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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Appellate Case No. 2018-001124

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

Plaintiff – Appellee,

v.

Ford Motor Company.

Defendants – Appellants.

BRIEF OF *AMICUS CURIAE*

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STATEMENT OF INTEREST

The South Carolina Association for Justice (“SCAJ”) is a non-profit organization with a membership of more than 1,200 women and men of the trial bar of the State of South Carolina. SCAJ members represent tens of thousands of South Carolinians who have been injured or who face other life-changing events due to the actions of others and are in need of legal counsel. For almost sixty years, the SCAJ has promoted the rights of citizens by advocating the right to a trial by jury, full and just compensation for innocent victims, and the maintenance of a free and independent judiciary.

SCAJ members engage in litigation on behalf of injured parties, including in complex areas such as products liability and wrongful death. SCAJ is especially knowledgeable on the burdens of pursuing litigation, particularly products liability litigation that involves extensive discovery, expert testimony, and difficult questions of law.

Through the *Amicus Curia* Committee, the SCAJ works to protect, through advocacy, the rights of injured individuals faced with potentially daunting litigation, including complex and novel issues of law. The SCAJ submits *amicus curiae* briefs in cases involving important consumer issues affecting its members and those persons whom its members are sworn to

protect. This Court's determination of the question certified by the United States Court of Appeals for the Fourth Circuit will impact the ability of the SCAJ members to adequately represent innocent victim clients in both products liability and personal injury actions, thereby depriving consumers of their ability to have their claims fully explored by a jury in accord with the 7th Amendment of the United States Constitution.

STATEMENT OF ISSUE ON APPEAL

In an order dated June 27, 2018, this Court agreed to answer two questions of law certified by a panel of the United States Court of Appeals for the Fourth Circuit. The specific questions certified were:

1. 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?

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

STATEMENT OF THE CASE

The South Carolina Association for Justice adopts by reference the Statement of the Case of the Plaintiff Wickersham. *See* Rule 208(b)(6), SCACR.

SUMMARY OF THE ARGUMENT

This Court should answer the Fourth Circuit's first question in the negative. In South Carolina, comparative negligence does not apply when a plaintiff alleges claims of strict liability and breach of warranty. With regard to the Fourth Circuit's second question, this Court should make clear that South Carolina does recognize an "uncontrollable impulse" exception to the general rule that suicide breaks the causal chain for wrongful death claims. Moreover, a plaintiff is only required to prove that any injury was foreseeable in order to satisfy causation under this exception. These are the only conclusions that can be squared with statutory and common law of South Carolina as well as protect the rights of innocent South Carolina litigants who have been harmed by the acts of others.

ARGUMENT

I. 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?

No. Comparative negligence in causing enhanced injuries does not 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.

A. Neither The General Assembly Nor This Court Considers Comparative Negligence To Be Applicable When The Plaintiff Alleges Claims Of Strict Liability Or Breach Of Warranty.

Strict liability and breach of warranty are both statutory constructs in South Carolina. See S.C. Ann §§ 15-73-10, -20 (2005); 36-2-314, -711 (2003). In fact, strict liability in tort was not recognized in South Carolina prior to the enactment of 1974 Act No. 1184. *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 300 S.E.2d 735 (1983); *Hatfield v. Atlas Enterprises, Inc.*, 274 S.C. 247, 262 S.E.2d 900 (1980). The Act incorporated almost verbatim the definition of strict liability from § 402A of the Restatement (Second) of Torts. Adoption of this theory, based upon a no-negligence concept of liability, effected a profound change in the law of this State. See *Schall, supra*.

The General Assembly specifically included various defenses to these claims of strict liability and breach of warranty. For example, the General Assembly expressly stated that a manufacturer is strictly liable for the damages caused by a defective product except when a plaintiff “discovers

the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product.” S.C. Code Ann. § 15-73-20 (2005). By including assumption of the risk as a defense, but excluding other potential defenses, the General Assembly demonstrated that it considered various defenses to the causes of action for strict liability and breach of warranty and expressly chose to include certain defenses, such as assumption of the risk, but exclude others, including comparative negligence. *See Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (recognizing the canon of “*expressio unius est exclusio alterius*”).

In this case, Ford would like for this Court to read comparative negligence into the statutory construction of both strict liability and breach of warranty. Specifically, Ford would have this Court create out of whole cloth an entirely new defense to both causes of action, which the Legislature could have included – but did not – when it drafted either section of the South Carolina Code. Effectively, Ford asks this Court to step into the shoes of the General Assembly and legislate. This is an invitation for judicial activism that this Court should politely decline.

Where the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute. This

principle was laid out in *Creech v. South Carolina Pub. Serv. Auth.*, 200 S.C. 127, 146, 20 S.E.2d 645, 652 (1942):

It is perhaps unnecessary to say that Courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the Courts to construe, not to make, the laws. If the Act is to be amended so as to provide for the recovery of punitive damages, this must be accomplished by the legislature, not the courts.

Id. As has been made clear repeatedly when this Court was previously invited to legislate by judicial decree, the South Carolina Supreme Court will not judicially alter the plain language of a statute. *See, e.g., Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 537-538, 393 S.E.2d 162, 163-164 (1989). And, with specific regard to the strict liability statute, this Court already declined a virtually identical invitation to judicially alter the plain language of the same statute as recently as 2017. *See Donze v. General Motors, LLC*, 420 S.C. 8, 22, 800 S.E.2d 479, 486 (2017); *see also, Bray v. Marathon Corp.*, 356 S.C. 111, 117 n.6, 588 S.E.2d 93, 96 n.6 (2003) (finding that the Court could not amend the “strict liability cause of action,

this must be accomplished by the legislature, not the court.”); *Stanley v. B.L. Montague Co.*, 299 S.C. 51, 56, 382 S.E.2d 246, 249 (1989).

Importantly, the South Carolina courts have repeatedly refused to create such a defense and have recognized comparative negligence as a defense only to a negligence cause of action. *See, e.g., Donze*, 420 S.C. at 19, 800 S.E.2d at 485; *Berberich v. Jack*, 392 S.C. 278, 286, 709 S.E.2d 607, 611 (2011); *Ritter & Assoc. v. Buchanan Volkswagon, Inc.* 405 S.C. 643, 651, 748 S.E.2d 801, 805 (Ct. App. 2013) (“the doctrine of comparative negligence is only applicable to cases alleging negligence as a cause of action”). This Court should join this line of previous decisions. The South Carolina Code does not provide for a defense of comparative negligence when the plaintiff alleges claims of strict liability and/or breach of warranty. A cursory review of the plain language of the statute reveals this to be true for crashworthiness claims, such as the action currently before the Court, as well as all other strict liability and breach of warranty claims. There is only one possible answer to the Fourth Circuit’s certified question: in South Carolina, comparative negligence in causing enhanced injuries does not 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.

B. Allowing A Comparative Negligence Defense To Strict Liability In Crashworthiness Cases Would Be Adverse To Public Policy And Harmful To South Carolina Drivers.

Unfortunately, South Carolina residents regularly suffer injuries as a result of design and/or manufacturing defects. These injuries can be horrific and may even lead to death. The dangerous defects that cause such injuries and death can be found in all sorts of manufactured products found in South Carolina, especially automobiles. By way of just one example, according to the National Highway Transportation Safety Administration, as of December 21, 2018, “roughly 37 million vehicles equipped with 50 million defective Takata air bags are under recall because these air bags can explode when deployed, causing serious injury or even death.” *See* <https://www.nhtsa.gov/press-releases/nhtsa-releases-end-year-update-takata-air-bag-recalls> (last visited January 25, 2019). A significant percentage of these 37 million vehicles are owned and driven daily by South Carolinians. None of these South Carolina citizens created this dangerous defect. Nonetheless, if any of these unsuspecting drivers happen to be in an accident – whether due to their own negligence or the negligence of another person – there is a significant risk of serious injury or even death as a result of the defective air bags that may explode upon impact.

Under the current strict liability scheme as envisioned by the South Carolina legislature, the manufacturers and distributors of these defective airbags would be strictly liable for all extraordinary injuries to these innocent South Carolinians that result from the defective airbags. Of course, the manufacturer would not be liable for those injuries that are the result of the accident alone. These injuries would subject the negligent party to liability in a negligence cause of action where the defense of comparative negligence would be applicable. While the South Carolina General Assembly has wisely decided that the drivers of the cars involved, as well as other *negligent* parties, may apportion fault by application of comparative negligence, the manufacturer of a defective product, such as the airbag in this example, may not assert comparative negligence as a defense. Insofar as the plaintiff's extraordinary injuries were caused solely by the product defect, any negligence on the part of the plaintiff in causing the collision is irrelevant. Thus, when it comes to manufacturing defects that cause additional injuries that an innocent driver would not have suffered but for the defective product, the victim's fault in causing the accident is irrelevant to the manufacturer's strict liability. *See Donze*, 420 S.C. at 19, 800 S.E.2d at 485

The public policy for such strict liability is clear. When an innocent South Carolina driver is injured or killed because of a defective product such as the airbags in the example recounted above, that unlucky South Carolinian, his or her family, friends, and the community at large, are suddenly compelled to bear tremendous losses, including medical care, long-term care, the loss of a family member, lost income, and the loss of a contributing member of our society. The General Assembly has wisely concluded that it outrages our sense of justice to levy these costs, attributable to the operations of a specific industry against a specific isolated driver selected on a relatively random basis. Therefore, the law attempts to shift these individual losses to the manufacturing and distributing industry. *See, e.g., Purvis v. Consolidated Energy Products Co.*, 674 F.2d 217, 219 (4th Cir. 1982).

If this Court were to adopt Ford's position and allow comparative negligence such that a manufacturer's strict liability relating to crashworthiness could be reduced by the driver's negligence, the legislature's goal of redistributing these significant costs from the individual and back to the responsible industry would be undermined. Such a redistribution of costs back to South Carolina consumers is contrary not only to public policy, but also to the express laws of this state. In South Carolina,

manufacturers have statutory duties to design reasonably safe, merchantable products which, if breached, entitle a consumer to bring a first party action for damages, regardless of the consumer's mental state or negligence at the time of the injury. *See* S.C. Code Ann. §§ 15-73-10 ("One who sells any product in a defective condition unreasonably dangerous to the user . . . is subject to liability"), 36-2-314 (stating a merchant will be liable for breach of warranty if the goods sold are not merchantable at the time of the sale); *see also, Donze*, 420 S.C. at 22, 800 S.E.2d at 486. This duty is not obviated because the unsuspecting driver of a vehicle equipped with a defective airbag negligently caused the underlying accident that precipitated an airbag explosion, was sitting too close to the steering wheel, or happened to be leaning the "wrong way" at the time the defective airbag exploded. Such a result is what Ford urges this Court to adopt, but it is not what our General Assembly envisioned nor is it in the best interest of South Carolina citizens.

This Court should hold that comparative negligence in causing enhanced injuries does not 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.

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

Yes. South Carolina recognizes an “uncontrollable impulse” exception to the general rule that suicide breaks the causal chain for wrongful death claims. In order to satisfy causation under this exception, a plaintiff is only required to prove that any injury is foreseeable.

A. South Carolina Recognizes An Uncontrollable Impulse Exception.

South Carolina recognizes an uncontrollable impulse exception. As early as 1948, the South Carolina Supreme Court stated that the plaintiff in a wrongful death action might recover where the decedent is “no longer a free agent incapable of controlling his own conduct, and [is] bent upon suicide.” *Scott v. Greenville Pharmacy*, 212 S.C. 485, 48 S.E.2d 324, 328 (S.C. 1948). In *Scott v. Greenville Pharmacy*, the South Carolina Supreme Court stated that an intervening act, such as a suicide, will not insulate the original wrongdoer from liability if the “intervening act and the injury resulting therefrom are of such a character that the author of the primary negligence should have reasonably foreseen and anticipated them in the light of the attendant circumstances.” *Id.*

Forty years later, the South Carolina Court of Appeals relied upon this Court's decision in *Scott* when it decided *Crolley v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716, 717 (S.C. Ct. App. 1989). Affirming the circuit's grant of summary judgment in favor of a bartender who sold alcohol to an intoxicated person who subsequently attempted suicide after being arrested and taken to jail, the court made no mention of any categorical rule precluding causation in suicide cases. *Id.* To the contrary, the court of appeals analyzed the foreseeability of the plaintiff's injuries and ultimately determined that the attempted suicide was "too remote from the alleged statutory violation to establish proximate causation. One does not expect a person to attempt suicide as a natural and probably result of being served a drink while intoxicated." *Id.*

Plainly, South Carolina courts have recognized an exception for an uncontrollable impulse for almost seventy years.

B. Society's Understanding of Suicide Has Evolved. The Law Must Keep Pace With Our Understanding of Suicidal Ideation.

Over the last fifty years, society's understanding of suicidal ideation has gradually evolved. As early as the 1980's, clinicians and researchers began to realize that suicide attempts often are impulsive. *See, generally*, Williams CL, Davidson JA, Montgomery I., Impulsive suicidal behavior. *J. Clin. Psychol.* (1980); *see also*, Rimkeviciene J, O'Gorman J, De Leo D,

Impulsive suicide attempts: a systematic literature review of definitions, characteristics and risk factors. *J. Affect. Disord.* (2015).

In a 2001 study of impulsivity and suicide, researchers examined impulsive suicide attempts within a population-based, case-control study of nearly lethal suicide attempts among people 13-34 years of age. Attempts were considered impulsive if the respondent reported spending less than five minutes between the decision to attempt suicide and the actual attempt. Among the 153 subjects, 24% attempted suicide impulsively. *See Simon OR, Swann AC, Powell KE, Potter LB, Kresnow MJ, O'Carroll PW, Characteristics of impulsive suicide attempts and attempters, Suicide Life Threat Behav.* (2001).

In a similar 2011 study, researchers concluded that 48% of the suicide attempters in that study attempted suicide impulsively without forethought or advanced planning. *See Meerae Lim, Soojung Lee, & Jong-Ik Park, Differences between Impulsive and Non-Impulsive Suicide Attempts among Individuals Treated in Emergency Rooms of South Korea, Psychiatric Investigation* (Jul. 2016). A separate study in South Korea concluded that 36.1–85.3% of suicide attempts were initiated impulsively. *See Ha K, Ahn YM, Jeon, HJ, Chang, SM, Cha, B, Youn, T, A Multi-Center Study on the*

Causes and Precipitating Factors of Suicidal Behavior in Suicidal Attempters, Seoul: Korean Association for Suicide Prevention (2011).

The recognition that suicide is frequently the result of an impulse represents an evolution in our society's understanding of the nature of suicide. Not every suicide will be the result of uncontrollable impulse. Sadly, many suicides are planned and premeditated. Nonetheless, as we have come to understand that a significant percentage of suicides are the results of uncontrolled impulses, it is imperative that our jurisprudence concerning suicides also evolves with our understanding. As the District Court correctly stated: "As society's understanding of suicide progresses, so must the law." *Wickersham v. Ford Motor Co.* 194 F. Supp. 3d 434, 446 (2016). Although much of the jurisprudence around the country relating to suicide may not have kept pace with the advances in our understanding of suicide and impulsivity, the Courts of South Carolina have been at the forefront, recognizing an uncontrollable impulse exception as early as 1948.

C. Suicide Is A Foreseeable Result Of Traumatic Injuries.

Victims of major traumatic injury are at significant risk of having high suicide rates in the years after their injury.¹ *See, e.g.* Bryant, RA, et al., The

¹ For example, in a recently published Canadian study, researchers studied a cohort of 19,338 patients who suffered a major traumatic injury, such the injuries sustained in an automobile accident. *See* Christopher C.D. Evans, Yvonne DeWit, Dallas Seitz,

course of suicide risk following traumatic injury, 77 *J. Clin. Psychiatry* 648-53 (2016); March, J, et al., Increased suicidal activity following major trauma; a population-based study, 76 *J Trauma Acute Care Surg.* 180-4 (2014); Zatzick D, Jurokovich GJ, Rivera FP, et al., A national US study of posttraumatic stress disorder, depression, and work and functional outcomes after hospitalization for traumatic injury, 248 *Ann. Surg.* 429-37 (2008). Research has shown that there is a similar increase in the risk of suicidal activity after a traumatic brain injury, spinal cord injuries, or even a concussion. See Kesinger MR, et al., Acute Trauma Factor Associations With Suicidality Across the First 5 Years After Traumatic Brain Injury, 97(8) *Arch Phys Med Rehab*, 1301-8 (2016); Teasdale, TW, Suicide after traumatic brain injury: a population study. 71 *J Neurology, Neurosurgery Psych* 436–440 (2001); McCullumsmith, CB, et al., Novel risk factors associated with current suicidal ideation and lifetime suicide attempts in individuals with spinal cord injury, *Arch Phys Med Rehab* (2014); Fralick, M, et al., Association of Concussion with the Risk of Suicide: A Systemic Review and Meta-Analysis, *JAMA Neurol.*

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Stephanie Mason, Avery Nathens & Stephen Hall, Mental health outcomes after major trauma in Ontario: a population-based analysis, 190 *CMAJ* 45 (2018). Over a five-year period following these patients' injuries, the suicide rate was 70 per 100,000 patients per year. This was considerably higher than the suicide rate for the overall Canadian population, which was only 11.5 per 100,000 patients per year. *Id.*

Nov. 12, 2018, (last visited January 27, 2019). In fact, a recent study published in JAMA Neurology revealed that experiencing a concussion and/or a mild TBI was associated with a two-fold increase in the risk of suicide. *Id.*

A significant number of South Carolinians are living with chronic disabling pain as a result of the acts of others. These individuals may be living with acute pain as a result of injuries caused by negligent drivers or defective products. These individuals may experience acute and/or chronic pain as a result of workplace injuries or exposure to toxic substances. Unfortunately, a number of these individuals may be unable to manage their acute pain and may become overcome by an impulse to commit suicide in order to end their pain and suffering.² In fact, in studies of suicide among patients suffering from chronic non-cancer related pain, researchers

² A significant number of individuals living with chronic and/or acute pain are prescribed opioids to manage this pain. Over time, as the number of South Carolina residents using opioids has increased, our state has found itself in an opioid crisis. In fact, South Carolina, like much of the country, is in the throes of an opioid epidemic. In June 2018, Governor Henry McMaster released South Carolina's Opioid Emergency Response Plan, which details strategy and guidance developed to support state and local efforts to combat the opioid epidemic. See <https://www.scemd.org/news/gov-henry-mcmaster-announces-opioid-emergency-response-plan/> (last visited January 25, 2019). The use of opioids is a common suicide method. In 2017, Richland county alone experienced ninety-three (93) drug overdose deaths. See <http://justplainkillers.com/data/richland/> (last visited January 25, 2019). Seventy-one of these deaths were caused by opioid overdose. *Id.* These statistics make plain that suicide by opioid overdose is highly foreseeable and, more likely than not, the result of a decedent's uncontrollable urge to consume opioids.

concluded that, relative to control group participants, the risk of death by suicide appeared to be at least doubled in chronic pain patients. *See*, Tang, NK & Crane, C, Suicidality in chronic pain: a review of the prevalence, risk factors and psychological links, *Psychol. Med.*, Vol. 36(5), 575 (May 2006); *see also* Racine, M, Chronic pain and suicide risk: A comprehensive review, *Prog Neuropsycharmacol Biol Psychiatry*, Vol 87 (Pt. B), 269 (2018). The lifetime prevalence of suicide attempts was between 5% and 14% in individuals with chronic pain. *Id.*

D. South Carolina Should Allow Recovery Against A Tortfeasor Where Any Injury Was Foreseeable.

Our understanding of suicide has evolved. Modern psychiatry now appreciates that suicide is not always planned and is often the result of an uncontrolled impulse. Psychiatric scholars believe that all suicides result from mental illness. *See, e.g.*, D. Henderson & R. Gillespie, *Textbook of Psychiatry*, 69 (10th ed. 1969); Arora & Meltzer, Serotonic Measures in the Brains of Suicide Victims: 5-HT₂ Binding Sites in the Frontal Cortex of Suicide Victims and Control Subjects, 146 *Am. J. Psychiatry*, 730-36 (1989). Modern psychiatry also supports the idea that suicide sometimes is a foreseeable result of traumatic injuries. *See* Allen C. Schlinsog, Jr., *The Suicidal Decedent: Culpable Wrongdoer, or Wrongfully Deceased*, 24 *J. Marshall L. Rev.* 463, 479, n 76 (1991)(citing various studies); *see also*

Gabriel Ryb E, M.D. et al., Longitudinal Study of Suicide After Traumatic Injury, 61 J. Trauma 799 (2006) (finding that suicide is more common for trauma patients than the general population, particularly with increased age, for while male trauma patients, for trauma patients having a positive alcohol toxicology and for trauma patients suffering from disability resulting from the trauma). This marks a shift away from an emphasis on a decedent's particular mental state at the time of a suicide attempt and toward a focus on the decedent's control.

This is where the Court's focus should be when considering what a plaintiff is required to prove is foreseeable in order to satisfy causation under the uncontrollable impulse exception. The Court should allow recovery against a tortfeasor where an underlying injury contributed to suicide when the decedent was overcome by an uncontrollable impulse. Thus, to answer the second part of the Fourth Circuit's question, in order to satisfy causation under the uncontrollable impulse exception, the plaintiff must only prove that some injury was foreseeable.

The Plaintiff does not need to prove that the suicide itself or the uncontrollable impulse were foreseeable results of the tortfeasor's actions. To require this would ask too much of a plaintiff and would require a step backward in our understanding of the nature of suicide. To require the

plaintiff to prove anything more than the foreseeability of any injury would also run counter to the existing law of South Carolina.³ In South Carolina, “[f]oreseeability is determined by looking at the natural and probably consequences of the complained of act, although it is not necessary to prove that a particular event of injury was foreseeable.” *Roddey v. Wal-Mart Stores East, LP*, 415 S.C. 580, 590, 784 S.E.2d 670, 676 (2016). “[T]he doer of the act cannot shelter himself behind the defense that the actual consequence was one that rarely follows from that particular act. He may be held liable for anything which, after the injury is complete, appears to have been a natural and probably consequence of his act or omission.” *Oliver v. S.C. Dep’t of Highways & Public Transp.*, 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992). “[I]f the actor’s conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not negate his liability.” *Baggerly v. CSX Transp., Inc.* 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006).

South Carolina courts have recognized the uncontrollable impulse exception for decades. A plaintiff need not prove that the suicide or the

³ For example, if this court were to create a heightened foreseeability requirement requiring a plaintiff to prove the foreseeability of a specific injury – suicide – this would effectively gut the “eggshell plaintiff” rule in South Carolina.

impulse were foreseeable in order to invoke the exception. Under the law as it exists in South Carolina a plaintiff need only prove that an injury was foreseeable in order for the uncontrollable impulse exception to apply.

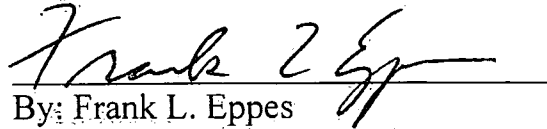
CONCLUSION

This Court should answer the first Certified Question in the negative. In South Carolina, comparative negligence in causing enhanced injuries does not 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. This Court should answer the second Certified Question in the affirmative. South Carolina does recognize an "uncontrollable impulse" exception to the general rule that suicide breaks the causal chain for wrongful death claims. Moreover, when applying the "uncontrollable impulse" exception, the plaintiff is only required to prove any injury is foreseeable in order to satisfy causation under the exception. To require otherwise would fundamentally alter the existing law concerning foreseeability in South Carolina and unnecessarily deprive suicide victims and their families of the ability to recover against otherwise culpable tortfeasors.

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Respectfully submitted,

South Carolina Association for Justice

A handwritten signature in cursive script, appearing to read "Frank L. Eppes", is written over a horizontal line.

By: Frank L. Eppes

Its: Chair, Amicus Curie Committee