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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

Paul V. Niemeyer, Diana G. Motz, and Henry F. Floyd, Judges for 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.

PLAINTIFFS' PETITION FOR REHEARING

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Pursuant to Rules 221(a) and 240, SCACR, Plaintiffs, Crystal L. Wickersham; Crystal L. Wickersham, as Personal Representative of the Estate of John Harley Wickersham, Jr., petition for rehearing of the Court's decision in *Wickersham v. Ford Motor Co.*, Op. No. 27904 (S.C. Sup. Ct. filed July 24, 2019) (Shearouse Adv. Sh. No. 30 at 62), as to section III. of the Court's opinion addressing "Proximate Cause of Enhanced Injuries." Plaintiffs are compelled to file this petition because, in restating the question, the Court does not address the issue certified by the United States Court of Appeals for the Fourth Circuit. The Certification Order from the Fourth Circuit states that "the Supreme Court of South Carolina may restate these questions." However, when this Court issued its order accepting certification, it stated it "will answer" the questions as written by the Fourth Circuit. (Order, dated June 27, 2018). The parties briefed and argued the questions as written by the Fourth Circuit and accepted by this Court. Counsel was unable to find another decision in which the Court restated certified questions in this manner. Further, the parties were not given an opportunity to present any argument on the new question which, prior to this Court's opinion, was never raised as an issue in this action. By restating the question in terms of proximate cause, the Court addresses something that is not an issue in this case. In fact, the procedure below complied with the proximate cause principles stated in the Court's opinion.

Plaintiffs request the Court grant the petition and answer "No" to the second certified question as written by the Fourth Circuit.

I. THE QUESTION ASKED BY THE FOURTH CIRCUIT

While the Court may restate the certified questions, in doing so in this case, it answered a question that no party raised and that does not address the issue certified by the Fourth Circuit. Plaintiffs request the Court grant this Petition for Rehearing to answer the question certified by the Fourth Circuit.

The comparative negligence issue, as stated by Judge Norton in his order denying Ford's post-trial motions, is as follows:

[T]he jury found that both Ford and Wickersham's actions were proximate causes of Wickersham's injuries, attributing 70% of the fault to Ford and 30% of the fault to Wickersham. The jury also found that Wickersham's total damages amounted to \$4.65 million. Ford argues that this amount must be reduced by 30% to reflect the jury's finding with respect to Wickersham's comparative fault. Plaintiffs contend that the damages should not be reduced to account for Wickersham's comparative fault because comparative fault is not a defense to claims for strict liability or breach of warranty.

Wickersham v. Ford Motor Co., 2017 U.S. Dist. LEXIS 139792, 2017 WL 3783122, *42 (D.S.C. Aug. 30, 2017). Judge Norton held, "that the Supreme Court of South Carolina would not recognize comparative fault as a defense to strict liability or breach of warranty." *Id.* at *50. That is the holding Ford appealed to the Fourth Circuit. *See* Doc 29, Brief of Ford Motor Co., p. ix ("whether the injured person's comparative fault in causing his injuries reduces the jury's damages award"), p. 3 ("even though the jury found that Wickersham was 30 percent at fault for his own injuries, the district court declined to reduce the damage award by that percentage"), p. 4 (stating the issue on appeal is: "Did the district court err in failing to reduce Plaintiff's damages award by 30 percent when the jury found that Wickersham bore 30 percent of the fault for his enhanced injuries?").

In the certification order, the Fourth Circuit wrote "the answers will determine . . . whether the district court properly denied the defendant's motion to alter or amend the judgment based on the jury's finding of comparative negligence." (Order p. 2). In describing the events relevant to the certification order, the Fourth Circuit explained, "Ford also appealed the district court's denial of its Rule 59(e) motion to alter or amend the judgment based on the jury's finding that Wickersham was thirty percent at fault for his injuries, arguing that South Carolina law permits comparative negligence as a defense in strict liability and breach of warranty claims under these

facts. As explained below, we believe South Carolina courts have not answered either question . . .” (Order p. 6). The issue the Fourth Circuit sought to resolve when it certified the case to this Court is whether comparative negligence is a defense to statutory causes of action for strict liability and breach of warranty.

The Court’s restatement of the certified question does not provide the Fourth Circuit with the information it sought. The question is not “whether the plaintiff’s actions that cause only the enhancement of his injuries—not the accident itself—may be a proximate, or are they necessarily legally remote as in *Donze*, and therefore irrelevant.” *Wickersham v. Ford Motor Co.*, Op. No. 27904 (S.C. Sup. Ct. filed July 24, 2019) (Shearouse Adv. Sh. No. 30 at 62). Neither party argued that “comparative principles” do not “apply in a crashworthiness case in determining who caused the enhancement of the plaintiff’s injuries.” *Id.* at 62. Rather, Plaintiffs argued that, regardless of whether Mr. Wickersham proximately caused his enhanced injuries, his contribution to his injuries cannot reduce Ford’s liability to pay the full verdict amount under the breach of warranties and strict liability causes of action.¹ The question in this case is whether the jury’s finding that Mr. Wickersham “was at fault in his use of the 2010 Ford Escape restraint system, and that [his] fault was a [30%] proximate cause of his injuries” can operate to reduce Ford’s liability to pay the jury verdict by 30% under breach of warranties or strict liability.² (Jury Verdict Form ECF # 131 p. 2).

¹ Plaintiff agrees that comparative negligence related to the cause of the enhanced injuries can reduce a negligence verdict in a crashworthiness case. However, in this case, Plaintiff received a jury verdict for negligence, breach of warranties, and strict liability.

² During oral argument before this Court, counsel for Ford stated at the beginning of his argument that the second certified question is “whether the plaintiff’s comparative fault in causing enhanced injuries is a defense to claims for strict liability and breach of warranty.” (Video at 1:00-1:10, <http://media.sccourts.org/videos/2018-001124.mp4>).

The Court's opinion does not address whether comparative negligence is a defense to statutory causes of action for strict liability and breach of warranty. Whether the defendant proximately caused the plaintiff's damages is a separate question from whether the plaintiff's comparative negligence can reduce a verdict for breach of warranties and strict liability. The latter is the question that Ford raised and the parties briefed in this case. So long as the defendant's negligence is a proximate cause of the plaintiff's injuries, the plaintiff may recover his or her full damages from the defendant, absent an available and proven affirmative defense. "The defendant's negligence *does not have to be the sole proximate cause* of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury." *Roddey v. Wal-Mart Stores East, LP*, 415 S.C. 580, 590, 784 S.E.2d 670, 676 (2016) (emphasis added); *accord Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006). In this case, it is undisputed that Plaintiffs proved Ford's negligence was a proximate cause of Mr. Wickersham's injuries. The Court should grant the Petition for Rehearing and answer the question certified by the Fourth Circuit.

II. PROXIMATE CAUSE IS NOT THE ISSUE

The Court restates the question as one of proximate cause. However, there is no appellate issue as to proximate cause in this case. Ford did not raise a proximate cause issue as to Mr. Wickersham's enhanced injuries. Rather, the jury found Ford and Mr. Wickersham proximately caused Mr. Wickersham's enhanced injuries. Plaintiffs did not dispute that plaintiff conduct that causes his or her enhanced injuries is relevant and may be a proximate cause in a crashworthiness case. In short, the District Court employed "comparative principles", as the Court referred to them, in this case and those principles are not at issue on appeal.

Ford fully presented evidence and argument to the jury that Mr. Wickersham proximately caused his enhanced injuries. The District Court instructed the jury as follows as to “comparative fault”:

Ford asserts the defense of comparative fault. If you find that the 2010 Ford Escape was defective and that the defect was a proximate cause of John Wickersham’s injuries, then you must consider the defense of comparative fault. On this defense, Ford claims that even if it was at fault in bringing about John Wickersham’s injuries, John Wickersham was also at fault in his use of the 2010 Ford Escape because he was an out of position occupant, and Mr. Wickersham’s fault was a proximate cause of his own injuries.

If you find that Mr. Wickersham’s injuries were proximately caused by the fault of Ford and not by fault on the part of Mr. Wickersham, then Plaintiff is entitled to recover the full amount of any damages you may find she sustained [as] a result of the fault. But if you find that Mr. Wickersham’s injuries were proximately caused by the fault of both Mr. Wickersham and Ford, then you must compare Mr. Wickersham and Ford’s percentages of fault. The percentages allocated between Mr. Wickersham and Ford must total 100%.

Even if you find John Wickersham was at fault, you must determine the total amount of damages sustained by Plaintiff and enter this amount on the verdict form. You are not permitted to make any reduction based on the percentage of fault attributed to Mr. Wickersham. After your verdict is returned, the Court will address any matters related to reduction that may be appropriate as a matter of law.

Ford bears the burden of proving John Wickersham’s fault in the use of the 2010 Ford Escape by a preponderance of the evidence.

(Jury Charge, Joint App. 675-76). The jury was fully charged to determine “who caused the enhancement of the plaintiff’s injuries.” *Wickersham v. Ford Motor Co.*, Op. No. 27904 (S.C. Sup. Ct. filed July 24, 2019) (Shearouse Adv. Sh. No. 30 at 62). For negligence, strict liability, breach of express warranty, and breach of the implied warranty of merchantability, the verdict form separately asked the jury if plaintiff proved each cause of action and whether the “defective condition”, “negligence”, “breach of Defendant’s express warranty”, and “breach of the Implied Warranty of Merchantability” “was a proximate cause of Plaintiff’s injuries”. (Verdict Form, Joint App. 364-65). Plaintiffs in this case met their “burden to prove the defendant’s” conduct

proximately caused Mr. Wickersham's enhanced injuries. *Wickersham v. Ford Motor Co.*, Op. No. 27904 (S.C. Sup. Ct. filed July 24, 2019) (Shearouse Adv. Sh. No. 30 at 63).

Taking into account the procedure and law applied by the District Court and the issues Ford actually raised, the issue before this Court is what effect the jury's findings have on the verdict amount or, in other words, whether Mr. Wickersham's comparative negligence is a defense that reduces Ford's liability to pay the jury verdicts for breach of warranties and strict liability. Stated plainly, the issue in this case is how much does Ford have to pay—100% of the verdict or 70% of the verdict. That issue is answered (and was raised and briefed) based on the **nature of the causes of action** that the jury found Plaintiffs proved by a preponderance of the evidence and not based on proximate cause.

There is a significant legal difference between proximate cause and comparative negligence. The Court refers numerous times to the jury's finding of Mr. Wickersham's 30% comparative negligence as "fault". *Wickersham v. Ford Motor Co.*, Op. No. 27904 (S.C. Sup. Ct. filed July 24, 2019) (Shearouse Adv. Sh. No. 30 at 57, 62). However, a finding of proximate cause does not equate to comparative negligence. For example, the jury could have believed that Mr. Wickersham's conduct proximately caused his injuries but believed it to be reasonable conduct under the circumstances and, therefore, not comparative negligence. See *Fairchild v. S.C. Dep't of Transp.*, 385 S.C. 344, 362, 683 S.E.2d 818, 828 (Ct. App. 2009) (stating in a discussion of comparative negligence, "[t]he defendant asserting comparative negligence "must prove the following three elements: (1) a duty of care . . . ; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty."); F. Patrick Hubbard, et al., The South Carolina Law of Torts, § 2.D.1.a(1) (stating for proof of a comparative negligence affirmative defense, "[t]he tests of negligence and causation are the same as those used for

analyzing the defendant's conduct."); David G. Owen, *Products Liability: User Misconduct Defenses*, 52 S.C. L. REV. 1, 12 (Fall 2000) ("In short, persons have a duty to exercise reasonable care in using products to avoid injuries to themselves."). There is no proximate cause issue in this case. Plaintiffs ask the Court to grant the Petition for Rehearing and answer the issue of whether comparative negligence is a defense to strict liability and breach of warranties.

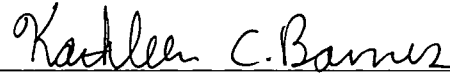
Plaintiffs rely on and incorporate their briefs, reply briefs, and oral argument as to the merits of whether comparative negligence is a defense to strict liability and breach of warranty, and urge the Court to hold that the fault-based, common law defense of comparative negligence does not apply to statutory causes of action for no-fault strict liability and contract breach of warranty. As this Court already held in *Donze v. General Motors, LLC*, 420 S.C. 8, 800 S.E.2d 479 (2017), "strict liability and breach of warranty are statutory constructs as are the available defenses to these causes of action". *Id.* at 19-20, 800 S.E.2d at 485. This Court already acknowledged, "**If** the General Assembly intends for comparative negligence to constitute a defense under either of these [strict liability or breach of warranty] theories, it is unquestionably capable of amending these statutory schemes accordingly." *Donze*, 420 S.C. at 19, 800 S.E.2d at 485 (emphasis added). In writing this sentence, the Court plainly stated that comparative negligence is **not** a defense to strict liability or breach of warranty. Otherwise, it would be unnecessary to use the word "If" and to say the General Assembly may amend the statutes to make comparative negligence a defense. Based on statutory law and the principles stated in *Donze*, this Court should answer "No" to the second certified question.

CONCLUSION

Plaintiffs request the Court grant the petition for rehearing and answer "No" to the second certified question asked by the Fourth Circuit and briefed and argued by the parties.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that a copy of *Plaintiffs' Petition for Rehearing* has been served
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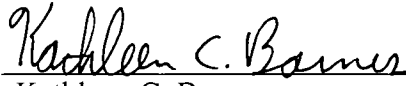
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