

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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

RECEIVED

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Appellate Case No. 2018-001124

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AUG 19 2019

S.C. SUPREME COURT

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

v.

Ford Motor Company ..... *Defendant.*

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FORD MOTOR COMPANY'S RETURN TO  
PLAINTIFFS' PETITION FOR REHEARING

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J. Kenneth Carter, Jr.  
(SC Bar No. 12812)  
Carmelo B. Sammataro  
(SC Bar No. 69746)  
TURNER PADGET GRAHAM  
& LANEY P.A.  
Post Office Box 1473  
Columbia, SC 29202  
Phone: (803) 254-2200  
Fax: (803) 799-3957  
KCarter@TurnerPadget.com  
SSammataro@TurnerPadget.com

Adam H. Charnes  
(*pro hac vice*)  
Thurston H. Webb  
(*pro hac vice*)  
KILPATRICK TOWNSEND  
& STOCKTON LLP  
1001 West Fourth Street  
Winston-Salem, NC 27101  
Phone: (336) 607-7382  
Fax: (336) 734-2602  
acharnes@kilpatricktownsend.com  
twebb@kilpatricktownsend.com

*Counsel for Defendant*

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According to Plaintiffs, this Court’s unanimous opinion fails to do what the Fourth Circuit requested of the Court: answer whether a finding of the plaintiff’s comparative fault in causing his enhanced injuries reduces the jury’s award for strict liability and breach of warranty claims. Plaintiffs are flat wrong. While this Court restated the question, the Court’s opinion nonetheless answers the ultimate issue in this case: whether the jury’s finding of comparative fault can apply to Plaintiffs’ claims for breach of warranty and strict liability. The Court clearly answered that question “yes.” While viewing the issue as involving proximate cause, the Court held that comparative-fault principles do apply and that a plaintiff has the “burden to prove the defendant’s tortious conduct—whether the theory of recovery is negligence, *breach of warranty*, or *strict liability*—proximately caused a specific share of the plaintiff’s enhanced injuries.” *Wickersham v. Ford Motor Co.*, \_\_\_ S.E.2d \_\_\_, 2019 WL 3311057, at \*5 (S.C. July 24, 2019) (emphasis added). The Court should see the Petition for what it is—an attempt to change an opinion that Plaintiffs do not like—and deny it.

### **ARGUMENT**

When a party files a petition for rehearing, it “must ‘state with particularity the points supposed to have been overlooked or misapprehended by the court.’” *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) (quoting Rule 221(a), SCACR). “The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate

court a second time.” *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, *Appellate Practice in South Carolina* 309 (1999)).

Plaintiffs’ Petition is an attempt to mask a second bite at the apple as an argument that the Court failed to perform its job. Plaintiffs are wrong, and the Court should deny the Petition.

1. Plaintiffs argue that “in restating the question, the Court does not address the issue certified by the United States Court of Appeals for the Fourth Circuit.” (Pet. 1.) But the Court unquestionably had the right to restate the Fourth Circuit’s question, and it answered the Fourth Circuit’s question.

In its order, the Fourth Circuit explained that “the jury found that Wickersham was thirty percent at fault for proximately causing his own injuries,” and that Ford argued that this finding required reduction in the jury’s award by 30 percent. (June 14, 2018 Order at 12–13.) The court then requested that this Court answer the following question to determine if Ford was correct: “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 plaintiff’s enhanced injuries?” (*Id.* at 2.)

In responding to this question, this Court reframed the issue. The Court viewed the issue as one of proximate cause—whether, if the plaintiff proximately caused his own injuries, then “comparative principles” would apply. *Wickersham*, 2019 WL 3311057, at \*4–\*5. The Court answered this question yes. The Court first

explained that if a plaintiff's actions proximately caused his own injuries, then "comparative principles must be employed ...." *Id.* at \*5. This answered the Fourth Circuit's question of whether the principles of comparative fault (that each party bears the burden for his own fault in causing an injury) applies in a crashworthiness case when the plaintiff is seeking damages only related to enhanced injuries. In other words, the Court held that *Donze v. General Motors, LLC*, 420 S.C. 8, 800 S.E.2d 479 (2017), did not preclude application of comparative fault principles to Wickersham's enhanced injuries in this case.

But this Court did not end there. It concluded that "it is the plaintiff's burden to prove the defendant's tortious conduct—whether the theory of recovery is negligence, *breach of warranty*, or *strict liability*—proximately caused a specific share of the plaintiff's enhanced injuries." *Id.* (emphasis added). This sentence, which Plaintiffs' Petition completely ignores, expressly holds that comparative fault principles *do apply* to claims for breach of warranty and strict liability.

To be sure, the Opinion does not directly address Plaintiffs' argument that comparative fault principles cannot operate as a defense to statutory causes of action for strict liability and breach of warranty. But the Court is under no obligation to directly refute expressly each and every one of a party's arguments. And, in any event, the Court effectively mooted Plaintiffs' argument by adopting a proximate cause rationale. In the end, that Plaintiffs are unhappy that the Court failed to accept their primary argument does not justify rehearing. *See supra* p. 1.

2. Contrary to Plaintiffs' contention, this Court's opinion also directly applies in this case. As Plaintiffs acknowledge in their Petition, "[t]he 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." (Pet. 3 (citing Jury Verdict Form ECF # 131 at 2) (alterations in original).) Under this Court's opinion, the answer is yes. As this Court held, even with respect to claims for strict liability and breach of warranty, Plaintiffs were required to prove the percentage of Wickersham's injuries proximately caused by the defendant. Because the jury found that 30 percent of the injuries were caused by Wickersham, "[t]hese actions must be compared to Ford's fault *in determining Ford's liability* for enhancement of Mr. Wickersham's injuries." *Wickersham*, 2019 WL 3311057, at \*5 (emphasis added). The Court's opinion could not be more plain: The jury's assignment of 30 percent fault to Wickersham reduces "Ford's liability" by 30 percent.

3. In a last ditch effort, Plaintiffs argue that the Court erred because "there is no appellate issue as to proximate cause in this case." (Pet. 4.) But this is simply not true. Ford expressly raised this issue as one of proximate cause before the Fourth Circuit. (Ford's Opening Fourth Circuit Brief at 47–48.)

Plaintiffs also argue that there is a difference between proximate cause and comparative negligence, faulting the Court for "refer[ring] numerous times to the jury's finding of Mr. Wickersham's 30% comparative negligence as 'fault.'" (Pet. 6–

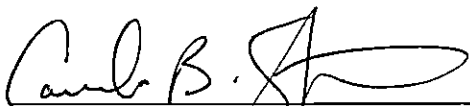
7.) But this argument ignores the very same jury instructions that Plaintiffs quote in their Petition. Those jury instructions on “comparative fault” told the jury to determine whether “Mr. Wickersham’s *fault* was a proximate cause of his own injuries.” (Pet. 5 (Jury Charge, Joint App. 675–76) (emphasis added).) The instructions continued: “[I]f 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*.” (*Id.* (emphasis added).) Based on these jury instructions—which no party contested—Plaintiffs are flat wrong that “a finding of proximate cause does not equate to comparative negligence.” (Pet. 6.)

### CONCLUSION

The Court should deny the Petition.

(Signature page to follow.)

August 19, 2019

By: 

J. Kenneth Carter, Jr. (SC Bar No. 12812)  
Carmelo B. Sammataro (SC Bar No. 69746)  
TURNER PADGET GRAHAM  
& LANEY P.A.

Post Office Box 1473  
Columbia, SC 29202  
Phone: (803) 254-2200  
Fax: (803) 799-3957  
KCarter@TurnerPadget.com  
SSammataro@TurnerPadget.com

Adam H. Charnes, *pro hac vice*  
Thurston H. Webb, *pro hac vice*  
KILPATRICK TOWNSEND  
& STOCKTON LLP  
1001 West Fourth Street  
Winston-Salem, NC 27101  
Phone: (336) 607-7382  
Fax: (336) 734-2602  
acharnes@kilpatricktownsend.com  
twebb@kilpatricktownsend.com

*Counsel for Defendant*

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PROOF OF SERVICE

I certify this 19th day of August 2019 that I have served a copy of the FORD  
MOTOR COMPANY'S RETURN TO PLAINTIFFS' PETITION FOR REHEARING  
upon other counsel of record, by mailing same, postage prepaid in the United States  
mail, addressed to the following:

Ronnie L. Crosby, Esquire  
Peters, Murdaugh, Parker, Eltzroth  
& Detrick, P.A.  
P. O. Box 457  
Hampton, SC 29924

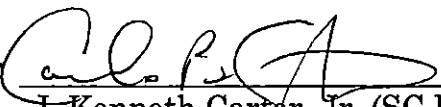
Kathleen C. Barnes, Esquire  
Barnes Law Firm, LLC  
P. O. Box 897  
Hampton, SC 29924  
COUNSEL FOR PLAINTIFFS

Steve A. Matthews, Esquire  
Haynsworth Sinkler Boyd, P.A.  
1201 Main St., 22nd Floor  
Columbia, SC 29201-3226

Victor E. Schwartz, Esquire (*pro hac vice*)  
Cary Silverman, Esquire (*pro hac vice*)  
Phil Goldberg, Esquire (*pro hac vice*)  
Shook Hardy & Bacon LLP  
1155 F. Street NW, Suite 200  
Washington, DC 20004  
ATTORNEYS FOR AMICUS CURIAE  
ALLIANCE OF AUTOMOBILE  
MANUFACTURERS, INC.

Gray T. Culbreath, Esquire  
Jessica A. Waller, Esquire  
Gallivan White & Boyd, P.A.  
P. O. Box 7368  
Columbia, SC 29202  
ATTORNEYS FOR AMICUM  
CURIAE PRODUCT LIABILITY  
ADVISORY COUNSEL, INC.

August 19, 2019

By   
J. Kenneth Carter, Jr. (SC Bar No. 12812)  
Carmelo B. Sammataro (SC Bar No. 69746)  
TURNER PADGET GRAHAM  
& LANEY P.A.  
Post Office Box 1473  
Columbia, SC 29202  
Phone: (803) 254-2200  
Fax: (803) 799-3957  
KCarter@TurnerPadget.com  
SSammataro@TurnerPadget.com

Adam H. Charnes, *pro hac vice*  
Thurston H. Webb, *pro hac vice*  
KILPATRICK TOWNSEND  
& STOCKTON LLP  
1001 West Fourth Street  
Winston-Salem, NC 27101  
Phone: (336) 607-7382  
Fax: (336) 734-2602  
acharnes@kilpatricktownsend.com  
twebb@kilpatricktownsend.com

*Counsel for Defendant*