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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, as Personal Representative of the Estate of
John Harley Wickersham, Jr.,.....Plaintiffs,

v.

Ford Motor Company,Defendant.

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CERTIFIED QUESTIONS

1. Does South Carolina recognize an “uncontrollable impulse” exception to the general rule that suicide breaks the causal chain for wrongful death claims? If so, what is the plaintiff required to prove is foreseeable to satisfy causation under this exception—any injury, the uncontrollable impulse, or the suicide?
2. 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 the plaintiff’s enhanced injuries?

STATEMENT OF THE CASE

In this product liability case, the jury found Ford Motor Company defectively designed the restraint system in John Harley Wickersham’s 2010 Ford Escape and the defect proximately caused Mr. Wickersham’s injuries and an uncontrollable impulse to commit suicide.

The accident occurred on the night of February 3, 2011, while Mr. Wickersham drove home from work in a rain storm. He hydroplaned while making a left turn at a T intersection. (JA 910 lns. 12-13). The vehicle ran off the road and hit a tree on the front passenger side. The driver’s airbag improperly deployed and, rather than protecting Mr. Wickersham, it caused severe, permanent injuries to his eyes and face. He later committed suicide due to the chronic pain from his injuries.

Mr. Wickersham was married to Crystal Wickersham, with whom he had four children. (JA 1448-52). In 2003, Mr. Wickersham was diagnosed with bipolar disorder. (JA 1454 lns. 6-8). He saw a psychiatrist, who successfully treated the disorder with medications. (JA 1454-56). Mr. Wickersham worked as a pharmacist. At the time of the accident, Mr. Wickersham worked the nighttime pharmacy shift at Beaufort Memorial Hospital and drove home to Charleston each night.

On the night of the accident, Mr. Wickersham was transported to the Medical University of South Carolina. He received treatment for a ruptured left eyeball and extensive facial fractures. Mr. Wickersham’s entire midface—from the upper jaw to the eyebrows—was fractured into many

pieces and pushed back. (JA 875, 885). After a surgical attempt to save his left eyeball, Mr. Wickersham underwent a surgery in which the treating physician used metal tongs called “midface disimpactors” that go into a person’s nose and mouth to “rock” and “yank” Mr. Wickersham’s midface forward “and then line it up with the teeth” on the lower jaw “because his upper teeth were sitting behind his jaw.” (JA 886, 906-07). In a second surgery, the physician inserted additional plates and pulled Mr. Wickersham’s nose “up and out”, using splints to hold it in place. (JA 893-94).

After the accident, Mr. Wickersham never drove again. (JA 1408). He lost his left eye, sense of smell, and ability to chew food. (JA 949). The Wickershams “went to everywhere [th]e[y] could to try to get [] some help” with the unrelenting facial pain, including “many pain specialists, different surgeons, and types of doctors to manage his pain; oral surgeon, endodontist, dentist, neurosurgeon.” (JA 1479, 1195). None of it helped. (JA 1479). The pain originated in the trigeminal nerve in the face, which one medical expert testified is pain “far worse than any pain you can imagine because it’s close to the brain.” (JA 943, 945, 950).

Mr. Wickersham continued consulting work and tried twice to return to a normal pharmacy position. However, to work he could not take pain medication, and the chronic pain was too great for him to bear without medication. (JA 1295-96, 1300, 1489-92). On April 6, 2012, shortly after resigning from the second position, Mr. Wickersham told his wife that he may hurt himself. (JA 1493). He was admitted to the hospital and, upon discharge, Mr. Wickersham felt better and no longer thought about suicide. (JA 1494-95). On June 19, 2012, Mr. Wickersham received a nerve treatment at Emory University that alleviated his pain for up to eight hours. (JA 1496-98). However, the Wickershams’ COBRA insurance expired, and they were unable to pay out-of-pocket for further treatments. (JA 1499).

On July 21, 2012, Mr. Wickersham took his normal afternoon nap. While in his bedroom, he overdosed on methadone. (JA 1511-12). Mrs. Wickersham found him and performed CPR until EMS arrived but he never resuscitated. (JA 1511). He was fifty-five years old.

Crystal Wickersham, individually and on behalf of the estate of John Harley Wickersham, asserted actions against Ford for negligence, strict liability, breach of express warranty, and breach of the implied warranty of merchantability. (JA 44-47, 51-54). The Wickershams sought damages for survival, wrongful death, and loss of consortium.

Ford filed a motion for summary judgment arguing “Wickersham’s suicide precludes any showing of proximate cause as a matter of law.” *Wickersham v. Ford*, 194 F. Supp. 3d 434, 440 (D.S.C. 2016). Plaintiffs argued South Carolina follows the general rule that suicide breaks the chain of causation unless a plaintiff satisfies the uncontrollable impulse exception, which applies when the defendant’s tortious conduct caused the decedent to have a mental condition that resulted in an uncontrollable impulse to commit suicide. *Id.* at 440, 442. The District Court analyzed the decisions in *Scott v. Greenville Pharmacy, Inc.*, 212 S.C. 485, 48 S.E.2d 324 (1948), and *Crolley v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989), and agreed with Plaintiffs. *Wickersham*, 194 F. Supp. 3d at 442 (“Though the general rule may establish a default position that no proximate cause exists in suicide cases, the court still finds occasion in this case to apply the aforementioned uncontrollable impulse exception.” (internal quotation marks omitted)). The District Court explained, “As society’s understanding of suicide progresses, so must the law.” *Id.* at 446. It defined the exception as looking “to whether the decedent has the ability to control his conduct, and if not, whether his uncontrollable impulse [to commit suicide] was proximately caused by the defendant’s negligence.” *Id.*

Ford's Rule 30(b)(6) representative testified Ford knows "there is potential injury from an airbag." (JA 267, 1409-10). The vehicle owner's manual states airbags have "risk of death or serious injuries" and the restraint system is designed to "reduce the risk of airbag-related injuries." (JA 1159, 984). Dr. Donna Schwartz-Maddox, Plaintiffs' forensic psychiatry expert, testified the chronic pain from the facial injuries caused Mr. Wickersham to experience an uncontrollable impulse to commit suicide.¹ (JA 1216, 1229). Dr. Schwartz-Maddox testified Mr. Wickersham's "depression he had from bipolar disorder was not the cause of his suicide" (JA 1312 lns. 10-12) and the suicidal ideation that occurred before the accident "went away", proven by the fact that for seventeen months he coped with daily, unrelenting chronic pain and the loss of an eye, sense of smell, and ability to chew food. (JA 1291, 1264, 1271-72).

The Wickershams asserted the defective airbag system caused Mr. Wickersham's facial injuries, and Ford asserted the gear shift lever caused the injuries. Ford argued Mr. Wickersham was out-of-position at the time of the collision, looking towards the passenger seat, such that his left eye hit the gear shift lever located between the driver and passenger seats. (JA 1729-31). Ford argued the alleged out-of-position scenario rendered Mr. Wickersham comparatively negligent for his injuries. The surgeon who treated Mr. Wickersham's facial fractures testified to her opinion that the airbag, not the gear shift lever, caused Mr. Wickersham's facial injuries because his bones displaced front-to-back rather than side-to-side. (JA 912, 929).

After a ten-day trial in August 2016, the jury found in the Wickershams' favor on all four causes of action. (JA 364-67). The jury answered "yes" to the verdict form question of whether Plaintiffs proved Mr. Wickersham "suffered from an uncontrollable impulse to commit suicide, and that the Defendant's wrongful conduct was a proximate cause of [Mr.] Wickersham's

¹ Her testimony is undisputed as Ford chose not to call its psychiatry expert. (JA 1782).

uncontrollable impulse to commit suicide.” (JA 366). The jury further found Ford 70% negligent and Mr. Wickersham 30% negligent. (JA 365). The jury awarded the Estate \$2,625,000.00 and Mrs. Wickersham \$2,025,000.00. (JA 366). The District Court entered the full judgment amount for the Wickershams without reducing the recovery for comparative negligence.

Ford filed a post-trial motion arguing the judgment should be reduced by 30% based on the finding of comparative negligence. Plaintiffs argued comparative negligence applies only to a negligence action and not to the strict liability, breach of express warranty, and breach of the implied warranty of merchantability actions in which the jury also found in Plaintiffs’ favor. Applying this Court’s decision in *Donze v. General Motors, LLC*, 420 S.C. 8, 800 S.E.2d 479 (2017), the District Court held comparative negligence does not apply to statutory causes of action for strict liability and breach of warranties, and denied Ford’s post-trial motions. *Wickersham v. Ford Motor Co.*, 2017 WL 3783122, *42-50 (D.S.C. 2017).

On appeal, the Fourth Circuit believed South Carolina law does not directly answer the questions of the applicability of the uncontrollable impulse exception to recovery for suicide and of comparative negligence to claims for strict liability and breach of warranties. This led to certification of the questions now before this Court.

ARGUMENT

I. SOUTH CAROLINA RECOGNIZES THE UNCONTROLLABLE IMPULSE EXCEPTION TO THE GENERAL RULE THAT SUICIDE BREAKS THE CHAIN OF CAUSATION FOR A WRONGFUL DEATH CLAIM

A. *South Carolina Recognizes the Uncontrollable Impulse Exception*

In a case for wrongful death by suicide, South Carolina follows the general rule that suicide breaks the chain of causation except when a plaintiff presents evidence that the defendant’s conduct caused the decedent to have a mental condition that resulted in an uncontrollable impulse to commit suicide. The parties agree as to the general rule and that there is an exception to it but

disagree as to what exception applies.² For clarity, the exception argued by Plaintiffs is exactly that applied and charged by the District Court at the trial of this case.

Ford claims that, even if it is liable for John Wickersham's injuries, it is not liable for John Wickersham's death because its actions did not proximately cause John Wickersham's death. Specifically, Ford claims that John Wickersham's suicide was an intervening cause of his death, for which Ford is not liable. An intervening cause is an independent event which intervenes between the original wrongful act or omission and the injury, turns aside the natural sequence of events, and produces a result which would not otherwise have followed and which could not have been reasonably anticipated. As a general rule, a person's suicide will constitute an independent and intervening event which breaks the line of causation between the Defendant's actions and the person's death. However, when a person's suicide is the result of an "uncontrollable impulse" and the uncontrollable impulse was proximately caused by the Defendant's actions, the Defendant may be liable for the person's suicide. . . . Put differently, a plaintiff may recover for the wrongful death when the defendant's actions made the person incapable of controlling his or her own actions.

(Jury Charge, JA 673-74). The exception, as stated by the District Court, applies the general proximate cause law of South Carolina, including foreseeability, within the specific context of the uncontrollable impulse exception.

South Carolina law addressing liability for suicide demonstrates that our Courts recognize the uncontrollable impulse exception. In *Scott v. Greenville Pharmacy, Inc.*, 212 S.C. 485, 48 S.E.2d 324 (1948), the decedent went to the defendant drug store and asked for something to help him sleep. *Id.* at 488, 48 S.E.2d at 325. The defendant sold him barbiturate capsules, and the

² In the event the Court reviews the parties' prior filings in the District Court or the Fourth Circuit, Plaintiffs note that Ford's argument on this issue changed over the course of these proceedings. Ford initially argued at summary judgment and trial that suicide was not recoverable as a matter of law and, if it was, it was subject to proof of insanity. (JA 66-69, 1533-34). On appeal Ford did not dispute that suicide is recoverable and the uncontrollable impulse exception is the applicable law in South Carolina. At oral argument, Ford stated: "In South Carolina, we haven't challenged this on appeal, even if there is an irresistible impulse concept that allows you theoretically to recover for suicide, the irresistible impulse itself must be foreseeable." (Oral argument audio, <http://coop.ca4.uscourts.gov/OAarchive/mp3/17-2131-20180508.mp3>, 36:10-36:30). Ford now argues the uncontrollable impulse exception is not the law of South Carolina and proposes a foreseeability exception.

decedent developed an addiction that led to his mental and physical deterioration. *Id.* The decedent committed suicide by hanging, and his widow brought a wrongful death action alleging the “suicide was the proximate result of the acts of respondent in making the sales to him.” *Id.* This Court denied recovery for wrongful death because it found the decedent acted voluntarily in continuing to purchase the drug when he “knew the nature of the drug” and, therefore, would not have had an action against the pharmacy if he survived. *Id.* at 491-93, 48 S.E.2d at 326-27. The Court explained the allegations of the complaint “fall far short of presenting the case of one who was no longer a free agent *incapable of controlling his own conduct*, and bent upon suicide.” *Id.* at 493, 48 S.E.2d at 328 (emphasis added). This statement shows an action for wrongful death by suicide exists where an uncontrollable impulse to commit suicide is alleged. While “[t]he *voluntary willful* act of suicide of an injured person” generally breaks the chain of causation, a suicide that results from an involuntary, uncontrollable impulse does not break the chain of causation. *Id.* at 495, 48 S.E.2d at 328 (emphasis added) (citing 16 Am. Jur. § 81, p. 60). The Court ultimately found “it would be going too far *in this case*, on the face of the complaint to hold that the unlawful sale of the barbiturate capsules *brought about a condition or suicidal mania* as the natural and probable consequence of the sale.” *Scott*, 212 S.C. at 495, 48 S.E.2d at 328 (emphasis added).

Scott is based on the absence of allegations that the decedent was “incapable of controlling his own conduct” or the defendant’s conduct “brought about a condition or suicidal mania.” *Id.* at 493, 495, 48 S.E.2d at 328. This demonstrates that, when such allegations are present, the uncontrollable impulse exception applies to an action for wrongful death by suicide. A defendant may be liable for wrongful death by suicide when, as in this case, there are allegations (and proof

by expert testimony at trial) that the defendant's conduct caused the decedent to have an uncontrollable impulse to commit suicide.

The Court of Appeals applied this principle in *Crolley v. Hutchins*, 300 S.C. 355, 387 S.E.2d 716 (Ct. App. 1989). In *Crolley*, the defendant bartender served the plaintiff alcohol to the point of intoxication. *Id.* at 356, 387 S.E.2d at 717. After the plaintiff refused to pay his bill, the bartender called the police, who arrested him. *Id.* While incarcerated, the plaintiff attempted suicide by hanging. *Id.* Relying on *Scott*, the Court of Appeals affirmed the trial court's decision to grant summary judgment to the defendant. *Id.* at 357, 387 S.E.2d at 717-18. It quoted the reasoning from *Scott* that the Court could not impose liability where the circumstances did not show the defendant's actions "brought about the condition of suicidal mania as the natural and probable consequence." *Id.* at 357, 387 S.E.2d at 717-18 (quoting *Scott*, 212 S.C. at 495, 48 S.E.2d at 328). This shows application of the uncontrollable impulse exception.

The District Court of South Carolina also analyzes the uncontrollable impulse exception as the law of South Carolina. In *Watson v. Adams*, 2015 WL 1486869 (D.S.C. March 31, 2015), the decedent committed suicide after his termination from the police department for an alleged false accusation of driving under the influence. *Id.* at *3-7. The decedent shot himself while intoxicated and left a note stating he committed suicide "because of the loss of his wife and his career as a detective." *Id.* at *7. The District Court began its proximate cause analysis by acknowledging "South Carolina reflects the majority rule" that suicide is an intervening force that breaks the chain of causation. *Id.* at *16-17 (citing 11 A.L.R. 2d 751). It then discussed exceptions to the general rule, including the uncontrollable impulse exception. *Id.* at *18. This exception "involves cases where a tortious act is found to have caused a mental condition in the decedent that proximately resulted in an uncontrollable impulse to commit suicide" and "typically involve[s] a physical injury

that causes the decedent to have an irresistible impulse to commit suicide.” *Id.* (internal quotation marks omitted). Although “South Carolina Courts have never permitted a recovery on this basis”, the Court reviewed the evidence for applicability of the exception and found “in the absence of evidence that Watson . . . suffered an uncontrollable impulse to commit suicide, he does not fall within [] the exceptions to the rule.” *Id.* at *18, 24. Therefore, under *Watson*, South Carolina recognizes the uncontrollable impulse exception. Further, it is significant that, when discussing exceptions to the general rule, the *Watson* Court never mentioned the exception Ford now proposes—that the plaintiff may recover “when the suicide itself was reasonably foreseeable to the defendant.” (Br. of Ford p. 9).

Finally, the uncontrollable impulse exception is consistent with South Carolina workers’ compensation law that provides for death benefits in the event of a suicide that is not the result of a willful intention. “No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the wilful intention of the employee to injure or *kill himself* or another.” S.C. Code Ann. § 42-9-60 (2015) (emphasis added). This prohibition is interpreted to apply to acts that are “not impulsive or instinctive, but deliberate.” *Zeigler v. S.C. Law Enforcement Div.*, 250 S.C. 326, 331, 157 S.E.2d 598, 600 (1967) (interpreting statute in case involving employees who shot at each other at the same time). Therefore, under § 42-9-60, the Legislature and this Court have held that death benefits are payable for an employee’s suicide if it was not “occasioned by” a willful intent of the employee to kill himself but, rather, was impulsive or instinctive.

The Court should find South Carolina recognizes the uncontrollable impulse exception.

B. The Uncontrollable Impulse Exception is the Majority Rule

The uncontrollable impulse exception, not Ford's proposed foreseeability exception, is the majority rule. The American Law Reports section cited by Ford and numerous courts as stating the general rule includes the uncontrollable impulse exception. (Br. of Ford p. 8).

Where an action is brought under a wrongful death statute the general rule is that suicide constitutes an intervening force which breaks the line of causation from the wrongful act to the death and therefore the wrongful act does not render defendant civilly liable. However, where the wrongful act produces such a rage or frenzy that the person injured by defendant's wrongful act destroys himself during such rage or frenzy, ***or in response to an uncontrollable impulse***, the act is, according to many dicta, considered as within and a part of the line of causation from defendant's wrongful act to the suicide and defendant's act is held to be the proximate cause of the death. This rule has been applied to cases where the suicide resulted from a prior physical injury

C.T. Drechsler, Annotation, *Civil liability for death by suicide*, 11 A.L.R.2d 751, *2b (emphasis added). Similarly, American Jurisprudence states "It has generally been held that where negligently inflicted personal injuries induce a state of insanity characterized by cognitive unawareness or uncontrollably impulsive behavior, as a result of which the tort victim commits suicide, the tortfeasor may be held liable for the death of the victim." 22A Am. Jur. 2d *Death* § 43.

The Restatement (Second) of Torts § 455 (1977) is commonly cited as the source of the uncontrollable impulse exception. It states:

If the actor's negligent conduct so brings about the delirium or insanity of another as to make the actor liable for it, the actor is also liable for harm done by the other to himself while delirious or insane, if his delirium or insanity

(a) prevents him from realizing the nature of his act and the certainty or risk of harm involved therein, or

(b) makes it impossible for him to resist an impulse caused by his insanity which deprives him of his capacity to govern his conduct in accordance with reason.

Id. The uncontrollable impulse exception is applied in numerous jurisdictions, some of which applied it decades ago. *See, e.g., Richmond Hill v. Maia*, 800 S.E.2d 573, 577 (Ga. 2017) (stating

“Georgia law has carved out two deviations from the general rule that suicide breaks the causal connection”, one of which is “where the tortfeasor’s wrongful act causes the injured party to kill himself during a rage or frenzy, or in response to an uncontrollable impulse” (internal quotation marks omitted); *Moore v. Western Forge Corp.*, 192 P.3d 427, 436 (Colo. Ct. App. 2007) (applying Restatement (Second) of Torts § 455); *Sindler v. Litman*, 887 A.2d 97, 112-13 (Md. Ct. Spec. App. 2005) (stating the exception requires proof “that the defendant’s action caused insanity, which prevented the decedent from realizing the nature of the act of suicide or resulted in the decedent’s having an uncontrollable impulse to commit suicide, in the sense that the decedent could not have decided against and refrained from killing himself, and because of such uncontrollable impulse, the decedent committed suicide” (internal quotation marks omitted)); *Clift v. Narragansett TV L.P.*, 688 A.2d 805, 811 (R.I. 1996) (“[T]he uncontrollable impulse rule that we believe to be fair to all . . . will hereinafter be applied in Rhode Island to all negligence actions seeking recovery for suicide”); *Dist. of Columbia v. Peters*, 527 A.2d 1269, 1276 (D.C. 1987) (adopting the uncontrollable impulse exception and noting it “has been rejected by none that has considered it”); *Orcutt v. Spokane Cnty.*, 364 P.2d 1102, 1105 (Wash. 1961) (permitting recovery for suicide when “the injury sustained by the decedent caused a mental condition which resulted in an uncontrollable impulse to commit suicide, in the sense that the decedent could not have decided against and refrained from killing himself, and because of such uncontrollable impulse, the decedent committed suicide”); *Tate v. Canonica*, 180 Cal. App. 2d 898, 915 (Cal Ct. App. 1960) (adopting “as the more realistic approach to the problem” the rule that “if the negligent wrong causes mental illness which results in an uncontrollable impulse to commit suicide then the wrongdoer may be held liable for the death”); *Cauverien v. De Metz*, 188 N.Y.S.2d 627, 632 (Sup. Ct. N.Y. Co. 1959) (adopting as “a more realistic approach” the rule that “where the suicide is

committed in a state of insanity in response to an uncontrollable impulse, recovery may be had if the mental state of the deceased was caused by the defendant's wrongful act").

Ford cites to cases from seven states to imply that they use its proposed foreseeability exception. (Br. of Ford pp. 12-13). This is misleading as all of the referenced states recognize the uncontrollable impulse exception, as shown by the following: (1) As to Arizona, *see Tucson Rapid Transit Co. v. Tocci*, 414 P.2d 179, 185 (Ariz. Ct. App. 1966) (stating the question presented is "whether there was substantial evidence that the accident was a substantial factor in bringing about an 'insanity' which caused an impulse which was 'impossible' to resist" and finding "no such evidence"); (2) as to Connecticut, *see Edwards v. Tardif*, 692 A.2d 1266, 1271-72 (Conn. 1997) (discussing the "uncontrollable impulse exception" but ruling the plaintiff presented a medical malpractice case and not an uncontrollable impulse argument); (3) as to Georgia, *see Appling v. Jones*, 154 S.E.2d 406, 409-10 (Ga. Ct. App. 1967) (noting Georgia "recognize[s]" an exception to the general rule for suicide "in response to an uncontrollable impulse" but finding "too much evidence of rational, conscious behavior . . . to find that his act of suicide was committed . . . in response to an uncontrollable impulse" (internal quotation marks omitted)); *Richmond Hill*, 800 S.E.2d at 577 (listing an exception to the general rule "where the tortfeasor's wrongful act causes the injured party to kill himself during a rage or frenzy, or in response to an uncontrollable impulse"); (4) as to Illinois, *see Turcios v. DeBruler Co.*, 32 N.E.3d 1117, 1126-28 (Ill. 2015) (holding the general rule applies to intentional and negligent conduct, and rejecting plaintiff's argument that the concept of foreseeability cannot limit liability for suicide); *Doe v. Doe*, 67 N.E.3d 520, 525 (Ill. App. Ct. 2016) (noting "only two recognized exceptions to this rule: (1) when, as the proximate result of a physical injury caused by the tortfeasor, the injured party becomes insane or bereft of reason and while in that state commits suicide . . ."); (5) as to Iowa,

see *Scoggins v. Wal-Mart Stores, Inc.*, 560 N.W.2d 564, 569-70 (Iowa 1997) (“hold[ing] that proof of the proximate cause of death in the case at bar has failed because the conduct of Wal-Mart was not a substantial factor in bringing about the harm to decedent”); *Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 182 (Iowa 1991) (stating “that exceptions [to the general rule] also can be found where a *tortious act* results in a mental condition which in turn results in an uncontrollable impulse to commit suicide or which prevents the decedent from realizing the nature of the act”); (6) as to New York, see *Stolarski v. DeSimone*, 83 A.D.3d 1042, 1044 (N.Y. App. Div. 2011) (noting “a tortfeasor may be held liable for the suicide of a person that is the result of the tortfeasor’s negligence conduct, provided the suicide is a foreseeable consequence of the tortfeasor’s acts” (internal quotation marks omitted) (citing *Fuller v. Preis*, 322 N.E.2d 263, 266 (N.Y. 1974) (addressing whether the evidence supported a finding “upon the theory of liability for a suicide by an accident victim suffering from ensuing mental disease, who was unable to control the ‘irresistible impulse’ to destroy himself”)); and (7) as to Tennessee, see *White v. Lawrence*, 975 S.W.2d 525, 530 (Tenn. 1998) (finding the absence of “insan[ity]” does not mean a suicide is unforeseeable but “the crucial inquiry is whether the defendant’s negligent conduct *led to or* made it reasonably foreseeable that the deceased would commit suicide” (emphasis added)); *Rains v. Bend of the River*, 124 S.W.3d 580, 593 (Tenn. 2003) (stating Tennessee’s courts “have also recognized the following three exceptions to this general rule: (1) circumstances in which the defendant’s negligence causes delirium or insanity that results in self-destructive acts”).

Ford does not cite to a single jurisdiction that uses a foreseeability exception to the general rule. None of the cases cited by Ford support its argument. Rather, they support Plaintiffs’ position that the uncontrollable impulse exception is the majority position and the law of South Carolina.

C. The Uncontrollable Impulse Exception is Consistent with the Reasoning of the General Rule

The general rule that suicide breaks the chain of causation is based on the perceived voluntariness of the act of suicide, essentially that the decedent voluntarily chose to end his life and such a voluntary act is an intervening act. The uncontrollable impulse exception logically addresses that concern by requiring allegations and proof that the suicide was not voluntary but, instead, resulted from an uncontrollable impulse to kill oneself. *See, e.g.*, 22A Am. Jur. 2d *Death* § 43 (“[I]f a defendant’s negligent conduct led to the deceased committing suicide, . . . then the suicide is not an independent intervening cause breaking the chain of legal causation.”). The underlying rationale for the exception is that absent volition, the suicide is not independent from the defendant’s original negligence. Ford’s proposed exception does not address the concern that forms the basis of the general rule but, instead, would defeat the rule by permitting recovery regardless of the voluntariness of the action if there is proof that suicide was foreseeable to the defendant.

Ford asks this Court to hold “that the general rule may be overcome if there is a showing that the suicide—not just any injury—was reasonably foreseeable to the defendant.” (Br. of Ford p. 9). This argument exclusively focuses on the question of what the plaintiff must prove is foreseeable without any proof that the defendant’s actions caused the suicide. If the test is merely whether the suicide was foreseeable to Ford, then it would not matter whether the decedent committed suicide with the ability to control his or her actions. *See, e.g., Tate v. Canonica*, 180 Cal. App. 2d 898, 915 (Cal. Ct. App. 1960) (“If defendant is to avoid liability, the decedent’s act must be voluntary, not in that sense but in the sense that he could, in spite of his mental illness, have decided against suicide and refrained from killing himself.”). This would result in liability in which the causal chain is actually more remote. The uncontrollable impulse exception is a more

legally and factually accurate standard that allows recovery where the original injury is an actual, direct cause of the suicide and some injury was foreseeable. This is demonstrated by the fact that Ford does not cite to a single jurisdiction that uses a “foreseeability” exception but cites only to jurisdictions that recognize the uncontrollable impulse exception and discuss their foreseeability law within that context. *Supra* I.B.

For these reasons, the Court should answer the first part of the first certified question “Yes.”

II. UNDER THE UNCONTROLLABLE IMPULSE EXCEPTION, THE PLAINTIFF MUST SATISFY GENERAL PROXIMATE CAUSE PRINCIPLES BY PROVING SOME INJURY IS FORESEEABLE

A. General Foreseeability Law Applies Within the Uncontrollable Impulse Exception

The first part of the first certified question addresses under what circumstances recovery for wrongful death suicide is permissible. The second part of the question is answered by applying general proximate cause law within the framework of the uncontrollable impulse exception. As the Maryland Court of Appeals explained, the uncontrollable impulse exception is “based on principles of proximate cause” and “is simply a statement of proximate cause in a specific context.” *Sindler v. Litman*, 887 A.2d 97, 109 (Md. Ct. Spec. App. 2005). In a wrongful death by suicide action where the plaintiff asserts the uncontrollable impulse exception, the plaintiff must show some injury was foreseeable to the defendant, consistent with general principles of proximate cause in South Carolina that apply to all wrongful death actions.

“Proximate cause requires proof of both causation in fact, and legal cause.” *Oliver v. S.C. Dep’t of Highways & Public Transp.*, 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992). “Causation in fact is proved by establishing the injury would not have occurred ‘but for’ the defendant’s negligence.” *Id.* at 316, 422 S.E.2d at 130 (internal quotation marks omitted). To recover for

wrongful death by suicide under the exception, a plaintiff satisfies causation-in-fact by showing the uncontrollable impulse would not have occurred “but for” the defendant’s conduct.

“Legal cause is proved by establishing foreseeability. The standard by which foreseeability is determined is that of looking to the natural and probable consequences of the complained of act.” *Id.* at 316, 422 S.E.2d at 131 (internal quotation marks and citation omitted). To recover for wrongful death by suicide, a plaintiff satisfies legal cause by showing some injury was foreseeable.

“[W]hile foreseeability of *some injury* from an act or omission is a prerequisite to establishing proximate cause, the plaintiff need not prove that the defendant should have contemplated the *particular event* which occurred.” *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006) (emphasis added); *see also Oliver*, 309 S.C. at 317, 422 S.E.2d at 131 (“[T]he doer of the act cannot shelter himself behind the defense that the actual consequence was one that rarely follows from that particular act. He may be held liable for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act or omission.” (internal quotation marks omitted)). “[I]f the actor’s conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not negative his liability.” *Baggerly*, 370 S.C. at 369, 635 S.E.2d at 101 (internal quotation marks omitted).

“Foreseeability is determined by looking at the natural and probable consequences of the complained of act, although it is not necessary to prove that a particular event or injury was foreseeable.” *Roddey v. Wal-Mart Stores East, LP*, 415 S.C. 580, 590, 784 S.E.2d 670, 676 (2016). “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.” *Id.* at 590, 784 S.E.2d at 676. In *Roddey*, this Court found “there is more

than one reasonable inference as to whether the consequences of the [defendant's] actions were foreseeable", and the defendant's "own policies demonstrate" it "recognized the danger . . . and it was reasonably foreseeable that" its conduct "would be dangerous." *Id.* at 591, 784 S.E.2d at 677. The Court did not require the plaintiff to prove that the specific injury or manner of injury was foreseeable, but only that it was foreseeable to the defendant that its conduct would be dangerous. That same logic should apply to cases for wrongful death by suicide. For example, in this case, Ford's owner's manual and Rule 30(b)(6) witness's testimony demonstrate it recognized the danger of a defective airbag system and that such danger could cause death. (JA 1159, 984, 267, 1409-10).

Ford admits the heightened foreseeability standard it asks the Court to adopt "is not the normal foreseeability standard" but argues "it is necessary in the context of suicide to ensure that the general rule . . . is not rendered meaningless." (Br. of Ford p. 19). Applying existing proximate cause law to proof of the uncontrollable impulse exception does not render the general rule meaningless. Rather, it gives the rule its full effect. As discussed above, the general rule ensures that a defendant is not liable for a voluntary suicide, with "voluntary" meaning the decedent could control his actions. The uncontrollable impulse exception permits liability only when there is proof that the decedent could not control his impulse to commit suicide and that impulse is caused by the defendant's conduct. The exception itself addresses Ford's concern. Even the *Scott* case that Ford cites as the source for this heightened standard actually applied general proximate cause law. "In every case of this character the inquiry is: Was the injury a natural and probable consequence of the wrongful act, and ought it to have been foreseen in light of the attendant circumstances?" *Scott*, 212 S.C. at 493, 48 S.E.2d at 328. To require a plaintiff to prove the

specific injury and manner of injury are foreseeable in a wrongful death by suicide case puts a heightened, unnecessary, and unjustified burden of proof on the plaintiff.

To answer the certified question as Ford argues—that a plaintiff must prove the defendant foresaw death by suicide specifically—is not only contrary to South Carolina proximate cause law but also undermines the established principles that (1) the negligence of a treating physician is foreseeable and (2) the defendant takes the plaintiff as he finds him. These principles, discussed below, show why general proximate cause law, not a heightened standard, is the applicable law.

“It has been held in South Carolina that the negligence of an attending physician is reasonably foreseeable.” *Graham v. Whitaker*, 282 S.C. 393, 399, 321 S.E.2d 40, 44 (1984) (citing *Bessinger v. DeLoach*, 230 S.C. 1, 4, 94 S.E.2d 3, 5 (1956) (“[I]f an injured person uses ordinary care in selecting a physician for treatment of his injury, the law regards the aggravation of the injury resulting from the negligent act of the physician as a part of the immediate and direct damages which naturally flow from the original injury.” (internal quotation marks omitted))). Our law presumes the foreseeability of an injured person suffering injuries from medical malpractice of a third party. The chain of causation from an injury to an independent third party’s possible negligence is more attenuated than that of a suicide that is the result of an injury that causes a person to suffer an uncontrollable impulse to commit suicide. As the Court of Appeals of New York explained,

An initial tort-feasor may be liable for the wrongful acts of a third party if foreseeable. Thus a tort-feasor may be liable for the ensuing malpractice of a physician treating the victim for the tortiously caused injuries. No different rule applies when death results from an “involuntary” suicidal act of the victim as a direct consequence of the wrongful conduct.

Fuller v. Preis, 322 N.E.2d 263, 265-66 (N.Y. 1974). Chronic pain is known to cause an increased risk for suicide.³ A personal injury is not known to cause third party medical malpractice.

“The defendant takes the plaintiff as he is found and the plaintiff is entitled to recover damages resulting from the aggravation of a pre-existing condition.” *Raino v. Goodyear Tire & Rubber Co.*, 309 S.C. 255, 259, 422 S.E.2d 98, 100 (1992). This is sometimes referred to as the “eggshell plaintiff” rule. By way of illustration, if a person with hemophilia who is in a low-impact collision that results only in severe cuts dies due to bleeding, our law holds the negligent defendant liable for the death. That the death itself or the manner of death were unlikely or not specifically foreseeable does not negate the defendant’s liability. The same principle should apply to suicide that occurs due to an uncontrollable impulse.

An eggshell plaintiff and an injured plaintiff who is the victim of medical malpractice receive the benefit of presumed foreseeability. Plaintiffs are not arguing for presumed foreseeability for a plaintiff who commits suicide as the result of an uncontrollable impulse but simply that he or she is not subject to a heightened foreseeability standard. Using the facts of this case as an example, Ford did not dispute that general proximate cause law applies to its liability for Mr. Wickersham’s pain and mental suffering up to the point of death and for the results of such suffering—e.g., inability to work, loss of enjoyment of life, depression, and medical bills for pain relief. However, it seeks to separate suicide as a result of pain and mental injury by forcing a plaintiff to show not only that the suicide is the result of an uncontrollable impulse caused by

³ See, e.g., *Suicide and Patients with Chronic Pain*, U.S. Department of Veterans Affairs https://www.pbm.va.gov/PBM/AcademicDetailingService/Documents/PAIN_Provider_AD_Chronic_Pain_and_Suicide_Factsheet.pdf (accessed on Oct. 11, 2018) (“Pain conditions independently increase risk for suicidal ideation (SI) and suicide attempts and chronic pain is estimated to double the risk of death by suicide.”).

Ford's conduct but also to meet a heightened foreseeability standard not applicable to any other injuries or to any other legal context in which damages for mental suffering are recoverable.

The Court should find general proximate cause law applies to the uncontrollable impulse exception in an action for wrongful death by suicide.

B. Judicial Treatment of Mental Injury and Illness

It is necessary to consider the judicial treatment of and medical evidence concerning mental illness and suicide. Ford's argument that suicide requires a heightened foreseeability standard treats a mental injury differently than a physical injury and presumes that it is not possible to prove the cause of a mental injury such as an uncontrollable impulse to commit suicide.⁴ The law of South Carolina shows that our judicial system is capable of rendering decisions as to mental injuries without a heightened standard of proof.

In 2016, 18.3% of all U.S. adults suffered a mental illness.⁵ As of 2016, suicide was the 10th leading cause of death across all ages in the United States.⁶ "Studies have revealed high rates of suicidal ideation and suicide attempts in patients suffering from chronic pain", with one survey finding "that 50% of chronic pain patients had serious thoughts of committing suicide due to their

⁴ Ford acknowledges that foreseeability of the mental condition of an uncontrollable impulse to commit suicide is the same thing as foreseeability of suicide itself. (Br. of Ford p. 18 ("[F]oreseeing whether an action will cause an individual to have an uncontrollable impulse to die by suicide would not require anything different from foreseeing an actual suicide. If an individual has an uncontrollable impulse to die by suicide, by definition a suicide attempt will be foreseeable.")).

⁵ National Institute of Mental Health, *Mental Illness*, <https://www.nimh.nih.gov/health/statistics/mental-illness.shtml> (accessed Oct. 10, 2018).

⁶ National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, *Web-based Injury Statistics Query and Reporting System (WISQARS)*, Available at <https://webappa.cdc.gov/sasweb/ncipc/leadcause.html> (accessed Oct. 10, 2018); National Institute of Mental Health, *Suicide*, <https://www.nimh.nih.gov/health/statistics/suicide.shtml> (accessed Oct. 10, 2018).

pain disorder.” Cheatle, Martin D., Ph.D., *Depression, Chronic Pain, and Suicide by Overdose: On the Edge*, *Pain Med.* 2011 June; 12:S44. South Carolina has long recognized recovery for pain and mental injury without proof of specific foreseeability, and our juries have ably determined the existence, proximate cause, and extent of such injuries for decades.

An award for pain and suffering compensates the injured person for the physical discomfort and the *emotional* response to the sensation of pain caused by the injury itself. Separate damages are given for *mental anguish* where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset, and/or humiliation as the result of the defendant’s negligence.

Boan v. Blackwell, 343 S.C. 498, 501-02, 541 S.E.2d 242, 244 (2001) (emphasis added). A bystander may recover for negligent infliction of emotional distress if, among other things, he proves to a jury with expert testimony that his “emotional distress manifests itself by physical symptoms capable of objective diagnosis.” *Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 67-68, 651 S.E.2d 305, 307 (2007). A plaintiff may recover for intentional infliction of emotional distress if, among other things, he proves to a jury that the defendant’s actions caused emotional distress that was so severe no reasonable man could be expected to endure it. *Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981). The South Carolina Tort Claims Act provides for recovery of “pain and suffering, [and] mental anguish.” S.C. Code Ann. § 15-78-30(f) (Supp. 2014). Telegraph companies are liable for “mental anguish or suffering, even in the absence of bodily injury, for negligence in receiving, transmitting or delivering messages, without regard to relationship by blood or marriage or whether such messages afforded notice of such relationship or otherwise or that injury or damage would result if such anguish or suffering resulted as matter of fact.” S.C. Code Ann. § 58-9-1860 (2015). In each of these situations permitting recovery for mental injury there is no heightened foreseeability standard. Ford provides no reason why suicide mental illness or injury warrants a heightened standard. The Court should preserve the law of South Carolina that mental injuries are subject to the same burden of proof as physical injuries.

C. There is No Need for a Heightened Standard of Foreseeability for an Injury that has Occurred for Decades

Ford's argument for a heightened foreseeability standard assumes that committing suicide following a physical injury is an extremely rare event. While the general rule already provides this legal presumption in Ford's favor, it is apparent from a review of case law that suicide following a physical injury has occurred for decades. *See, e.g., Young v. Swiney*, 23 F. Supp. 3d 596, 624 (D. Md. 2014) (denying summary judgment where defendant admitted liability for car accident that caused permanent and painful injuries to decedent, who committed suicide); *Bak v. Burlington N., Inc.*, 417 N.E.2d 148, 150 (Ill. App. Ct. 1981) (reversing summary judgment for defendant where plaintiff fell down deteriorating stairs on defendant's premises and overdosed); *Repinski v. Jubilee Oil Co.*, 405 N.E.2d 1383, 1391 (Ill. App. Ct. 1980) (reversing directed verdict for defendant where plaintiff suffered permanent injuries after tripping on its premises and unsuccessfully attempted suicide); *Exxon Corp. v. Brecheen*, 526 S.W.2d 519, 524 (Tex. 1975) (submitting proximate cause to the jury where defendant negligently sprayed decedent in the face with oil and he committed suicide); *Orcutt v. Spokane Cnty.*, 364 P.2d 1102, 1108 (Wash. 1961) (allowing recovery where defendant failed to fix a road washout and decedent suffered severe facial injuries in a car accident, followed by suicide attempts and a fatal overdose).

That an event is rare is not a basis for subjecting recovery for it to a heightened standard. The cited cases demonstrate that courts have successfully managed disputes over civil liability for suicide for decades without the need for a heightened foreseeability standard.

D. The Court Should Reject Ford's Proposed "Cognizant" Requirement

Finally, the Court should reject Ford's request that it adopt as part of the uncontrollable impulse exception a requirement that the "exception does not apply if the decedent was cognizant of his actions." (Br. of Ford p. 16). It is unclear what exactly Ford is asking because it also refers

to its proposed requirement as applying if the decedent “chooses to die by suicide”, and says it is necessary to ensure a defendant is liable for suicide “only when the decedent had no control over his or her actions.” (Br. of Ford pp. 16-18). To the extent Ford is urging the Court to adopt a requirement that a plaintiff cannot recover if the decedent chose to die or voluntarily committed suicide, these concerns are already addressed by the general rule. Ford is essentially asking for an exception to the exception, and the Court should reject this circular argument.

Proof of the uncontrollable impulse exception already requires a plaintiff to present evidence the decedent acted involuntary because he could not control his actions. In response, a defendant will naturally argue the plaintiff acted voluntarily and could control his actions or attack the sufficiency of the plaintiff’s evidence. A jury will make the ultimate determination as to the decedent’s ability to control his actions. That the parties will present opposing views on these circumstances does not warrant a confusing burden of proof with an exception to an exception. Ford’s concern is already addressed by proof of the uncontrollable impulse exception.

To the extent Ford urges this Court to adopt a requirement that a plaintiff may not recover if the decedent knew his actions would result in death, this notion was properly rejected by the District Court. *Wickersham v. Ford Motor Co.*, 194 F. Supp. 3d 434, 445 (D.S.C. 2016) (“This shift away from the question of ‘insanity’ and toward the question of ‘control’ explains [] why a number of courts have liberally construed the uncontrollable impulse exception to apply in cases where the decedent understood, or even intended, his actions.”). The general rule is based on the voluntariness of the decedent’s conduct and not on the cognizance of his actions. Therefore, an exception to the rule is properly addressed to the question of control.

That a decedent may know his action will result in death does not negate the uncontrollable nature of the impulse to commit suicide. “It is evident that a person may know that he is destroying

himself while at the same time he is unable to control his physical acts. The suicide should not bar a claim notwithstanding it can be said that he knew the nature and consequences of his physical acts.” *Exxon Corp. v. Brecheen*, 526 S.W.2d 519, 524 (Tex. 1975); *see also Fuller v. Preis*, 322 N.E.2d 263, 267 (N.Y. 1974) (“In tort law, as contrasted with criminal law, there is recognition that one may retain the power to intend, to know, and yet to have an irresistible impulse to act and therefore be incapable of voluntary conduct.”); *R.D. v. W.H.*, 875 P.2d 26, 29 (Wyo. 1994) (“In tort law, there is a recognition that one may retain the power to intend and yet be subject to an irresistible impulse.” (internal quotation marks omitted)).

Further, the cases cited by Ford do not state the proposition it asks this Court to adopt and, further, none states it as a separate requirement of proof under the uncontrollable impulse exception. *See Kivland v. Columbia Orthopaedic Grp., LLP*, 331 S.W.3d 299, 309 (Mo. 2011) (discussing the various definitions of an “uncontrollable impulse” in reference to whether the decedent “knew what he was doing”, and rejecting the uncontrollable impulse test in favor of an ordinary proximate cause analysis); *Tate v. Canonica*, 180 Cal. App. 2d 898, 915 (Cal Ct. App. 1960) (“Some cases . . . take the view that if the decedent knew what he was doing, the suicide is an independent intervening cause. We think, in the light of modern knowledge as to mental illness, that *this view is too narrow. It should not make any difference that the decedent ‘knew what he was doing.’*” (emphasis added)); *Rodriguez v. Lee Marine Towing*, 1996 WL 20867 (E.D. La. 1996), *aff’d* 1996 U.S. App. LEXIS 43127 (5th Cir. 1996) (stating in a case in which the plaintiff did not argue suicide was the result of an uncontrollable impulse that “a rational, deliberate choice to commit suicide in order to end one’s pain and suffering is a superseding event”); *Porter v. Murphy*, 792 A.2d 1009, 1011, 1016 (Del. Super. Ct. 2001) (affirming as “a correct statement of law” a jury instruction that stated “if the negligence of the defendants only causes a mental

condition in which the injured person is able to realize the nature of the act of suicide; and *has the power to control it* if he so desires, the act then becomes an independent intervening force” (emphasis added)); *Richmond Hill v. Maia*, 800 S.E.2d 573, 577-78 (Ga. 2017) (stating the uncontrollable impulse exception “requires a showing that the suicide was a product of insanity, delirium, an uncontrollable impulse, *or* was accomplished without conscious volition to produce death” (emphasis added)); *Postell v. Am. Family Mut. Ins. Co.*, 823 N.W.2d 35, 41-44 (Iowa 2012) (discussing the intent of an insured to cause a loss to a home in a dispute regarding coverage under a fire insurance policy completely unrelated to recovery for wrongful death by suicide); *Sindler v. Litman*, 887 A.2d 97, 113 (Md. Ct. Spec. App. 2005) (stating the question for the jury is “whether [the decedent] was insane or delirious and that suicide resulted, not from her own voluntary conduct, but from lack of realization or an ‘uncontrollable impulse’ that was the product of insanity created by [the defendant]”); *McMahon v. St. Croix Falls Sch. Dist.*, 596 N.W.2d 875, 880 (Wis. Ct. App. 1999) (“[A]n exception to this general rule is when the defendant’s negligence or wrongful act creates in the deceased an uncontrollable impulse, a delirium, frenzy or rage, during which the deceased commits suicide without conscious volition to produce death.” (internal quotation marks omitted)). Some of the language cited by Ford is cherry-picked to suit its argument and the remainder only refers to a circumstance in which an irresistible impulse may not exist, i.e., when the suicide was voluntary and thus falls under the general rule. None of the cited cases support an additional requirement of proof as an exception to the exception. The Court should reject this argument.

E. South Carolina Recognizes the Uncontrollable Impulse Exception and Requires Proof that Some Injury was Foreseeability

For these reasons, the Court should answer the first certified question “Yes” and hold that under the uncontrollable impulse exception a plaintiff is required to prove some injury is foreseeable.

III. COMPARATIVE NEGLIGENCE DOES NOT APPLY AS A DEFENSE TO STATUTORY CAUSES OF ACTION FOR STRICT LIABILITY AND BREACH OF WARRANTY

The second certified question before this Court is whether the defense of comparative negligence applies to statutory causes of action for strict liability and breach of warranty. While this question arises in a crashworthiness case, the answer to the question applies equally to all product liability actions. This is because, although this is a crashworthiness case, the negligence alleged as to each party relates to the same product (the restraint system) and the same collision (the second collision with the defective product). Ford asserts a comparative negligence defense for product misuse in the same manner a defendant could assert such a defense in any product liability negligence action.

The jury in this case found the airbag was defective and caused Mr. Wickersham enhanced injuries. Ford argued Mr. Wickersham was comparatively negligence in his use of the airbag restraint system by being out-of-position, leaning towards the passenger seat, at the time of the collision such that the gear shift lever—not the airbag—caused his eye injuries. The jury found Ford 70% negligent and Mr. Wickersham 30% negligent. Plaintiffs argued throughout this case that comparative negligence applies as a defense only to a negligence cause of action and not to the claims for strict liability and breach of warranties.⁷ As the jury returned a verdict for Plaintiffs

⁷ The Order certifying this case incorrectly states “Wickersham argues that South Carolina law does not recognize comparative negligence as a defense in crashworthiness under any cause of action when the product defect caused enhanced injuries.” (Order p. 13). See Doc 31, Br. of

on all four causes of action, Plaintiffs may recover the full judgment amount without a reduction under strict liability or breach of warranties because the comparative negligence finding cannot operate to reduce the damages awarded under those causes of action.

This Court already answered the question now before it in *Donze v. General Motors, LLC*, 420 S.C. 8, 800 S.E.2d 479 (2017). In *Donze*, the Court addressed the certified question: “Does comparative negligence 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.* at 11, 800 S.E.2d at 480. It answered the question “No.” *Id.* at 12, 800 S.E.2d at 481. The question presented in *Donze* related to the crashworthiness nature of the case, *i.e.* fault in causing the initial collision versus fault in causing the enhanced injuries from the second collision with the defective product. This Court held “that comparative negligence does not apply to permit the negligence of another party—whether the plaintiff or another defendant—in causing an initial collision to reduce the liability of a manufacturer for enhanced injuries in a crashworthiness case.” *Id.* at 20, 800 S.E.2d at 485. In reaching its conclusion, this Court found (1) “strict liability and breach of warranty are statutory constructs as are the available defenses to these causes of action”, and (2) permitting “comparative negligence in crashworthiness actions brought under strict liability and breach of warranty theories would conflate those two distinct doctrines with ordinary negligence.” *Id.* at 19-20, 800 S.E.2d at 485. The District Court relied on those findings to reach its decision in this case.

The fact remains that strict liability and breach of warranty claims are “statutory constructs,” and as the *Donze* court recognized, the General Assembly has not added comparative fault as a defense under either statutory scheme. Similarly, it

Appellees, p. 41; JA 200, 576, 1876-77 (“[C]omparative negligence only goes – is only a defense to the negligence cause of action. It’s not a defense to strict liability and breach of warranty.”). Comparative negligence is a defense to a negligence action, with the caveat that in a crashworthiness case it applies only if the comparative negligence relates to the enhanced injuries.

would be just as “inconsistent” in this case to look to the plaintiff’s fault, while ignoring the manufacturer’s fault, as it would in any other.

Wickersham v. Ford Motor Co., 2017 WL 3783122, *50 (D.S.C. 2017) (quoting *Donze* 420 S.C. at 19, 800 S.E.2d at 485). These two principles apply directly to the second certified question in this case and require the Court to answer the question “No.”

A. The Defense of Comparative Negligence Does Not Apply to Statutory Causes of Action for Strict Liability and Breach of Warranties

“[B]oth strict liability and breach of warranty are statutory constructs as are the available defenses to these causes of action.” *Donze*, 420 S.C. at 19, 800 S.E.2d at 485 (citing S.C. Code Ann. §§ 15-73-10, -20 (2005); 36-2-314, -711 (2003)). “If the General Assembly intends for comparative negligence to constitute a defense under either of these theories, it is unquestionably capable of amending these statutory schemes accordingly.” *Donze*, 420 S.C. at 19, 800 S.E.2d at 485. That holding requires the Court to answer the question of whether a comparative negligence defense applies to strict liability and breach of warranty in the negative. It is equally true now that strict liability and breach of warranties are statutory causes of action with statutory defenses that do not include comparative negligence.

“In South Carolina, contributory negligence is an affirmative defense to an action for negligence. It has no application to an action based on breach of warranty or liability for a defective product.” *Wallace v. Owens-Illinois, Inc.*, 300 S.C. 518, 523, 389 S.E.2d 155, 157-58 (Ct. App. 1989) (citing *Imperial Die Casting*, 264 S.C. 604, 609, 216 S.E.2d 532, 534 (1975); S.C. Code Ann. § 15-73-30 (2005); Restatement (Second) of Torts § 402A, cmt. n.).

The General Assembly already determined the law and public policy of South Carolina is that a manufacturer is strictly liable for the damages caused by a defective product except when a plaintiff “discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product.” S.C. Code Ann. § 15-73-20 (2005). When this assumption-of-the-

risk defense applies, it is an absolute bar from recovery and not merely a matter of reducing a plaintiff's recovery by a percentage. *Id.*

When the General Assembly adopted strict products liability, it "adopted almost verbatim the rule enunciated in Restatement 402A and the 'Comments' to Section 402A as its legislative intent." *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 648, 300 S.E.2d 735, 736 (1983). Comment n to § 402A states: "Since the liability with which this Section [402A] deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies.⁸ ***Contributory negligence of the plaintiff is not a defense*** when such negligence consists merely in the failure to discover the defect in the product, or to guard against the possibility of its existence." § 402A cmt. n. (emphasis added). To prevail on a defense based on anything besides the plaintiff's actual knowledge of a defect under § 15-73-20, a defendant manufacturer must necessarily rely on the plaintiff's "failure to discover the defect in the product, or to guard against the possibility of its existence", which is prohibited by Comment n. § 402A cmt. n. For example, in this case, Ford's comparative negligence defense that Mr. Wickersham was out-of-position is an argument that he should have guarded against the possibility of a defective airbag. The General Assembly only allows a defense to strict liability based on a plaintiff's conduct when the defendant manufacturer proves the plaintiff's actual knowledge of a defect.⁹ By expressly adopting this defense, the General Assembly is presumed to have

⁸ Restatement (Second) of Torts § 524 relates to strict liability for abnormally hazardous activity. Comment a. to § 524 confirms that because "[s]trict liability . . . is not founded on [a defendant's] negligence, the ordinary contributory negligence of the plaintiff is not a defense."

⁹ This is consistent with the fact that "[t]he modern products liability tort action is premised on the concept that the cost of injuries which flow from a 'product defect' should be borne by the manufacturer or seller rather than the ultimate user." *Fleming v. Borden*, 316 S.C. 452, 456, 450 S.E.2d 589, 592 (1994)."

intended to exclude a comparative negligence (constructive knowledge) defense. *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (“The canon of construction ‘expressio unius est exclusio alterius’ or ‘inclusio unius est exclusio alterius’ holds that to express or include one thing implies the exclusion of another, or of the alternative.” (internal quotation marks omitted)). Applying the plain language used by the General Assembly, either a manufacturer is strictly liable or a plaintiff is barred from recovery.

This Court consistently refuses to judicially alter the plain language of the strict liability statute. See *Donze v. General Motors, LLC*, 420 S.C. 8, 22, 800 S.E.2d 479, 486 (2017) (“[T]o extend *Tobias* and *Lydia* to bar intoxicated plaintiffs from bringing strict liability or breach of warranty actions would have the effect of adding an impaired plaintiff exception to these statutory causes of action, which exceeds this Court’s authority.”); *Bray v. Marathon Corp.*, 356 S.C. 111, 117 n.6, 588 S.E.2d 93, 96 n.6 (2003) (finding the court is “without authority” to apply the bystander analysis to a strict liability cause of action because “If the Act is to be amended so as to provide for the requirement of a close relationship in the context of a strict liability cause of action, this must be accomplished by the legislature, not the court.”); *Stanley v. B.L. Montague Co.*, 299 S.C. 51, 56, 382 S.E.2d 246, 249 (1989) (“[T]he defense of completion and acceptance is inconsistent with the statute providing that sellers of defective products are strictly liable for physical harm caused to the ultimate users of the products or to their property.”). It should follow precedent and refuse to apply a common law defense to statutory causes of action subject only to statutory defenses.

Ford incorrectly asserts that the Uniform Contribution Among Tortfeasors Act (“the Act”) applied comparative negligence to “all claims for personal injury”, including strict liability and breach of warranty. (Br. of Ford pp. 25-26). This Court already rejected that notion in *Donze* when

it wrote that some states “have statutes which require the application of comparative fault analysis in *all* personal injury actions, regardless of the cause of action or the theory of liability under which they are brought” but did not include South Carolina among those states. 420 S.C. at 14, 800 S.E.2d at 482. The Act “abrogated pure joint and several liability for tortfeasors who are less than fifty percent at fault.” *Smith v. Tiffany*, 419 S.C. 548, 552-53, 799 S.E.2d 479, 481 (2017). Apportionment of negligence does not apply to all personal injury actions but only those in which “indivisible damages are determined to be proximately caused by *more than one defendant*.” S.C. Code Ann. § 15-38-15(A) (2005) (emphasis added). Apportionment under the Act does not apply to this case because it involves only one defendant. A product liability action is frequently asserted against one defendant. This alone shows the fallacy of Ford’s argument. The General Assembly intended the Act to change the rules of joint and several liability in cases involving multiple defendants and not to abolish the no-fault basis of strict liability and breach of warranty.

The Act also did not change the law that comparative negligence is an affirmative defense only to a negligence action. In multiple cases decided after the passage of the Act, our Courts followed the law that comparative negligence is a defense only to a negligence action. *See, e.g., Berberich v. Jack*, 392 S.C. 278, 286, 709 S.E.2d 607, 611 (2011) (“[U]nder comparative negligence a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant.” (internal quotation marks omitted)); *Ritter & Assocs. v. Buchanan Volkswagen, Inc.*, 405 S.C. 643, 651, 748 S.E.2d 801, 805 (Ct. App. 2013) (“[U]nder South Carolina law, the doctrine of comparative negligence is only applicable to cases alleging negligence as a cause of action.”). This is consistent with the language of the Act, which refers to “comparative negligence” each time it refers to the plaintiff. The first time the plaintiff is mentioned, the Act states “the fault (*comparative negligence*), if any, of plaintiff.” S.C. Code Ann.

§ 15-38-15(A)(ii) (emphasis added). Each subsequent time the apportionment section of the Act references the plaintiff, it refers back to section (A)(ii), *see* § 15-38-15(C)(3), and states the jury shall determine the plaintiff's "fault, if any, . . . under applicable rules concerning 'comparative negligence'." § 15-38-15(C)(2).

The General Assembly's use of the term "comparative negligence" for each reference to a plaintiff demonstrates that it intended to maintain existing law that comparative negligence of a plaintiff is a defense to a negligence action. If the General Assembly intended to supplant decades-old product liability law, it would have plainly stated that change. *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 538, 393 S.E.2d 162, 163-64 (1989) (stating courts "cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret."). To construe the Act to apply a comparative negligence defense to strict liability and breach of warranty would create an irreconcilable conflict with the language of the statutes creating and defining those causes of action "and would be inconsistent with this Court's obligation to harmonize statutory schemes whenever such a construction is consistent with legislative intent." *Machin v. Carus Corp.*, 419 S.C. 527, 546, 799 S.E.2d 468, 478 (2017). Further, for § 15-38-15 to apply, the plaintiff must allege the defendant is at "fault", and, as discussed in detail below, strict liability and breach of warranty are no-fault actions.

Ford's argument that the Act applies comparative negligence to all personal injury actions is also contrary to existing law that comparative negligence does not apply to intentional torts such as false imprisonment or intentional infliction of emotional distress, *see Berberich v. Jack*, 392 S.C. 278, 293 n.3, 709 S.E.2d 607, 615 n.3 (2011) (stating that intentional conduct may not be compared to negligence in any form), and that it does not apply to strict liability in other areas of

the law, see *Harris v. Anderson Cnty. Sheriff's Office*, 381 S.C. 357, 366, 673 S.E.2d 423, 427 (2009) (“Our Legislature has spoken clearly in section 47-3-110 that, as concerns a dog owner’s liability, negligence principles in general and fault in particular have no place.”); *Wallace v. A.H. Guion & Co.*, 237 S.C. 349, 355, 117 S.E.2d 359, 361 (1960) (holding a defendant is strictly liable for abnormally dangerous activities, such as the use of explosives, “without allegation and proof of negligence”). This illustrates that it is the nature of the cause of action that determines whether comparative negligence is an affirmative defense and not, as Ford argues, the nature of the injury.

The Court should answer the question before it “No” based on the principle that strict liability and breach of warranty are statutory causes of action subject only to statutory defenses.

B. The Fault-based Comparative Negligence Defense Does Not Apply to No-Fault Causes of Action for Strict Liability and Breach of Warranties

“[T]o permit comparative negligence in crashworthiness actions brought under strict liability and breach of warranty theories would conflate those two distinct doctrines with ordinary negligence.” *Donze*, 420 S.C. at 19-20, 800 S.E.2d at 485 (citing *Smith v. Smith*, 278 N.W.2d 155, 160 (S.D. 1979) (holding that, due to the unique nature of strict liability and breach of warranty actions where the conduct of the manufacturer is irrelevant in determining liability, it would be “inconsistent to hold that the user’s negligence is material when the seller’s is not”)).¹⁰ That principle directly applies to the second certified question and also necessitates that the Court answer the question “No.” A contrary finding would ignore and eliminate the distinct and important differences between a negligence action and strict liability and breach of warranty.

¹⁰ The *Donze* Court’s citation to *Smith* supports Plaintiffs’ position. *Smith* holds “that the plaintiff’s or the defendant’s negligence is irrelevant and contributory negligence is not a defense in strict liability.” 278 N.W.2d at 160-61. The *Smith* Court explained, “Strict liability is an abandonment of the fault concept in product liability cases. No longer are damages to be borne by one who is culpable; rather they are borne by one who markets the defective product.” *Id.* at 160.

“In a product liability action the plaintiff must establish three things, regardless of the theory on which he seeks recovery: (1) that he was injured by the product; (2) that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant; and (3) that the injury occurred because the product was in a defective condition unreasonably dangerous to the user.” *Madden v. Cox*, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985). These are the only elements of proof for a strict liability claim. A breach of warranty claim requires proof of the warranty and its breach. S.C. Code Ann. § 36-2-314, cmt. 13 (2003). Neither strict liability nor breach of warranty require proof of the manufacturer’s fault.

“However, under a negligence theory, the plaintiff bears the additional burden of demonstrating the defendant (seller or manufacturer) failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault.” *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995). “This burden may be met by showing that the manufacturer was aware of the danger and failed to take reasonable steps to correct it.” *Madden*, 284 S.C. at 580, 328 S.E.2d at 112. In contrast, a manufacturer is strictly liable “although [it] has exercised all possible care in the preparation and sale of his product.” S.C. Code Ann. § 15-73-10; *see also Fleming v. Borden*, 316 S.C. 452, 457, 450 S.E.2d 589, 593 (1994) (referring to “the ‘no fault’ ‘strict liability’ setting of the mode[m] products case”).

Ford argues that, because a negligence product liability action requires a plaintiff to prove the elements of strict liability and breach of warranty,¹¹ those claims would always exist and comparative negligence will never apply. (Br. of Ford p. 28). It also argues that there is no

¹¹ This is incorrect as to breach of warranty because it requires the additional elements of proof of the existence of a warranty and its breach.

justification for permitting a negligent defendant to use the defense while prohibiting a non-negligent defendant from asserting it. (Br. of Ford p. 27). Ford ignores that there are logical differences in the theories of recovery for each cause of action and, therefore, reasons why our General Assembly and Judiciary have maintained separate causes of action and why a plaintiff may choose one over another.

Punitive damages are recoverable only in a negligence action. “[P]unitive damages are not recoverable under the” strict product liability statute. *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 537, 393 S.E.2d 162, 163 (1989). In a breach of warranty action, recovery is limited “to actual, incidental, and consequential damages.” *Rhodes v. McDonald*, 345 S.C. 500, 504, 548 S.E.2d 220, 222 (Ct. App. 2001). This distinction is significant, as recognized by Ford at trial when it asked the District Court to instruct the jury “the black letter law of punitives aren’t available under the strict liability” action. (JA 1687). Ford would like to implant a negligence concept into all product liability causes of action by applying comparative negligence as a defense to reduce its liability while retaining the benefits of the no-fault character of strict liability and breach of warranty to avoid exposure to punitive damages. This contrary assertion demonstrates the fallacy of Ford’s position and that adopting it would result in a wholesale judicial change to product liability law and procedure as it exists in South Carolina. A decision applying comparative negligence to strict liability would essentially eliminate the cause of action because a plaintiff would not only be unable to seek punitive damages but would also be forced to prove the negligence of the defendant to defend himself; as a result, he would have no logical basis for pursuing strict liability as opposed to negligence. Further, such a decision is contrary to the basis of strict liability “that the cost of injuries which flow from a ‘product defect’ should be borne by the manufacturer or seller rather than the ultimate user” because it places a higher burden on a

plaintiff while decreasing a manufacturer's liability. *Fleming v. Borden*, 316 S.C. 452, 456, 450 S.E.2d 589, 592 (1994). In South Carolina, a negligent defendant is subject to the risk of punitive damages and, thus, permitting the defense of comparative negligence to a negligent defendant while prohibiting its use by a non-negligent defendant is justified and logical.

An additional distinction is that a warranty action is based in contract, not tort. Therefore, when a defective product injures only itself, resulting in purely economic loss, a plaintiff may not recover under negligence or strict liability tort theories but only under a breach of warranty. See *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009) ("Accordingly, where a product damages only itself, tort law provides no remedy and the action lies in contract; but when personal injury or other property damage occurs, a tort remedy may be appropriate."). It would be doctrinally inconsistent to apply a tort-based comparative negligence defense to a contract cause of action.

The Court should answer the question before it "No" based on the principle that strict liability and breach of warranty are no-fault causes of action in which the manufacturer's conduct is irrelevant and, therefore, it is inconsistent to consider a plaintiff's conduct while ignoring the manufacturer's conduct.

C. Footnote 4 in the Donze Opinion is Consistent with Plaintiffs' Position

The language used in footnote 4 of *Donze* is a source of apparent confusion. However, Ford simply misinterprets the footnote and its application to the present case. The following is the language at issue:

We note, as did the district court in *Jimenez I*, that "[c]omparative negligence related to the [defective component] itself—tying [a door] shut for example—could still be a defense, if a factual basis existed"

Donze, 420 S.C. at 20 n.4, 800 S.E.2d at 485 n.4 (alteration in original) (quoting *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548, 566 n.11 (D.S.C. 1999)). Plaintiffs agree that comparative

negligence related to the defective component could still be a defense *to a negligence action*. The footnote is consistent with Plaintiffs' position that comparative negligence related to the defective component is a defense to a negligence action but not to strict liability or breach of warranty. For example, if the jury in this case returned a punitive damages verdict, Plaintiffs may have chosen to proceed under a negligence action with a reduction for comparative negligence to receive the punitive damages and then this issue would not be before the Court.

The footnote is not as broad as Ford argues. Rather, when read in conjunction with the Court's analysis and in light of the fact that *Jimenez I* "was brought under a negligence theory—as opposed to strict liability and breach of warranty claims"—it is apparent the footnote merely states that comparative negligence remains a defense to negligence in a crashworthiness case if the alleged comparative negligence relates to the defective component. *Donze*, 420 S.C. at 20, 800 S.E.2d at 485.

D. Ford Incorrectly Interprets the Donze Opinion

Ford incorrectly interprets two additional aspects of *Donze*—(1) that the Court did not expressly rule on the issue of whether comparative negligence applies to strict liability and breach of warranty and (2) that Justice Kittredge wrote a concurring opinion.

First, Ford posits that this Court could have held in *Donze* that comparative negligence never applies to strict liability and breach of warranty rather than analyzing the case under the crashworthiness doctrine. (Br. of Ford p. 22). According to Ford, that the Court did not do that "suggests" that comparative negligence applies to strict liability and breach of warranty. *Id.* This is incorrect. Had the *Donze* Court decided only whether comparative negligence applies to strict liability and breach of warranty actions, the question would remain whether, in a crashworthiness case, the plaintiff's negligence in causing the initial collision may reduce the manufacturer's

liability for enhanced injuries. The *Donze* Court limited its analysis to the certified question before it, which necessitated an answer in the context of crashworthiness. *See Donze*, 420 S.C. at 20 n.4, 800 S.E.2d at 485 n.4 (“Our ruling today is limited to the certified questions before us . . .”).

Second, Ford incorrectly argues that Justice Kittredge’s concurrence supports its position. (Br. of Ford p. 22). Justice Kittredge concurred to address the possible factual scenario that a defendant may argue the initial collision caused some of the plaintiff’s enhanced injuries, *i.e.*, that the injuries from the initial collision and second collision are not divisible.¹² *Donze*, 420 S.C. at 24-25, 800 S.E.2d at 487-88 (Kittredge, J., concurring). Whether a defendant is “entitled to present evidence” that the initial collision caused the plaintiff’s alleged “enhanced injuries” is a different issue from whether a plaintiff’s comparative negligence is a defense to strict liability and breach of warranty such that it reduces the plaintiff’s recovery. *Id.* at 24, 800 S.E.2d at 487.

The crashworthiness doctrine is based on the premise that the injuries caused in the initial collision and the second collision with the defective component are divisible. A plaintiff in a crashworthiness case is responsible for proving the injuries caused by the second collision and separating them from the injuries caused by the initial collision. A manufacturer may defend by arguing the plaintiff failed to meet his burden of proof or with evidence that the initial collision and not the second collision with the defective part caused the injuries. *See Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548, 566 (D.S.C. 1999), *rev’d on other grounds by Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439 (4th Cir. 2001), (“[D]efendant is liable only for the increased injury caused by its own conduct and not for the injury resulting from the crash itself.”). The jury

¹² The concurrence is consistent with Justice Kittredge’s question at oral argument as to whether a defendant is permitted to dispute the plaintiff’s allegations as to what caused the enhanced injuries. (Video of Oral Argument, 11:22-12:24, <http://media.sccourts.org/videos/2016-001437.mp4>, accessed Oct. 17, 2018).

will determine which of a plaintiff's injuries resulted from the initial collision and which resulted from the second collision.

However, this framework of proof is not relevant to the question now before the Court. The issue before this Court relates to the nature of the causes of action and not to proof of what caused the injuries. That a defendant may dispute the cause of the enhanced injuries does not mean that comparative negligence is an affirmative defense to strict liability and breach of warranty.

E. The General Assembly's Adoption of Strict Liability and Breach of Warranty Negates Ford's Arguments as to Proximate Cause and Public Policy

"The doctrine of strict products liability in tort was created to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Purvis v. Consolidated Energy Products Co.*, 674 F.2d 217, 219 (4th Cir. 1982) (internal quotation marks omitted). Ford's proximate cause and public policy argument¹³ that the General Assembly's adoption of no-fault strict liability and breach of warranty absolve a plaintiff of his own negligence are simply disagreements with the public policy of South Carolina as enacted by the General Assembly in adopting those causes of action. (Br. of Ford pp. 29-32). Strict liability and breach of warranty causes of action protect consumers by permitting a plaintiff to recover without proving negligence while balancing a manufacturer's interest with a prohibition on punitive damages. See *Purvis*, 674 F.2d at 219 ("By shifting certain product-related losses from consumers and users to manufacturers, the doctrine both promotes fairness and provides manufacturers with a disincentive to market unreasonably dangerous products."). Comment c. to Restatement (Second) of Torts §

¹³ Ford cites to the California case of *Daly v. Gen. Motors Corp.*, 144 Cal. Rptr. 380 (1978), for its public policy argument. (Br. of Ford pp. 31-32). This Court specifically considered *Daly* in reaching the *Donze* decision and declined to rely on its reasoning. *Donze*, 420 S.C. at 14-15, 800 S.E.2d at 482. Further, it is significant that California judicially adopted strict liability whereas South Carolina legislatively adopted it.

402A, adopted by the General Assembly as its legislative intent, states “public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.” If this Court were to adopt Ford’s position, it would overturn the public policy announced by the General Assembly. *See Creech v. South Carolina Public Serv. Auth.*, 200 S.C. 127, 146, 20 S.E.2d 645, 652 (1942) (“The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the Courts to construe, not to make, the laws.”).

Given that the General Assembly enacted no-fault, statutory causes of action for strict liability and breach of warranty without permitting comparative negligence as a defense, this Court should not pronounce public policy to the contrary by applying judicial proximate cause law

F. Comparative Negligence Does Not Apply to Strict Liability and Breach of Warranty

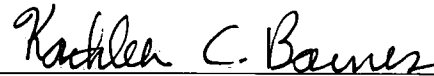
For these reasons, the Court should answer the second certified question “No”.

CONCLUSION

The Court should answer the first part of the first certified question “Yes” and answer the second part of the first certified question by finding that under the uncontrollable impulse exception a plaintiff is required to prove some injury is foreseeable. The Court should answer the second certified question “No”.

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