ronically, defendant manufacturers found liable in negligence would have the damages apportioned, despite the fact that their conduct was clearly more culpable than the conduct of those defendants found liable in strict liability or implied warranty."[9] *See, e.g., Fiske v. MacGregor*, 464(A) 2d 719, 728 (R.I.1983); *see also* Victor E. Schwartz, Comparative Negligence § 11-1 (3rd ed. 1994). (noting that allowing comparative negligence to be applied to negligence but not strict liability actions would produce an illogical result as plaintiff's fault would be taken into account when a defendant has been negligent and objectively at fault, but not taken into account under strict liability where the defendant may not have been at fault at all). The *Fiske* court noted that the outcome of a case should not be determined by "adroit pleading or semantical distinctions." *Id.* ("A defendant's culpability is the basis for an award of damages, whether that culpability is denominated negligence, strict liability, or breach of warranty. Similarly, a plaintiff's culpable conduct is the basis for an apportionment of those damages.").

Furthermore, exempting a certain category of plaintiffs from comparative fault in strict liability also raise other challenges such as equal protection. *See Webb v. Navistar Int'l Transp. Corp.*, 692 A.2d 343, 348 (1996) ("Comparative liability principles also further fairness by preventing a negligent plaintiff from recovering as much as a plaintiff who has taken all reasonable precautions."). The same risks exist for the inconsistent application among defendants. *See Donze*, 420 S.C. at 24, 800 S.E.2d at 487 (Kittredge, J., concurring) ("My concern here is that today's apparent categorical rule may be applied

[9] Unless, as here, the trial court simply ignored the negligence verdict *sua sponte*.

to preclude a manufacturer from asserting a valid defense, which in my judgment would implicate due process considerations."). Indeed, Justice Kittredge's concurrence in *Donze* envisioned situations where defendants would be hamstrung in their defense, while comparatively negligent plaintiffs are absolved of any liability in proximately causing their own enhanced injury:

> For example, where a manufacturer does not accept the plaintiff's framing of the issue and presents evidence that the plaintiff's comparative fault in the initial collision was a proximate cause of the so-called "enhanced injuries," is the manufacturer entitled to present evidence of the plaintiff's comparative fault? I would say yes. It is for this reason I would caution courts from reading today's result too broadly. I would limit the holding 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."

Donze, 420 S.C. at 24-25, 800 S.E.2d at 487-88 (Kittredge, J., concurring).

Otherwise, defendants are prematurely and unfairly found liable in actions in which they did not join, influence or cause injury, merely because those product liability defendants, categorized pursuant to "adroit pleading" and "semantical distinctions," are deemed to suffer a fate different than other defendants. Surely that is not the public policy of South Carolina.

However, as discussed *infra*, these semantical distinctions admonished by *Fiske* and other courts determined the outcome of the case *sub judice* and will continue to effect South Carolina's product liability litigation for years to come.

B. As Evidenced by the Outcome Below, Failure to Apply Comparative Fault as a Defense in Product Liability Actions Where the Fault Causes Enhanced Injuries Creates an Unworkable System and Results in Inequities.

PLAC is well-aware of the practice of this State's appellate courts of narrowly and mindfully answering the questions presented to them. Indeed, "appellate courts in

this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." Nevertheless, this Court in *Donze* did speak beyond the question asked of it:

> Our ruling today is limited to the certified questions before us which concern only the applicability of comparative negligence to a plaintiff in causing the collision in a crashworthiness case. We note, as did the district court in *Jimenez I*, that "[c]omparative negligence related to the [defective component] itself—tying [a door] shut for example—could still be a defense, if a factual basis existed . . . ."

Donze, 420 S.C. at 20, 800 S.E.2d at 485, n.4. In so doing, *Donze*, at a minimum, implied that comparative fault could be a defense to product liability cases involving strict liability and warranty claims if the facts support a comparative negligence defense to enhanced injury claims.

Comparison of the certified question before this Court currently and the certified question before the *Donze* court is a worthwhile task. The only difference in the questions is the removal of the phrase "in causing an accident" and the injection of the phrase "in causing enhanced injuries." Thus, the remaining portions of the questions are identical and can be read without reference to either phrase as follows: "Does comparative negligence [] apply in a crashworthiness case when the plaintiff alleges claims of strict liability and breach of warranty and is seeking damages related only to the plaintiff's enhanced injuries?" While the questions at issue here and in *Donze* are similar, they are also quite different. Surely if this Court wished to foreclose any consideration of comparative negligence in any crashworthiness case, it could have done so in *Donze*. It did not.

The different factual circumstances of the case before the Court and the underlying case in *Donze* are also noteworthy. Unlike *Donze* where negligence was not pled by the plaintiff, negligence was squarely before the court and the jury in the case *sub judice.* Plaintiff pled and tried the case under a negligence theory (in addition to strict liability and breach of warranty), negligence was sent to the jury, a finding of negligence was made by the jury, and the jury allocated fault among all parties, including apportioning 30% to Plaintiff for his comparative fault in causing the enhanced injury, notably his positioning at the time of the accident. Even more important, Plaintiff's position in the vehicle was the "comparative negligence related to the [air bag] itself[.]" In footnote four limiting its holding, *Donze* foresaw this very scenario and gave credence to applying comparative fault as a defense herein. *See also Donze*, 420 at 24, 800 S.E.2d at 487 (Kittredge, J., concurring) ("We must answer [ostensible questions of law predicated on certain factual assumptions] narrowly and recognize that even a slight tilting of the facts can impact the analysis and alter the conclusion.").

Inherent in a crashworthiness case such as *Donze,* is a plaintiff's concession that the driver's negligence caused the initial collision; yet, in cases where there is evidence that a driver or other person caused the enhanced injury, a plaintiff's concession regarding the cause of the initial collision does not suffice. This is even more pronounced in cases such as this one, where the plaintiff herself brought a negligence claim regarding the cause of the enhanced injury. In so doing, practicalities and public policy dictate that the driver's own negligence in causing the enhanced injury must be considered. To hold otherwise hamstrings manufacturers from defending against all causes of action and

eviscerates the very premises of the crashworthiness doctrine and strict liability, "foreseeability" and "unreasonableness," respectively.

Here, as the jury found, Wickersham's actions caused or contributed to the enhanced injury. There is absolutely no evidence that Ford or its design of the vehicle caused, persuaded, influenced or otherwise contributed to Wickersham sitting in the position that he was at the time of the accident. It would be a nonsensical result to say that the plaintiff can recover for enhanced injuries which were caused, in part, by his own negligence, while the defendant is prohibited from raising the plaintiff's comparative fault related to the defect as a defense. Nevertheless, this very circumstance occurred during trial. Given the inequities that existed below, and which were foreshadowed by the *Donze* majority and concurrence, this Court must answer Certified Question 2 in the affirmative.

To do otherwise leaves South Carolina continuing to struggle with an unworkable doctrine from 1974 that has been abrogated by the majority of the states and even rejected by the very body which initially promulgated it. *See Webb v. Navistar Int'l Transp. Corp.*, 166 Vt. 119, 130, 692 A.2d 343, 348-49 (1996) ("Under the 'all or nothing' framework, some plaintiffs receive windfalls because they collect damages for injuries caused by their own negligence in addition to damages for injuries caused by the product defect. On the other hand, some plaintiffs receive nothing because the court or jury has determined that their negligence constitutes misuse, assumption of risk or an intervening cause, concepts often difficult distinguish. Applying principles of comparative liability will reduce the total damages awarded to some plaintiffs but will

also extend recoveries to some plaintiffs formerly barred from any recovery; thus, recoveries will be more equitably distributed among plaintiffs.").

Moreover, while a plaintiff is the master of her own complaint, a plaintiff cannot use her complaint and alternative causes of action as both a sword and a shield. Indeed, as in the trial below, where a plaintiff hedges her bets and brings a negligence cause of action in addition to strict lability causes of action for enhanced injuries, a plaintiff must accept that evidence regarding the cause of the enhanced injuries, to include a driver's negligence in causing the enhanced injuries, is relevant. *Donze* relied in part on *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548, 566 (D.S.C. 1999) ("*Jimenez I*"), which held that "[t]he alleged negligence causing the collision is legally remote from, and thus not the legal cause of, the enhanced injury caused by a defective part that was supposed to be designed to protect in case of a collision." However, the same cannot be said for the alleged negligence in *causing the enhanced injury*, for such comparative negligence is *not* legally remote from and *can be* the cause of the enhanced injury.

Recognizing this rationale implores this Court to answer the narrower Question 2 in the affirmative; but beyond the facts of this case, it compels the broader conclusion that comparative fault should apply to all product liability actions no matter the semantics. Fairness requires that courts treat plaintiffs and defendants consistently.

CONCLUSION

For these reasons, PLAC respectfully requests that this court answer yes to Question 2, and hold that comparative fault is a defense to all products liability causes of action including those where the issue is the cause of an enhanced injury. At a minimum, it should conclude that where there has been a finding that the manufacturer was negligent, the jury's finding of comparative fault must be given effect regardless of whether it was joined with a strict liability or breach of warranty claim.

Respectfully submitted,

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December 19, 2018

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

CERTIFICATION OF COUNSEL

The undersigned certifies that the Brief of the Product Liability Advisory Council, Inc. as Amicus Curiae in Support of Defendant Ford Motor Company complies with Rule 211,(b), SCACR.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the foregoing **BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT FORD MOTOR COMPANY** on counsel of record by depositing a copy of same in the United States Mail, postage prepaid, on December 19, 2018, addressed to its attorneys of record as follows:

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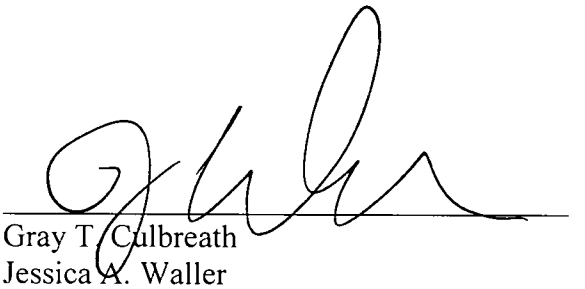

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