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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.....*Plaintiffs*,

v.

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

FORD MOTOR COMPANY'S PETITION FOR REHEARING

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Pursuant to Rules 221(a) and 240 of the South Carolina Appellate Rules, Defendant Ford Motor Company files this Petition for Rehearing of the Court's revised opinion in this case, Op. No. 28003 (filed Dec. 9, 2020), for the limited purpose of correcting factually inaccurate statements of the record in the Court's opinion.

In its opinion, this Court stated as follows:

> Ford alleged Mr. Wickersham was out of his seating position when the airbag deployed, but Ford made no argument he was "negligent" in being so or that his being so constituted misuse. Likewise, the district court did not charge the jury on any standard—negligence, misuse, or otherwise—by which the jury may judge whether Mr. Wickersham was at "fault." Therefore, in this case, the "defense" of comparative negligence or fault is simply not relevant.

Slip op. at 8. The Court later concluded that "Mr. Wickersham's non-tortious actions that were not misuse are not relevant to Ford's liability for enhancement of his injuries in terms of the defense of comparative negligence or fault." *Id.* at 9.

This Court's characterization of the record is simply wrong: comparative negligence or fault *was* "relevant" because Ford expressly argued that Mr. Wickersham's actions were tortious, the district court instructed the jury on comparative negligence, and the jury verdict includes findings on comparative negligence.

First, Ford expressly argued comparative fault at trial. JA 1995.[1] Ford's counsel told the jury that Ford "claim[s] that at a minimum it is entitled to comparative fault" because Mr. Wickersham "was an out-of-position occupant" and

[1] All pages of the Joint Appendix cited in this petition are attached as Exhibit A.

therefore at "fault" for his injuries. *Id.* After trial, the district court repeated Ford's position that the jury verdict "must be reduced by 30% to reflect the jury's finding with respect to Wickersham's comparative fault," JA 748—and the Court explained that the words "comparative fault" and "comparative negligence" are "interchangeable." JA 751 n.12. This is consistent with this Court's jurisprudence. *See Berberich v. Jack*, 392 S.C. 278, 291–92, 709 S.E.2d 607, 614 (2011) ("South Carolina's system is essentially a comparative fault system, but comparative negligence is the term most often used in this state, and we recognize the terms as equivalent.") Accordingly, Ford argued that Mr. Wickersham was at fault and "negligent" by being out of position.

Indeed, Plaintiffs recognized that Ford contended at trial that Mr. Wickersham was negligent in his positioning. In post-trial briefing, Plaintiffs' counsel admitted that "*the jury . . . found* Ford 70% negligent and *Mr. Wickersham 30% negligent*." JA 575 (emphasis added). Likewise, in a discussion with the district court concerning the jury charge, Plaintiffs' counsel conceded that if Mr. Wickersham "was negligent in using the restraint system," the jury "can compare that, as opposed to the accident causing fault." JA 1701.

Second, the court expressly instructed the jury on comparative fault: "Ford asserts the defense of comparative fault." JA 675. The court explained that "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." *Id*. The court further instructed that, "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." *Id*.

The instructions make clear that the jury charge used "negligence" and "fault" interchangeably:

> Negligence is defined as the failure to use reasonable or ordinary care. The word carelessness conveys the same idea as negligence. It is the failure by omission or commission to exercise such due care as a person of ordinary reason and prudence would exercise in the same circumstances. . . . [L]iability is determined according to fault.

JA 665. Indeed, as noted above, treating the words "fault" and "negligence" as equivalent is consistent with both this Court's precedent, *see Berberich*, 392 S.C. at 291–92, 709 S.E.2d at 614, and the district court's post-trial order, JA 751 n.12.

Third, the jury answered a question on the verdict form specifically pertaining to comparative fault: "What are John Harley Wickersham and Defendant Ford Motor Company's respective percentages of fault, as proven by the preponderance of the evidence? Recall that these percentages must add up to 100%." JA 365. The jury specifically found that Mr. Wickersham was 30 percent at fault for his injuries.

Finally, the adequacy of the district court's comparative fault instruction—in other words, whether the court should have "charge[d] the jury on any standard by which the jury may judge whether Mr. Wickersham was at 'fault,'" slip op. at 8—is not before this Court. Neither party challenged the comparative fault instruction on

appeal to the Fourth Circuit. "A party's failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue." *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012). The adequacy of the trial court's instructions is likewise not the issue that the Fourth Circuit asked this Court to address. *See* slip op. at 3.

CONCLUSION

For the foregoing reasons, the Court should grant this petition and modify the opinion to delete the erroneous description of the record on pages 8 and 9 of the slip opinion.

December 17, 2020

By: s/ Carmelo B. Sammataro

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