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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Paul V. Niemeyer, Diana G. Motz, and Henry F. Floyd, Judges for the United States Court of Appeals for the Fourth Circuit

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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.

PLAINTIFFS' BRIEF IN REPLY TO BRIEF OF ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. *AS AMICUS CURIAE*

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INTRODUCTION

Plaintiffs incorporate the Statement of the Case section in their main Brief.

ARGUMENT

I. COMPARATIVE NEGLIGENCE DOES NOT APPLY AS A DEFENSE TO STATUTORY CAUSES OF ACTION FOR STRICT LIABILITY AND BREACH OF WARRANTY[1]

For brevity, Plaintiffs incorporate as to this issue the argument made in their main Brief. Plaintiffs respond here only to some specific assertions and arguments of the Alliance of Automobile Manufacturers, Inc. ("the Manufacturers").

Manufacturers misstate the issue before the Court and Plaintiffs' argument made throughout this litigation. Plaintiffs do not argue that a plaintiff's conduct that contributes to his enhanced injuries in a crashworthiness case is precluded from the jury's consideration. The issue before the Court is whether such conduct operates to reduce the defendant's liability in statutory strict liability and breach of warranties actions. The answer is "No", comparative negligence does not apply as a defense to statutory causes of action for strict liability and breach of warranty. Nothing the Manufacturers argue changes the fact that "both strict liability and breach of warranty are statutory constructs as are the available defenses to these causes of action." *Donze v. General Motors, LLC*, 420 S.C. 8, 19, 800 S.E.2d 479, 485 (2017).

Ford and the Manufacturers insist on ignoring the fact that, under existing South Carolina law, juries are "permitted to allocate fault among those responsible for the harm." (Br. of Manuf. p. 3). In this case, the jury was not "blindfold[ed]" but heard evidence and argument as to the cause of Mr. Wickersham's enhanced injuries. (Br. of Manuf. pp. 2, 5). However, a finding that a plaintiff acted negligently and such negligence contributed to his injuries operates to reduce a

[1] For ease of reference for the Court, Plaintiffs reply to the arguments in the order used by the Manufacturers, first addressing the second certified question.

manufacturer's liability under only a negligence action and not under strict liability or breach of warranty actions. That is the law of South Carolina as enacted by the General Assembly. S.C. Code Ann. §§ 15-73-10, -20 (2005), § 36-2-314, -711 (2003).

The Manufacturers' disagreement with South Carolina laws should be directed to the General Assembly and not this Court. "If the General Assembly intends for comparative negligence to constitute a defense under either of these [strict liability or breach of warranty] theories, it is unquestionably capable of amending these statutory schemes accordingly." *Donze*, 420 S.C. at 19, 800 S.E.2d at 485 (emphasis added). In writing this sentence, this Court plainly stated that comparative negligence is ***not*** a defense to strict liability or breach of warranty. Otherwise, it would not be necessary to use the word "If" and say the General Assembly may amend the statutes to make comparative negligence a defense. The Court need go no further than the principles stated in *Donze* to conclude that comparative negligence is not a defense to strict liability and breach of warranty.

The Manufacturers cite to law from other states to support its position. It is not necessary to look to other jurisdictions when the issue is resolved by applying the plain language of South Carolina statutes. Regardless, South Carolina is the only state that legislatively adopted strict liability and judicially adopted modified comparative negligence. Therefore, there is not an analogous state for this Court to look to in resolving the issue before it. The Court should apply the strict liability and breach of warranty statutes as written—without application of a comparative negligence defense.

Manufacturers cite to Florida for the assertion that a decision in Plaintiffs' favor will open the floodgates of litigation. (Br. of Manuf. pp. 4-5). Florida's product liability law cannot be compared to South Carolina. In South Carolina, the General Assembly legislatively adopted strict

liability; whereas, in Florida, the courts judicially adopted strict liability. *See* S.C. Code Ann. § 15-73-10; *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 89 (Fl. 1976). Therefore, in South Carolina, our Courts are limited to interpreting rather than changing the nature of strict liability and breach of warranty. In addition, Florida enacted pure comparative negligence by statute, whereas South Carolina judicially enacted modified comparative negligence. *Compare* Fla. Stat. § 768.80(2), *with Nelson v. Concrete Supply Co.*, 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991). Finally, the Florida pure comparative negligence statute specifies that it applies to "a civil action for damages based upon a theory of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories." Fla. Stat. § 768.81. Whereas, "South Carolina has no statutory mandate to apply comparative negligence in crashworthiness cases based upon theories of strict liability and breach of warranty." *Donze v. General Motors, LLC*, 420 S.C. 8, 19, 800 S.E.2d 479, 485 (2017). South Carolina's only statute addressing comparative negligence applies solely to actions with numerous defendants and is not a statutory enactment of comparative negligence but, instead, an abrogation of joint and several liability. S.C. Code Ann. § 15-38-15 (2005); *Smith v. Tiffany*, 419 S.C. 548, 552-53, 799 S.E.2d 479, 481 (2017). As the Manufacturers note, after the Florida Supreme Court issued its ruling, the legislature acted to change the effect of the Court's decision. Any change to South Carolina's statutory causes of action must come from the General Assembly.

The Manufacturers also cite to New Jersey law to argue that some jurisdictions hold accident-causing conduct irrelevant but permit a plaintiff's negligence to reduce a manufacturer's liability. (Br. of Manuf. p. 5). New Jersey's law cannot be compared to South Carolina. New Jersey legislatively adopted comparative negligence. N.J.S.A. § 2A:15-5.1 (1982). New Jersey's product liability statute does not impose strict liability but states a burden of proof, N.J.S.A. §

2A:58C-2 (1987), applicable to a "'Product liability action' [defined as] any claim or action brought by a claimant for harm caused by a product, ***irrespective of the theory underlying the claim***, except actions for harm caused by breach of an express warranty." N.J.S.A. § 2A:58C-1 (1987) (emphasis added). Therefore, New Jersey law is not instructive as to whether comparative negligence applies to strict liability or breach of warranty in South Carolina.

Manufacturers incorrectly state that "Design defect and breach of warranty claims are fault-based theories." (Br. of Manuf. p. 7). In South Carolina, the concept of fault in product liability is limited to a negligence action, regardless of whether the underlying defect theory is design defect, manufacturing defect, or failure-to-warn defect. Unlike statutory causes of action for strict liability or breach of warranty, "[a] negligence theory imposes the ***additional*** burden on a plaintiff 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***." *Branham v. Ford Motor Co.*, 390 S.C. 203, 210, 701 S.E.2d 5, 9 (2010) (internal quotation marks omitted) (emphasis added). "The negligence claim must have a fault-based element, which is not required for a strict liability claim." *Id.* at 211, 701 S.E.2d at 9; *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[rn] products case"). Strict liability and breach of warranty are not fault-based theories, and the Manufacturers do not cite to a single South Carolina authority for their assertion to the contrary.

A strict liability action focuses on the product rather than the manufacturer's conduct. That a plaintiff must prove the defect in the product does not make strict liability or breach of warranty a fault-based theory. (Br. of Manuf. p. 8). "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). The balance our General Assembly struck by adopting strict liability is that a plaintiff may recover without proof of the manufacturer's fault but that recovery does not include punitive damages and is subject to an absolute bar if the 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. This does not make an automaker liable for an injury it did not cause. Rather, it balances protections for consumers and manufacturers.

The Manufacturers argue that not applying comparative negligence to strict liability and breach of warranty may result in a party being liable "for harm it did not cause." (Br. of Manuf. pp. 9-10). That result already exists in our law to the advantage of a defendant. South Carolina uses modified comparative negligence. "[A] plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant. The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence." *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991). Under modified comparative negligence, a defendant who is 49% at fault in causing the plaintiff's harm is absolved of all liability. Thus, a plaintiff is held liable for harm it did not cause. The Manufacturers ignore the protections that already exist for defendants and the practical application of South Carolina law.

Further, our General Assembly already expressed the public policy of South Carolina is that, under strict liability, a manufacturer is responsible for the harm caused by its product. The General Assembly adopted the comments to Restatement (Second) of Torts § 402A. S.C. Code Ann. § 15-73-30 (2005) ("Comments to § 402A of the Restatement of Torts, Second, are

incorporated herein by reference thereto as the legislative intent of this chapter."). Comment c. states, in part:

> [P]ublic 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.

Restatement (Second) of Torts § 402A cmt. c. This expressly adopted public policy negates the Manufacturers' responsibility and fairness arguments. Any disagreement with this public policy is properly directed at the General Assembly rather than this Court.

Based on this Court's statements in *Donze* and the arguments in Plaintiffs' main Brief and above, the Court should answer the second certified question "No."

II. SOUTH CAROLINA RECOGNIZES THE UNCONTROLLABLE IMPULSE EXCEPTION TO THE GENERAL RULE THAT SUICIDE BREAKS THE CHAIN OF CAUSATION FOR A WRONGFUL DEATH CLAIM AND SUCH EXCEPTION APPLIES EQUALLY TO AUTOMAKERS

Plaintiffs incorporate as to this issue the argument made in their main Brief. Plaintiffs respond here only to some specific assertions and arguments of the Manufacturers.

The Manufacturers' argument as to the first certified question essentially asks this Court to hold that automakers specifically are not liable for wrongful death by suicide.[2] They do not argue against the uncontrollable impulse exception and do not argue for the foreseeability exception proposed by Ford. The Manufacturers acknowledge the uncontrollable impulse exception but argue they do "not fall within" it because they "have not engaged in conduct intended to bring about severe emotional distress that results in suicide." (Br. of Manuf. p. 14). That is an issue for a jury to decide.

[2] The first certified question does not ask if the uncontrollable impulse exception applies to automakers. It asks if the exception is recognized in South Carolina as law equally applicable to all defendants.

Corporations, including automakers, routinely ask for a jury instruction that the jury must treat a corporation the same as an individual defendant. In this case, Ford asked for and received the following instruction: "A corporation and all other persons are equal before the law and must be treated as equals in this Court. You should therefore decide this case with the same impartiality you would use in deciding a case between individuals." (JA 659). An automaker is treated the same as an individual under the law. Therefore, if an individual may be liable for causing an injury that results in a suicide, then an automaker may also be liable for the same.

Further, the Manufacturers provide no argument as to why a product manufacturer should escape liability for suicide when other individual and corporate defendants are civilly liable for causing physical harm to a decedent that causes him to have an uncontrollable impulse to commit suicide. *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 county failed to fix a road washout and decedent suffered severe facial injuries in a car accident, followed by suicide attempts and a fatal overdose). There is no legal or logical basis for exempting automakers from liability that applies to other defendants.

That a manufacturer may "have no knowledge of an individual driver's mental condition [and] cannot refuse to sell cars to individuals with such challenges" is not a basis to carve out automakers as exempted from liability for wrongful death by suicide. (Br. of Manuf. p. 14-15). As discussed in Plaintiffs' main brief, accepting this argument would essentially overturn the law on foreseeability of third party medical malpractice and the eggshell plaintiff. Under the eggshell plaintiff rule, there is no requirement that a defendant has knowledge of an individual's condition. Rather, "[t]he 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). The Manufacturers' attempt to obtain specialized law for automakers should be rejected as contrary to South Carolina law.

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.

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".

Respectfully submitted,

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