THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Appeal from Charleston County

Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2016-002209

Steven Newbern and Claudia Newbern.....Appellants,

v.

Ford Motor Company.....Respondent.

RETURN TO PETITION FOR REHEARING

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ARGUMENT AGAINST REHEARING

Introduction

Following oral argument, the Panel unanimously affirmed Circuit Court Judge J.C. Nicholson, Jr.'s grant of directed verdict in favor of Respondent Ford Motor Company. Unhappy with this result, Appellants Steven and Claudia Newbern have now petitioned for rehearing, arguing that this Panel "misapprehended the law or overlooked the evidence," and that it also violated the standard of review, including by improperly deciding credibility issues, by weighing the evidence, and resolving purported evidentiary conflicts in Ford's favor. (Appellants' Pet. for Rehr'g ("Pet.")

The Panel did none of these things. Its analysis was thorough, well-reasoned, in accordance with the applicable standard of review, and correct on the law and the facts. The Newberns fail to show otherwise. Moreover, everything they argue in their petition they argued previously in their original briefing and at oral argument. The Newberns cannot show that the Panel misapprehended or overlooked anything—as they assert—because the Panel did no such thing.

In short, the Newberns' perfunctory petition is nothing more than a request for another bite at the same apple. That is not a proper basis for rehearing. The Panel should deny the Newbern's petition in full.

Argument

A party petitioning for rehearing must "state with particularity the points supposed to have been overlooked or misapprehended by the court." SCACR 221(a). Where the petitioning party fails to show that "any material fact or principle of law has been either overlooked or

disregarded," there "is no basis for granting a rehearing." *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 516, 548 S.E.2d 880, 882 (S.C. Ct. App. 2001).

Here, the Newberns wholly fail to point to any material fact or principle of law that the Panel either overlooked or disregarded. Instead, they merely recite the same evidence and rehash the same arguments they raised previously in both briefing and oral argument—which points the Panel fully considered and ultimately rejected in correctly affirming.

I. The Panel acknowledged and applied the proper standard of review.

Primarily, the Newberns argue that the Panel should grant rehearing because its "opinion is contrary to the applicable standard" of review. (Pet. at 1.) While the Newberns may disagree with the Panel's ultimate decision on appeal, they fail to show that the Panel overlooked or disregarded the applicable standard of review.

Rather, the Panel's unanimous decision correctly recited the applicable standard, including that both the Panel and the trial court were "required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing" a motion for directed verdict, and to deny such motions "where the evidence either yields more than one inference or its inference is in doubt." *Newbern v. Ford Motor Co.*, Op. No. 5680 (S.C. Ct. App. filed Aug. 21, 2019) (Shearouse Adv. Sh. No. 34 at 56). Merely disagreeing with the Panel's application of the standard of review falls far short of the required showing that the Panel overlooked or disregarded that standard. Yet the former is all the Newberns have done.

In addition, the Newberns assert that the applicable standard requires that the Court not "decide credibility or resolve conflicts in testimony," nor "rule based on its interpretation or weighing of the evidence." (Pet. at 1, 3.) Yet they fail to show that either the trial court or the Panel did any of these things. Indeed, nowhere in either the trial court or the Panel's rulings did

either of them mention any credibility determinations or conflicting testimony, nor that they were interpreting or weighing the evidence. To the contrary, both the trial court and the Panel looked long and hard at the entire record as a whole for *any* valid and sufficient evidence to support sending this case to the jury on a product liability claim. (*Newbern*, Shearouse Adv. Sh. No. 34 at 60.) They found none because there was none. The Newberns' attempt to mischaracterize the trial court's and the Panel's analysis is unfounded, as is their assertion of an abuse of the standard of review.

II. The Panel properly considered the entire record as a whole in affirming the trial court's ruling that the Newberns failed to prove their product liability action.

A. The Petition does not show any evidence the Panel overlooked or disregarded in deciding the Newberns failed to prove a design defect.

The Newberns first complain that the Panel overlooked or disregarded "evidence of a design defect"—chiefly, the initial calibration report sent to Bosch. (Pet. at 1–2.) Their assertion is inaccurate. The Panel's opinion specifically addressed the calibration report and the testimony and evidence surrounding it at length. (*Newbern*, Shearouse Adv. Sh. No. 34 at 58–60.)

In particular, the Panel correctly acknowledged that the calibration report initially sent to airbag supplier Bosch was comprised of "initial targets," as Ford witness Ram Krishnaswami testified in uncontradicted fashion. (*Id.* at 58.) The Panel correctly observed the uncontradicted testimony that Ford determined the final calibration was acceptable and, as the Newberns themselves acknowledge, "good." (*Id.* at 59; Pet. at 2.) The Panel further accurately noted that while design changes theoretically could be made should any initial targets not be met, the final calibration "has to take into account many crash modes" because "the crash modes are interconnected," and that the "calibration in one crash mode can affect the airbag's performance in another crash mode." (*Newbern*, Shearouse Adv. Sh. No. 34 at 59.) Again, this testimony was

uncontradicted—in other words, there was no other evidence to weigh on these issues, nor was there any conflicting testimony to resolve against it. Ironically, while the Newberns charge the Panel with overlooking or disregarding evidence, it is they who disregard this uncontradicted evidence—their *own* evidence presented in their case-in-chief—in demanding rehearing.

Moreover, the Newberns continue to insist (with nothing more than attorney argument) that because the initial design targets Ford provided to Bosch called for no airbag deployment for an unbelted passenger in a specific crash test, then the passenger airbag should not have deployed in the Newbern crash. (Pet. at 2.) They continue to ignore, however, that the only evidence at trial on this point—including from the Newberns' biomechanic expert Paul Lewis—was that the Newberns' vehicle's passenger airbag *would be expected to deploy* in this high-speed frontal crash. (R. 658:5–14.)

The Newberns further complain that the Panel's statement that Mr. Krishnaswami " 'did not offer testimony opinion [sic]' on design defect" is "factually incorrect." (Pet. at 3.) It is they who are incorrect. As the Panel correctly observed, Mr. Krishnaswami "did not offer testimony opining on the dangerousness or defectiveness of the 2009 Focus's airbag system." (*Newbern*, Shearouse Adv. Sh. No. 34 at 59.) Rather, his "testimony centered on Ford's design process" and served "to explain how Ford came to the calibration it adopted for the 2009 Focus." (*Id.* at 59, 60.)

In sum, the Newberns fail to point to any evidence the Panel overlooked or disregarded in affirming the lack of evidence of any alleged design defect. Rather, all they present is their own unsupported attorney argument in mischaracterizing the true nature of the evidence presented at trial—evidence that was wholly insufficient to send this case to a jury.

B. The Newberns fail to show that the Panel overlooked or disregarded anything in concluding there was no evidence of an alternative feasible design that would have made the airbag system safer.

The Newberns do not argue that the Panel overlooked or disregarded any law in analyzing the issue of alternative feasible design. To the contrary, they acknowledge that *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010), which the Panel cited and applied, provides the controlling law on this issue. Nor do the Newberns identify any material facts the Panel supposedly overlooked or disregarded.

Instead, contrary to the applicable standard on a petition for rehearing, the Newberns argue that the Panel should reconsider this appeal because the "Court incorrectly focuse[d] on Mr. Krishnaswami's testimony that modifications to the airbag system 'could' change deployment," which they label as "speculative and self-serving." (Pet. at 3.) The Newberns ignore, however, that it was *their* burden to present competent reliable evidence of a specific alternative design—as opposed to merely some vague concept—as well as that such a design "would have prevented the product from being unreasonably dangerous." *Branham*, 390 S.C. at 225, 701 S.E.2d at 16; *Holland Know v. Morbark*, 407 S.C. 227, 237–38, 754 S.E.2d 714, 720 (2014). They did not.

As the Panel correctly observed, while there was evidence that Ford could theoretically have altered the design for the airbag system in some respects, there was no evidence that any of these conceptual design alterations would have made the vehicle—including its airbag system—overall safer. (*Newbern*, Shearouse Adv. Sh. No. 34 at 60.) Nor was there any evidence that satisfied the risk-utility analysis, including as to the potential downsides of any of the Newberns' vague conceptual alternatives. Yet, as the Supreme Court has explained: "The very nature of feasible alternative design evidence entails the manufacturer's decision to employ one design

over another. This weighing of costs and benefits attendant to that decision is the essence of the risk-utility test." *Branham*, 390 S.C. at 223, 701 S.E.2d at 16.

It was the Newberns' burden to produce evidence as to all aspects of the required element of an alternative feasible design. Yet they failed to carry that burden, including—as the Panel correctly observed—because of the lack of evidence "as to how employing the[ir] alternatives would have made the airbag system safer or otherwise satisfied a risk-utility analysis." (*Newbern*, Shearouse Adv. Sh. No. 34 at 60.) Indeed, they fail to point to any such evidence to satisfy this essential requirement—certainly none that the Panel supposedly overlooked or disregarded. The Newberns' failure to present the requisite proofs on this issue was, itself, dispositive of their entire product liability action, and the Panel neither overlooked nor disregarded any material facts or law in affirming the trial court's directed verdict on this ground. *Branham*, 390 S.C. at 220, 701 S.E.2d at 14; *also Sunvillas Homeowners Ass'n, Inc. v. Square D Co.*, 301 S.C. 330, 334, 391 S.E.2d 868, 870 (Ct. App. 1990) (affirming directed verdict where the plaintiff's failure to present evidence on design defect, including on alleged design alternatives, would leave the jury merely to speculate).

C. The Newberns fail to show that the Panel overlooked or disregarded anything in concluding they failed to present evidence of any alleged negligence.

As to their negligence-based product liability claim and its requirement to show a failure to exercise due care in addition to an actual design defect, the Newberns again do not identify any evidence the Panel supposedly overlooked or disregarded. They likewise fail to identify any law the Panel overlooked or disregarded; indeed, they would be hard-pressed to argue such, in light of the Panel's discussion that deviation from a company's own policies can support a breach of the standard of care. (*Newbern*, Shearouse Adv. Sh. No. 34 at 61.)

Instead, the Newberns again merely re-argue the same points they raised in their earlier briefing and at oral argument, which the Panel fully considered and discussed in its decision. (Pet. at 4–5.) In particular, the Newberns again return to the initial calibration targets as supposedly requiring a non-deployment in their specific crash. (*Id.*) In doing so, however, they ignore and mischaracterize the actual evidence.

For example, they ignore, as the Panel recognized, that there was "little evidence of Ford's actual policies" and zero expert testimony to support "that Ford violated any policies or breached any standard of care." (*Newbern*, Shearouse Adv. Sh. No. 34 at 61.) Moreover, despite the Newberns' attorney argument about supposed testimony from Mr. Krishnaswami showing that Ford deviated from its internal policies by not redesigning the 2009 Focus, in fact, he "did not testify about a Ford policy requiring modifications when it did not meet the initial targets." (*Id.*) Rather, as the Panel recognized, he explained in uncontradicted fashion that if the initial targets "sent to Bosch are not met, then Ford studies those targets and determines whether it can accept the calibration," (*id.* at 59)—which is exactly what happened with the 2009 Focus.

Also, the Newberns' assertion that "an airbag was not needed for safety in a crash such as the Newberns' " remains wholly unsupported, just as it has been since trial. (*See* Pet. at 5.) Again, their own retained biomechanic expert Paul Lewis testified that given the severity of this crash, he would have expected the airbags to deploy as they did, (R. 658:5–14)—including for both the driver and the passenger.

In addition, the Newberns continue simply to ignore the uncontradicted testimony from Mr. Krishnaswami that the airbag-system design was holistic and required assessment of the system as a whole. They likewise ignore that while the specific test they rely on was "similar" to

their crash, it was not their crash, and that their own biomechanic testified he would have expected a passenger airbag deployment in the Newberns' actual crash.

Finally, the Newberns mischaracterize the evidence on multiple levels in arguing that "Ford failed to follow its own design process to come up with a safe design because it rushed to get the 2009 Focus into production while behind schedule," and that "Mr. Krishnaswami testified to this as Ford's corporate representative and an expert." (Pet. at 5.) Mr. Krishnaswami testified to no such thing, and this is merely more unsupported attorney spin. Rather, as the Panel correctly observed, Mr. Krishnaswami testified that:

- the initial targets Ford sent to Bosch were precisely that—" 'initial targets,' rather than requirements," (*Newbern*, Shearouse Adv. Sh. No. 34 at 59), as the Newberns repeatedly tried to mislabel them;
- Ford's internal design policy included reviewing overall vehicle crash performance, taking "into account many crash modes" and different seating positions, (*id.*); and
- final sign-off would not occur until Ford had studied scores of crash-test data of the system "as a whole" to arrive at the "optimal calibration" of the entire system, (*id.* at 59).

In short, the Newberns presented no evidence to support any deviation from an applicable standard of care at trial, nor have they carried their burden to show any such evidence that the Panel overlooked or disregarded.

III. The Newberns' arguments about Mr. Krishnaswami's testimony as supposed corporate-representative "admissions" or expert testimony likewise miss the mark and fail to support rehearing.

The Newberns' argument that the Panel should "reconsider its decision because it did not consider Mr. Krishnaswami's testimony as party admissions" fails for numerous reasons. (Pet. at 5.) Primarily, they do not appear to be arguing that the Panel did not consider Mr. Krishnaswami as having testified on behalf of Ford, nor that—if it did not—it erred in doing so. Indeed, the

Panel's opinion refers to Mr. Krishnaswami as the person "Ford designated as its representative and airbag design expert prior to the trial." (*Newbern*, Shearouse Adv. Sh. No. 34 at 59.) Moreover, the Panel referred to Mr. Krishnaswami's testimony as to Ford's design process based on his knowledge as a Ford employee and engineer.

Instead, the Newberns appear to be arguing that the Panel erred because it did not consider Mr. Krishnaswami's testimony as "party admissions." Primarily, there is no basis to conclude that the Panel did not consider this argument, since the Newberns argued it in their opening and reply briefs, as well as at oral argument. That the Panel did not specifically address and explicitly reject this argument—as the trial court correctly did—does not mean the Panel did not consider it.

More importantly, however, regardless of in what capacity it considered Mr. Krishnaswami's testimony, the Panel's decision makes clear that the evidence—as a whole, and including his testimony—was simply insufficient to send the case to the jury. In other words, the so-called "party admissions" comprise the same evidence the Panel specifically considered and rejected as evidentiarily insufficient to withstand directed verdict. (*Id.* at 60.) In other words, despite the Newberns' attempted mislabeling of Mr. Krishnaswami's testimony as "party admissions," he "admitted" nothing to support sending their claims to the jury. Thus, that the Panel did not explicitly address the Newberns' "party admissions" argument is not error—but even if it were, it would be merely harmless error, which provides no basis for rehearing. *See Jamison v. Morris*, 385 S.C. 215, 229, 684 S.E.2d 168, 175 (2009).

Next, as to their "expert" issue, the Newberns incorrectly preface their argument by asserting that although the Panel referenced "the existence of testimony 'opining' on certain topics, the Court stated it did not address the issue of whether Appellants presented expert

testimony." (Pet. at 8 (citing *Newbern*, Shearouse Adv. Sh. No. 34 at 61 n.1).) To be clear, the Panel did not write that it was "referencing the existence of testimony 'opining' on certain topics." To the contrary, the Panel expressly concluded that Mr. Krishnaswami "did *not* offer testimony opining on the dangerousness or defectiveness of the 2009 Focus's airbag system." (*Id.* at 59 (emphasis added).)

The Newberns next write that the Panel should grant rehearing to "the extent the Court's decision was based on any alleged absence of expert opinion testimony." (Pet. at 6.) But the Panel made clear that it did not rest its holding on whether Mr. Krishnaswami was considered an expert or not. Rather, as the Panel explained, the Newberns' failed to present sufficient evidence to withstand directed verdict, period—*regardless* of whether Mr. Krishnaswami was considered an expert or not. (*Newbern*, Shearouse Adv. Sh. No. 34. at 61 n.1.)

Lastly, the Newberns assertion that "expert testimony is not required to prove a design defect claim" is incorrect. There is no such bright-line rule in South Carolina—indeed, the Newberns cite none. To the contrary, the Supreme Court has expressly stated that in design defect cases where "the claims are too complex to be within ken of the ordinary lay juror," expert testimony "is required." *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 80, 735 S.E.2d 650, 658 (2012). This case—involving complex issues of airbag system design such as automotive design, electronics, computer enginnering, biomechanics, occupant kinematics, crash dynamics, and a host of other disciplines—plainly falls in the category of those requiring expert testimony.

In short, the Panel neither overlooked nor disregarded any material fact or principle of law with respect to the capacity in which Mr. Krishnaswami testified. Rather, it was the substance of his testimony that mattered. And the substance of that testimony provided nothing to allow the Newberns to withstand directed verdict.

CONCLUSION

The Newberns have failed to carry their burden to show any material fact or principle of law the Panel supposedly overlooked or disregarded. There is therefore "no basis for granting a rehearing." *S.C. Prop. & Cas. Guar. Ass'n*, 345 S.C. at 516, 548 S.E.2d at 882. The Panel should deny the petition in full.

Respectfully submitted,

September 16, 2019

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PROOF OF SERVICE

I certify this 16th day of September 2019 that I have served a copy of the RETURN TO PETITION FOR REHEARING upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

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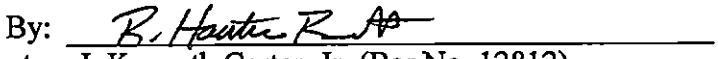
September 16, 2019

By: 
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September 16, 2019

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings, Clerk
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Columbia, SC 29201

Re: Steven Newbern and Claudia Newbern v. Ford Motor Company
Appellate Case No.: 2016-002209
File No.: 5100.360

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Respondent Ford Motor Company's Return to Petition for Rehearing regarding the above-referenced matter. Also enclosed are the original and one copy of the Proof of Service. Please file the original filings and return clocked copies to me via our office courier. Thank you for your assistance with this matter, and please contact me if you have any questions.

With kind regards, I am

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.

R. Kathleen Barnett

for Carmelo B. Sammataro

CBS/tj
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cc: William E. Applegate IV, Esquire
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