EXHIBIT A

(2) Did Plaintiff Crystal Wickersham prove, by a preponderance of the evidence, that Defendant was negligent with respect to the design of the restraint system and that Defendant's negligence was a proximate cause of Plaintiff's injuries?

YES X NO_____

Please proceed to Question 3.

(3) Did Plaintiff Crystal Wickersham prove, by a preponderance of the evidence, that the Defendant made and breached any express warranty with respect to the 2010 Ford Escape, and that this breach of Defendant's express warranty was a proximate cause of Plaintiff's injuries?

YES X NO_____

Please proceed to Question 4.

(4) Did Plaintiff Crystal Wickersham prove, by a preponderance of the evidence, that the Defendant breached the Implied Warranty of Merchantability, and that this breach of the Implied Warranty of Merchantability was a proximate cause of Plaintiff's injuries?

YES X NO_____

Please proceed to Question 5

(5) Did Defendant Ford Motor Company prove, by a preponderance of the evidence, that John Harley Wickersham was at fault in his use of the 2010 Ford Escape restraint system, and that John Harley Wickersham's fault was a proximate cause of his injuries?

YES X NO_____

If you answered NO *to Question 5, then proceed to Question 7. If you answered* YES *to Question 5, please answer Question 6.*

(6) 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%.

JOHN HARLEY WICKERSHAM: 30 %

FORD MOTOR COMPANY: 70 %

Please proceed to Question 7.

while driving during a rain storm, Mr. Wickersham lost control of the vehicle, went off the road, and collided with a tree. The driver's side airbag improperly deployed and, rather than protecting Mr. Wickersham, it caused severe, permanent injuries to his face. He later committed suicide as a result of the chronic pain caused by the defective airbag system.

Plaintiff asserted actions for negligence, strict liability, breach of express warranty, and breach of the implied warranty of merchantability. (ECF # 1-1). Plaintiff sought damages for survival, wrongful death, and loss of consortium. The Court charged the jury as to each of the four causes of action and had the jury separately determine whether Plaintiff proved each cause of action. (ECF 131, 9:13-cv-01192-DCN). After a ten-day trial, the jury found in Plaintiff's favor on all four causes of action. *Id.* at pp. 1-2. The jury further found Ford 70% negligent and Mr. Wickersham 30% negligent. *Id.* p. 2. As to the applicable elements of damages, the jury awarded Plaintiff a total of $4.65 million as follows:

To Mr. Wickersham's Estate for his pain and suffering from the accident until his death:		$1,250,000.00
To Crystal Wickersham for her loss of consortium from the accident until Mr. Wickersham's death:		$650,000.00
To Mr. Wickersham's beneficiaries for his wrongful death:		$1,375,000.00
To Crystal Wickersham for her loss of consortium after Mr. Wickersham's death:		$1,375,000.00

Id. at p. 3. The jury did not award punitive damages. All of the above-listed elements of damages are recoverable under each of Plaintiff's causes of action for negligence, strict liability, breach of express warranty, and breach of the implied warranty of merchantability.

CLAIM TWO: NEGLIGENCE

PLAINTIFF'S NEXT CLAIM IS FOR NEGLIGENCE. SPECIFICALLY, PLAINTIFF ALLEGES THAT DEFENDANT FORD MOTOR COMPANY WAS NEGLIGENT IN FAILING TO EQUIP THE 2010 FORD ESCAPE WITH A PROPERLY DESIGNED SUPPLEMENTAL RESTRAINT SYSTEM. AS A RESULT, PLAINTIFF ALLEGES, THE AIRBAG DEPLOYED IN A CRASH THAT DID NOT WARRANT DEPLOYMENT, AND EVEN IF THE DEPLOYMENT ITSELF WAS WARRANTED, THE DEPLOYMENT WAS UNREASONABLY LATE.

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. IN DETERMINING WHETHER A PARTICULAR ACT IS NEGLIGENT, YOU MUST ASK WHAT A PERSON OF ORDINARY REASON AND PRUDENCE WOULD DO UNDER THOSE CIRCUMSTANCES. WHEN I USE THE WORD "PERSON" HERE, THAT ALSO ENCOMPASSES THE WORD "CORPORATION." THE FOCUS IS ON THE CONDUCT OF THE DEFENDANT, AND LIABILITY IS DETERMINED ACCORDING TO FAULT.

RECKLESSNESS

RECKLESSNESS IS AN EXTENSION OF THE CONCEPT OF NEGLIGENCE. THE WORDS RECKLESSNESS, WILLFULNESS, AND WANTONNESS ARE SYNONYMOUS. THE TERMS ARE USED TO DESCRIBE A CONSCIOUS FAILURE TO EXERCISE REASONABLE OR DUE CARE. RECKLESSNESS IMPLIES THE DOING OF A

PLAINTIFF BEARS THE BURDEN OF PROVING AN UNCONTROLLABLE IMPULSE BY A PREPONDERANCE OF THE EVIDENCE.

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 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

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.

Ford first argues that the court need not decide the issue on the merits because plaintiff somehow waived the position she asserts now. ECF No. 130 at 4–5; ECF No. 150 at 4. Ford appears to suggest that, because plaintiff did not specifically discuss what would happen if the jury found Ford liable for both negligence and non-negligence claims, she implicitly acknowledged that all damages arising from such claims would be reduced. Ford explains:

> Plaintiff never argued, nor did the Court determine, that if the jury answered 'yes' to negligence, and also answered 'yes' to strict liability and/or breach of warranty, then the Court would not give effect to the comparative-fault finding. Rather, by her own admission, Plaintiff 'requested the jury apportion comparative negligence only if it found she proved the negligence cause of action,' which the jury did. Thus, Plaintiff should not now be heard to argue what she was silent on previously—that a finding of strict liability or breach of warranty would negate the jury's comparative-fault finding.

ECF No. 150 at 4. However, it is clear that plaintiff has always maintained that comparative fault is not a defense to strict liability or breach of warranty. T. 9:1885 ("[W]e don't think comparative negligence applies to either [strict liability or breach of warranty]."). It follows from this position that plaintiff's damages should not be reduced because the strict liability and breach of warranty claims are sufficient to support the judgment, even if the negligence claim is not. Thus, the court is not convinced that plaintiff has waived her arguments on this issue.

Turning to the merits question, the parties offer a variety of arguments as to whether the court should apply comparative fault to plaintiff's strict liability and breach

The District Court for the District of South Carolina certified the following question in Donze to the Supreme Court of South Carolina:[11]

> Does comparative negligence[12] in causing an accident 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?

Id. The court answered that question in the negative. Id. at 480–85. While the Donze court's analysis provides insight on how to decide the issue presented in this case, it is important to recognize that Donze is not directly on point. Here, as in Donze, plaintiff is seeking damages based on defects that made the vehicle unreasonably dangerous in the event of a crash. Thus, this case is—technically speaking—a crashworthiness case. But here, unlike in Donze, Wickersham's negligence was not a partial cause the crash, it was a partial cause of the enhanced injuries that were also caused by the defective RCM. Put differently, this case is distinguishable from Donze on the fact that Wickersham's negligence had the same type of causal relationship with his injuries as the defective RCM.

The Donze court made clear that its holding did not extent to such facts in footnote 4 of the opinion, which stated:

> Our ruling today is limited to the certified questions before us which concern only the applicability of comparative negligence to a plaintiff in causing the collision in a crashworthiness case. We note, as did the district court in Jimenez I, that "[c]omparative negligence related to the [defective

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[11] The district court also certified the question of whether "South Carolina's public policy bar[s] impaired drivers from recovering damages in a crashworthiness case when the plaintiff alleges claims of strict liability and breach of warranty." Donze, 800 S.E.2d at 480. This question does not bear on the instant matter.

[12] The Donze court used the term "comparative negligence." This court uses the term "comparative fault," when possible. However, the court regards the terms as interchangeable.

that particular injury that occurred was foreseeable. Do we even need the language about a defendant being entitled to assert -- alleging --

8:50:21AM (Discussion held off the record between counsel.)

8:50:30AM THE COURT: I'll look at that.

8:50:43AM MR. R. CROSBY: I guess our next position, Your Honor, as we filed in limine, we don't believe that comparative negligence is appropriate in a crash worthiness case unless it would be the conduct as related to his use of the restraints, as opposed to accident causing fault.

8:51:05AM THE COURT: So there is comparative negligence, basis for comparative -- certainly a claim for comparative negligence, and facts to back up a comparative negligence claim, although I haven't heard them yet, I'm sure I'll hear them today. Is that right?

8:51:21AM MR. R. CROSBY: Right. And I think we said earlier, and there's been no evidence of the cause of the accident, the actual cause. There's been a lot of gray stuff thrown around. And I don't know if they're -- it's a matter how we look at it. I believe Mr. Wickersham, if he was negligent in using the restraint system, that they can compare that, as opposed to the accident causing fault. As a matter of fact, if they believe Ford's position, it's going to be 100 percent Ford's way, so --

8:51:54AM THE COURT: That's what they're here for.

One of the jury charges that the judge is going to --

If you can put up the charge on comparative fault?

It's called "comparative fault" and reads like this: "Ford asserts the defense of comparative fault." This is one of the defenses that -- we assert a number of defenses. The primary defense is that the vehicle is not defective. There is not -- the retractor is not defective. But Ford asserts that the defense of comparative fault, "if you find that the 2010 Ford Escape was defective and that the defect was the 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 were at fault" -- which we deny, absolutely we deny -- but "even if it were at fault in bringing about Mr. Wickersham's injuries, Mr. Wickersham was also at fault in the 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."

Their own expert established at a minimum, at an absolute minimum, 8 inches of belt means that he was doing something. We don't know what, but it wasn't sitting behind the wheel driving a car normally, and that contributed to his injuries. And so when the judge charges you this -- you have this and you can read it for yourself -- Ford will claim that at a minimum it is entitled to comparative fault. Ford's