The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
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N O T I C E

In the Matter of Cynthia Collie

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on June 22, 2017, beginning at 3:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

May 15, 2017

[1] The date and time for the hearing are subject to change. Please contact the Office of Bar Admissions Office at the Supreme Court to confirm the scheduled time and date.

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N O T I C E

In the Matter of John William Harte

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

The Committee on Character and Fitness has now scheduled a hearing in this regard on June 22, 2017, beginning at 4:00 pm, in the Courtroom of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.[1]

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

May 15, 2017

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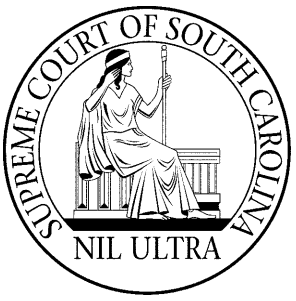

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 20
May 17, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Reid Harold Donze, Plaintiff,

v.

General Motors, LLC, Defendant.

Appellate Case No. 2016-001437

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
Timothy M. Cain, United States District Judge

Opinion No. 27719
Heard January 11, 2017 – Filed May 17, 2017

CERTIFIED QUESTIONS ANSWERED

Ronnie L. Crosby and Austin H. Crosby, both of Peters, Murdaugh, Parker, Eltzroth & Detrick, of Hampton; Bert G. Utsey, III, of Peters, Murdaugh, Parker, Eltzroth & Detrick, of Walterboro; S. Kirkpatrick Morgan, Jr. and Charles T. Slaughter, both of Walker & Morgan, LLC, of Lexington; and Kathleen C. Barnes, of Barnes Law Firm, LLC, of Hampton, all for Plaintiff.

Joel H. Smith, Angela G. Strickland and Kevin J. Malloy, all of Bowman & Brooke, LLP, of Columbia; David G. Owen, of Law Center, of Columbia; John M.

Thomas and Jill M. Wheaton, both of Dykema Gossett, of Ann Arbor, Michigan; and Michael P. Cooney, of Dykema Gossett, PLLC, of Detroit, Michigan, all for Defendants.

Henry B. Smythe, Jr. and Dana W. Lang, both of Womble Carlyle Sandridge & Rice, LLP, of Charleston, for Amicus Curiae, The Products Liability Advisory Council, Inc..

Steve A. Matthews, of Haynsworth Sinkler Boyd, PA, of Columbia; Phil Goldberg and Victor E. Schwartz, both of Shook, Hardy & Bacon, LLP, of Washington, DC, for Amicus Curiae, Alliance of Automobile Manufacturers, Inc..

JUSTICE HEARN: This case concerns the applicability of comparative negligence to strict liability and breach of warranty claims in a crashworthiness case brought by Plaintiff Reid Harold Donze against Defendant General Motors ("GM"). District Judge Timothy M. Cain of the United States District Court for the District of South Carolina certified two questions to this Court addressing the defenses available to a manufacturer in crashworthiness cases brought under strict liability and breach of warranty theories. We hold the defense of comparative negligence does not apply in crashworthiness cases, and that South Carolina's public policy does not bar a plaintiff, allegedly intoxicated at the time of the accident, from bringing a crashworthiness claim against the vehicle manufacturer.

FACTUAL/PROCEDURAL HISTORY

In November of 2012, Donze and his friend, Allen Brazell, were driving around Greenville County in Donze's 1987 Chevrolet pickup truck. Although in dispute, there is evidence—including deposition testimony from Donze himself—indicating Brazell and Donze had been smoking synthetic marijuana earlier that morning. While Brazell was driving,[1] they came to an intersection controlled by a

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[1] We note that at the time of the accident, Brazell was the driver and Donze was the passenger. GM argues Brazell's negligence should be imputed to Donze because they were engaged in a joint enterprise to smoke marijuana and drive while under the influence. Since this factual issue is outside the scope of the questions certified to this Court, for the purposes of this opinion we treat Brazell's negligence as that of Donze's.

stop sign. Brazell failed to stop and pulled directly in front of a Ford F-350 truck towing a horse trailer. Unable to stop, the Ford struck Donze's truck on the driver's side, and the truck burst into flames. Brazell died as a result of the fire, and Donze suffered severe burns to eighty percent of his body.

Donze filed this crashworthiness action against GM, alleging a defect in the truck's design—specifically, the placement of the gas tank outside of the truck's frame—caused the fire, and seeking damages only for his enhanced burn injuries.[2] GM filed a motion for summary judgment arguing Donze should be barred from recovery pursuant to South Carolina's public policy against driving while impaired. In the alternative, GM asserted comparative negligence should apply to limit Donze's recovery. Judge Cain denied GM's motion and certified two questions to this Court.

CERTIFIED QUESTIONS

I. 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?

II. Does South Carolina's public policy bar impaired drivers from recovering damages in a crashworthiness case when the plaintiff alleges claims of strict liability and breach of warranty?

STANDARD OF REVIEW

When a certified question raises a novel question of law, this Court is free to answer the question "based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right." *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008).

LAW/ANALYSIS

I. COMPARATIVE NEGLIGENCE IN CRASHWORTHINESS CASES

Donze argues comparative negligence is inapplicable in crashworthiness cases where the plaintiff is only seeking recovery of the enhanced injuries caused by the alleged defect. In particular, Donze asserts that in crashworthiness cases, the

[2] Donze's injuries from the initial impact were limited to a fractured rib and hip bones.

damages from the initial collision and those caused by the alleged design defect are divisible. In other words, according to Donze, the enhanced injuries are a subsequent and separate event, the *sole* cause of which is the manufacturer's defective design. Therefore, any negligence on the part of the plaintiff in causing the *initial* collision is irrelevant. We agree for the reasons set forth below, and therefore answer this first certified question, "no."

This Court first adopted the crashworthiness doctrine in *Mickle v. Blackmon*, 252 S.C. 202, 243, 166 S.E.2d 173, 192 (1969). In *Mickle* we recognized the high frequency of roadway accidents is common knowledge such that "an automobile manufacturer knows with certainty that many users of his product will be involved in collisions, and that the incidence and extent of injury to them will frequently be determined by the placement, design and construction of [the vehicle's] components . . . ." 252 S.C. at 230, 166 S.E.2d at 185. Therefore, we held vehicle manufacturers have a duty "to take reasonable precautions in the light of the known risks, balancing the likelihood of harm, and the gravity of harm if it should happen, against the burden of feasible precautions which would tend to avoid or minimize the harm." *Id.* at 243, 166 S.E.2d at 192.

Although South Carolina has not yet addressed whether comparative negligence may be raised as a defense in crashworthiness cases, a number of other jurisdictions have considered this question and reached differing results. We are aware of twenty-two states which have resolved this issue either statutorily or through case law. Of those, sixteen states permit a comparative fault analysis to reduce a plaintiff's recovery in crashworthiness cases and six do not. [3]

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[3] *Compare* FLA. STAT. ANN. § 768.81 (West 2016); MINN. STAT. ANN. § 604.01 (West 2017); *Montag v. Honda Motor Co.*, 75 F.3d 1414, 1419 (10th Cir. 1996) (holding, based upon Colo. Rev. Stat. § 13-21-406 (West 2016), the jury must weigh a plaintiff's negligence in causing an initial collision against a defendant's defective design in a crashworthiness case); *Morris v. Mitsubishi Motors N. Am., Inc.*, 782 F. Supp. 2d 1149, 1160–61 (E.D. Wash. 2011) (noting WASH. REV. CODE ANN. § 4.22.015 (West 2016) extends comparative fault analysis to strict liability claims like the crashworthiness action at issue); *Volkswagen of Am., Inc. v. Marinelli*, 628 So. 2d 378, 384 (Ala. 1993) (recognizing contributory negligence as an affirmative defense against crashworthiness claims); *Gartman v. Ford Motor Co.*, 430 S.W.3d 218, 220–21 (Ark. Ct. App. 2013) (noting Arkansas follows the majority rule that a plaintiff's negligence "is relevant in a crashworthiness case for the purpose of

apportioning the overall responsibility for damages"); *Doupnik v. Gen. Motors Corp.*, 225 Cal. App. 3d 849, 865 (1990) ("The doctrine of comparative fault is applicable to crashworthiness cases."); *Meekins v. Ford Motor Co.*, 699 A.2d 339, 346 (Del. Super. Ct. 1997) (holding "[t]he comparative negligence of a plaintiff is a defense to a product liability action based on an enhanced injury theory"); *Green v. Ford Motor Co.*, 942 N.E.2d 791, 795–96 (Ind. 2011) (holding evidence of plaintiff's negligence was a proximate cause of the injuries is admissible in crashworthiness cases); *Jahn v. Hyundai Motor Co.*, 773 N.W.2d 550, 560 (Iowa 2009) (adopting the majority rule and holding "the principle[] of comparative fault . . . appl[ies] in enhanced injury cases"); *Lowe v. Estate Motors Ltd.*, 410 N.W.2d 706, 707–08 (Mich. 1987) (noting "evidence concerning the existence of and [a plaintiff's] failure to use safety devices generally" is admissible to establish comparative negligence in crashworthiness cases); *Estate of Hunter v. Gen. Motors Corp.*, 729 So. 2d 1264, 1271 (Miss. 1999) (holding comparative negligence is an available defense in crashworthiness products liability actions); *Day v. Gen. Motors Corp.*, 345 N.W.2d 349, 357 (N.D. 1984) (holding a plaintiff's "contributing causal negligence" will reduce the plaintiff's injury in strict liability and products liability cases, and specifically in crashworthiness cases, such evidence is relevant to causation of both the initial collision as well as any enhanced injuries); *Dahl v. Bayerische Motoren Werke (BMW)*, 748 P.2d 77, 83–84 (Or. 1987) (holding comparative fault applies in crashworthiness cases); *Sherer v. Linginfelter*, 29 S.W.3d 451, 455 (Tenn. 2000) (holding "comparative fault principles will apply to products liability actions such as the case before us, in which the defective product did not cause or contribute to the underlying accident but did cause 'enhanced injuries'"), *and Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 427 (Tex. 1984) (judicially adopting "a comparative apportionment system, independent of statutory comparative negligence" to apply in strict liability cases, including crashworthiness cases), *with* ARIZ. REV. STAT. ANN. § 12-2509(B) (West 2016) (stating a plaintiff's comparative negligence "is not a defense to a claim alleging strict liability in tort, including any product liability action . . . except claims alleging negligence"); *Thornton v. Gray Automotive Parts Co.*, 62 S.W.3d 575, 587 (Mo. Ct. App. 2001) ("If the plaintiff's use (or misuse) of the product sets the injury-causing sequence in motion, and that use was reasonably foreseeable by the manufacturer, then the [enhanced injury] doctrine holds that the plaintiff's conduct is not relevant. . . . [T]he manufacturer cannot even raise the misconduct of the plaintiff as a basis for comparative fault."); *Shipler v. Gen. Motors Corp.*, 710 N.W.2d 807, 829–30 (Neb. 2006) (interpreting amendments to NEB. REV. STAT. §§ 25-21,185.07 to 185.12 as excluding comparative negligence as a defense

Most states espousing the majority view have statutes which require 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. *See, e.g.*, Fla. Stat. Ann. § 768.81 (expressly applying comparative negligence to all "civil action[s] 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"); *Bishop v. Tariq, Inc.*, 384 S.W.3d 659, 663–64 (Ark. Ct. App. 2011) (citing Ark. Code Ann. § 16-64-122 (West 2016)) (holding the comparative fault defense would be available in enhanced injury cases because Arkansas's comparative-fault statute "provides that, *in all actions for personal injuries or wrongful death in which recovery is predicated on fault*, liability shall be determined by comparing the fault chargeable to a claiming party with the fault chargeable to the party from whom he seeks to recover," where fault is defined "to include[] *any* act, omission, conduct, risk assumed, breach of warranty, or breach of any legal duty which is a *proximate cause* of any damages sustained by any party" (emphasis in original)); *Meekins*, 699 A.2d at 344–45 (noting Del. Code Ann. tit. 10 § 8132 (West 2016) patently allows comparative negligence to reduce a plaintiff's recovery in *all* personal injury actions).

However, some state courts have themselves extended comparative fault principles to crashworthiness claims. For example, the Supreme Court of California held in *Daly v. General Motors Corporation* that comparative negligence principles apply in strict products liability actions such that evidence of a plaintiff's intoxicated misuse of a vehicle was admissible in a crashworthiness case. 20 Cal. 3d 725, 731–

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in any strict products liability actions); *Andrews v. Harley Davidson, Inc.*, 796 P.2d 1092, 1095 (Nev. 1990) (holding comparative negligence "is not a defense in a strict liability case where the issue is whether the design of a vehicle is crashworthy"); *Green v. Gen. Motors Corp.*, 709 A.2d 205, 212 (N.J. Super. Ct. App. Div. 1998) (quoting *Green v. Sterling Extruder Corp.*, 471 A.2d 15, 20 (N.J. 1984)) (holding the "manner of driving [was] irrelevant to the plaintiff's crashworthiness issue," because "once the defendant has 'a duty to protect persons from the consequences of their own foreseeable faulty conduct, it makes no sense to deny recovery because of the nature of the plaintiff's conduct'"), *and Gaudio v. Ford Motor Co.*, 976 A.2d 524, 540 (Pa. Super. Ct. 2009) ("[T]he Supreme Court ruled that negligence concepts cannot be used to reduce the amount of recovery in a strict liability case, and that as a result comparative negligence may not be asserted as a defense in [crashworthiness] actions.").

38 (1978). Specifically, the court reasoned that the policies supporting strict liability—permitting claimants to recover without having to prove a specific act of negligence on the part of the manufacturer and incentivizing the safe and responsible design and manufacturing of goods—would not be thwarted by the application of comparative principles, and that the evolving nature of tort law requires "new remedies [to be] judicially created, and old defenses judicially merged," in order to achieve equitable results. *Id.* at 736–38. The Supreme Court of Tennessee has also held a comparative fault analysis applies in strict products liability actions, including crashworthiness claims. *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 693, 694 (Tenn. 1995). In particular, the court held "[t]he respective fault of the manufacturer and of the consumer should be compared with each other with respect to all damages and injuries for which the fault of each is a cause in fact and a proximate cause." *Id.* at 694.

On the other hand, a minority of states have declined to recognize comparative negligence as a defense in strict liability crashworthiness cases. In some states the legislature resolved the question. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-2509 (stating a plaintiff's comparative negligence "is not a defense to a claim alleging strict liability in tort, including any product liability action . . . except claims alleging negligence"); *Shipler*, 710 N.W.2d at 829–30 (interpreting the legislature's removal of "strict liability" from the comparative fault statute to exclude comparative negligence as a defense in all strict liability actions, including crashworthiness cases). Still other jurisdictions, including Nevada, New Jersey, and the District Court for the District of South Carolina, have reached the same conclusion—that comparative negligence is incompatible with strict liability crashworthiness claims—based upon their interpretation of the crashworthiness doctrine. *See Andrews*, 796 P.2d at 1095; *Green*, 709 A.2d at 212; *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548 (D.S.C. 1999), *affirmed on this issue and reversed on separate grounds by Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439 (4th Cir. 2001) [hereinafter *Jimenez I* and *II*].

In *Andrews*, the plaintiff was driving with a blood alcohol content level of .146 when he crashed his motorcycle into the back of a parked car. 796 P.2d at 1094. The plaintiff then brought a crashworthiness claim against Harley Davidson alleging that as a result of the collision a spring clip holding the gas tank broke, causing the gas tank to fly up and hit the plaintiff, enhancing his injuries. *Id.* at 1093–94. At trial, the court admitted evidence of the plaintiff's intoxication to prove the motorcycle's design was not the proximate or sole proximate cause of the plaintiff's

injuries. *Id.* at 1094. The Nevada Supreme Court reversed, holding it was reversible error to admit evidence of the plaintiff's intoxication. *Id.* at 1095–96. The court noted that under the Nevada crashworthiness doctrine, once a jury determines a defect exists, a plaintiff's recovery is only precluded when he misuses the product in a way the manufacturer could not reasonably foresee. *Id.* at 1095. Because "[n]egligent driving of a vehicle is a foreseeable risk" and "it is foreseeable that a plaintiff, who is intoxicated, will drive negligently and get into an accident," the court concluded that the plaintiff's negligence would not preclude his recovery. *Id.* Moreover, the court explained

> A major policy behind holding manufacturers strictly liable for failing to produce crashworthy vehicles is to encourage them to do all they reasonably can do to design a vehicle which will protect a driver in an accident. Hence, the jury in such a case should focus on whether the manufacturer produced a defective product, not on the consumer's negligence.

Id. Therefore, the court held that comparative negligence "is not a defense in a strict liability case where the issue is whether the design of a vehicle is crashworthy" and thus evidence of the plaintiff's intoxication or negligence was irrelevant. *Id.*

Similarly, in *Green*, the Appellate Division of the New Jersey Superior Court held evidence of a plaintiff's negligent driving was irrelevant to the proximate cause of any enhanced injuries in a crashworthiness action. 709 A.2d at 212. In that case, the plaintiff was speeding and veering across the dividing line when he saw a school van approaching in the opposite direction. *Id.* at 207. Unable to regain his lane in time, the left side of the plaintiff's vehicle struck the van at a speed between forty-five and eighty-one miles per hour. *Id.* at 208. As a result of the collision, the plaintiff suffered a spinal cord injury which rendered him a quadriplegic, and he brought a crashworthiness suit against General Motors alleging the collapse of the car's roof frame enhanced his injuries. *Id.* at 208–09. On appeal, General Motors argued the trial judge improperly instructed the jury not to consider evidence of the plaintiff's speeding when determining whether the vehicle's roof frame was defective. *Id.* at 209. However, the appellate court held the trial judge was correct that "the speed limit and manner of driving were irrelevant to the plaintiff's crashworthiness issue," because "once the defendant has 'a duty to protect persons from the consequences of their own foreseeable faulty conduct, it makes no sense to deny recovery because of the nature of the plaintiff's conduct.'" *Id.* at 212 (quoting *Sterling Extruder Corp.*, 471 A.2d at 20). The court reasoned that

> When GM placed this vehicle on the market, it certainly knew that it would be driven at lawful speeds up to fifty-five miles per hour and in some states sixty-five miles per hour. It also knew that the vehicle might collide with another vehicle similarly operated. . . . We see, therefore, that if GM was required to design a reasonably safe vehicle for its intended and reasonably foreseeable use, it should, if possible, have designed a vehicle that could reasonably withstand a crash at considerably higher speeds than in this case.

Id. at 211–12. Thus, the court held that "[i]nsofar as [the] plaintiff's injuries were caused solely by the product defect," any negligence on the part of the plaintiff in causing the collision was irrelevant. *Id.* at 212.

In *Jimenez I*, the Jimenez's minivan was involved in a rollover accident during which the liftgate latch failed. 74 F. Supp. 2d at 552. As a result, the plaintiff's son was killed when he was ejected from the vehicle through the open liftgate door. *Id.* Thereafter, the plaintiff brought suit against Chrysler, the minivan's manufacturer, alleging multiple causes of action, including a crashworthiness claim for negligent design of the liftgate latch. *Id.* at 552–53. After the jury returned a verdict for the plaintiff, Chrysler moved for a new trial arguing the district court erred, *inter alia*, in excluding evidence related to causation of the underlying accident. *Id.* at 564.

In addressing Chrysler's motion, the district court looked to this Court's decision in *Mickle*, noting that "[t]he crashworthiness doctrine imposes liability on automobile manufacturers for design defects that *enhance*, rather than cause, injuries." *Id.* at 565 (citing *Mickle*, 252 S.C at 233–36, 166 S.E.2d at 187–88) (emphasis added). In other words, because an underlying accident is presumed in crashworthiness cases, a manufacturer's liability is predicated on whether the injuries were enhanced by a defect in the automobile, not on the precipitating cause of the collision. *Id.*; *cf. Bramlette v. Charter-Medical-Columbia*, 302 S.C. 68, 74, 393 S.E.2d 914, 917 (1990) ("Where such a duty [to prevent a known risk] exists . . . clearly the very act which the defendant has a duty to prevent cannot constitute contributory negligence or assumption of the risk as a matter of law."). Therefore, according to the district court, "[u]nder this [*Mickle*] rubric, any alleged negligence by [another party] is remote—and thus irrelevant—and hence properly excluded." *Id.* at 566.

Moreover, although the district court acknowledged that courts are split on the issue of permitting comparative negligence to be injected into crashworthiness

cases, it concluded the better rule was to exclude any evidence of a plaintiff's or another defendant's alleged negligence in causing the initial collision. *Id.*

> First of all, such a rule intrinsically dovetails with the crashworthiness doctrine: Because a collision is presumed, and enhanced injury is foreseeable as a result of the design defect, the triggering factor of the accident is simply irrelevant. Secondly, the concept of "enhanced injury" effectively apportions fault and damages on a comparative basis; defendant is liable only for the increased injury caused by its own conduct, not for the injury resulting from the crash itself. Further, the alleged negligence causing the collision is legally remote from, and thus not the legal cause of, the enhanced injury caused by a defective part that was supposed to be designed to protect in case of a collision.

Id. Based upon this rationale and the ultimate goal of the crashworthiness doctrine to place responsibility on the manufacturer for failing to design a crashworthy vehicle, the district court held that another party's comparative negligence in causing the initial accident was not a defense to a negligent design crashworthiness claim. *Id.* at 565.

Chrysler appealed the district court's order to the Fourth Circuit, arguing the district court erred in denying its motion for a new trial based on the exclusion of evidence relating to the driver's negligence. *Jimenez II*, 269 F.3d at 452. Although the Fourth Circuit noted that South Carolina courts had not explicitly addressed the issue, the court affirmed the district court's ruling that "in light of the crashworthiness principle, the cause of the original accident was not relevant to proving a claim for enhanced injury." *Id.* at 453.

In the years since *Jimenez I* and *II* were decided, this Court has not had an opportunity to address the applicability of comparative negligence in crashworthiness cases until now. Upon careful review and consideration, we find the minority rule—specifically the analysis from the Supreme Court of Nevada in *Andrews* and the South Carolina District Court's reasoning in *Jimenez I*—to be the better-reasoned approach in light of the crashworthiness principles established in *Mickle*.

Unlike many states who have taken the alternative view, South Carolina has no statutory mandate to apply comparative negligence in crashworthiness cases based upon theories of strict liability and breach of warranty. As discussed more fully *infra*, both strict liability and breach of warranty are statutory constructs as are the available defenses to these causes of action. *See* 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.

Additionally, as the district court pointed out in *Jimenez I*, the underlying premise of the crashworthiness doctrine—that manufacturers are only liable for enhanced damages caused by a design defect when the defect does not cause the initial collision—is already taken into account through the concept of enhanced injuries. 74 F. Supp. 2d at 566. In other words, the doctrine of crashworthiness itself divides and allocates fault to a manufacturer for damages it alone caused, so it would be incongruous to allow comparative negligence to apply to further reduce the manufacturer's liability or shift that responsibility to another party. Moreover, to permit comparative negligence in crashworthiness actions brought under strict liability and breach of warranty theories would conflate those two distinct doctrines with ordinary negligence. *See, e.g.*, *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").

Furthermore, although the crashworthiness action in *Jimenez* was brought under a negligence theory—as opposed to the strict liability and breach of warranty claims at issue in this case—we see no reason to distinguish between these theories of liability when utilized in conjunction with the crashworthiness doctrine. Regardless of the theory under which a plaintiff chooses to bring a crashworthiness claim, the heart of the crashworthiness doctrine remains the same—manufacturer liability for enhanced injuries following a foreseeable collision. *Jimenez I*, 74 F. Supp. 2d at 565 (citing *Mickle*, 252 S.C. at 233–26, 166 S.E.2d at 187–88). Thus, any negligence by the plaintiff or another defendant which may have contributed to the initial collision is entirely irrelevant. *Id.* at 566. Therefore, we adopt the rationale established by the district court in *Jimenez I* and hold 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.[4] Accordingly, we answer the first certified question, "no."

[4] Our ruling today is limited to the certified questions before us which concern only the applicability of comparative negligence to a plaintiff in causing the collision in

II. PUBLIC POLICY

GM argues South Carolina's statutory and case law establish a strong public policy against impaired driving which should bar Donze from recovering in this case. Specifically, GM suggests this Court's opinions in *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998), and *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003), created "a public policy-based affirmative defense" against impaired plaintiffs bringing *any* cause of action to recover damages, including strict liability and breach of warranty claims. Additionally, the Products Liability Advisory Council, Inc., *amicus curiae*, points to a number of statutes demonstrating the General Assembly's policy of deterring impaired driving. Although we recognize South Carolina has a strong public policy against impaired driving, the current law of this state does not preclude an intoxicated plaintiff from bringing a crashworthiness case under theories of strict liability and breach of warranty. Therefore, we answer this second certified question, "no."

In *Tobias*, the plaintiff was driving home from a bar while intoxicated, crossed the center line, and collided with another vehicle. 323 S.C. 345, 347, 474 S.E.2d 450, 451 (Ct. App. 1996). The plaintiff brought a negligence action alleging the bar violated section 61-4-580(A)(2) of the South Carolina Code (Supp. 2016) by continuing to serve him while he was visibly intoxicated. However, this Court declined to "recognize a 'first party' cause of action against the tavern owner by an intoxicated adult predicated on an alleged violation of . . . [section 61-4-580(A)(2).]" 332 S.C. at 91, 504 S.E.2d at 319. Nevertheless, third parties injured by an intoxicated patron do have a cause of action against a bar for violation of section 61-4-580(A)(2). *Id.* at 93, 504 S.E.2d at 320.

Similarly, in *Lydia*, the plaintiff was drunk when the defendant allowed him to borrow his car. 355 S.C. at 37, 583 S.E.2d at 751. As a result of the plaintiff's intoxication, he crashed the vehicle and was severely injured. *Id.* The plaintiff then brought a negligent entrustment action against the defendant alleging the defendant knew or should have known the plaintiff was incompetent to operate the vehicle at that time. *Id.* This Court barred the plaintiff's action, holding:

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a crashworthiness case. 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 . . . ." *Jimenez I*, 74 F. Supp. 2d at 566 n.11.

> The essence of this case and the *Tobias* case are the same, for in both cases, the plaintiff, who was voluntarily intoxicated when the accident occurred, is attempting to deflect the responsibility that should be imposed upon himself towards another. Just as this plaintiff cannot bring a first party cause of action to challenge the discretionary conduct of the tavern owner, he cannot bring the same action to challenge the discretionary conduct of his entrustor.

Id. at 42–43, 583 S.E.2d at 754.

GM argues the public policy underlying our holdings in *Tobias* and *Lydia* should be extended to preclude impaired drivers from bringing strict products liability or breach of warranty actions to recover *any* damages they incur while intoxicated. We decline to do so. In those cases, this Court refused to recognize new, first party causes of action for impaired plaintiffs under the common law doctrines of negligence and negligent entrustment. *Tobias*, 332 S.C. at 93, 504 S.E.2d at 320; *Lydia*, 355 S.C. at 39, 583 S.E.2d at 752. Put simply, we declined to create a new common law duty of care for discretionary actions taken with respect to intoxicated individuals. *See Lydia*, 355 S.C. at 42–43, 583 S.E.2d at 754.

However, strict liability and breach of warranty are statutory causes of action. *See* S.C. Code Ann. §§ 15-73-10 (2005), 36-2-314 (2003). In these cases manufacturers already have statutory duties to design reasonably safe, merchantable products which, if breached, entitle a consumer to bring a first party action for damages, regardless of the consumer's mental state at the time of the injury. *See* S.C. Code Ann. §§ 15-73-10 ("One who sells any product in a defective condition unreasonably dangerous to the user . . . is subject to liability"), 36-2-314 (stating a merchant will be liable for breach of warranty if the goods sold are not merchantable at the time of the sale). Thus, to 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. *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 538, 393 S.E.2d 162, 163–64 (1989) (citations omitted) ("[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. 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."). Therefore, we reject GM's argument that this state's public policy articulated in *Tobias* and *Lydia* should bar Donze from bringing strict liability or breach of warranty claims.

We similarly find GM's statutory-based public policy arguments unavailing. Specifically, GM asserts that, in light of the South Carolina General Assembly's pervasive public policy toward discouraging drug and alcohol abuse, this Court should interpret the strict liability and breach of warranty statutes to bar recovery by impaired plaintiffs.

The General Assembly has made it clear that the public policy of this state treats infractions resulting from the influence of drugs and alcohol harshly. *See, e.g.*, S.C. Code Ann. § 15-38-15(F) (tortfeasors whose conduct involves drugs or alcohol are subject to pure joint and several liability regardless of their at-fault percentage, while other tortfeasors who are less than fifty percent at fault will only be liable for their allocated percentage of damages.); §§ 56-5-2950–2951 (Supp. 2016) (refusal to submit to a blood-alcohol breathalyzer test shall result in automatic suspension of one's driver's license); § 59-149-90 (2004) (students who are convicted or plead to certain drug and alcohol related offenses will become ineligible for Legislative Incentives for Future Excellence Scholarships).

Thus, the General Assembly is both capable of and willing to create statutory consequences for drug and alcohol abuse when it sees fit. This Court has repeatedly declined to create or expand public policies which the General Assembly could have adopted had it chosen to do so, and we decline to deviate from that practice now. *See, e.g.*, *Michau v. Georgetown County ex rel. S.C. Counties Workers Comp. Trust*, 396 S.C. 589, 595 n.4, 723 S.E.2d 805, 808 n.4 (2012) (declining to interpret an additional requirement into a workers' compensation statute where the General Assembly chose not to adopt a version of the statute including the requirement); *Montgomery v. AT&T Nassau Metals Corp.*, 304 S.C. 436, 439, 405 S.E.2d 393, 394 (1991) (declining to extend the applicability of the workers' compensation survival statute where "[h]ad the General Assembly so intended, it could have included such a provision applicable to nonwork-related deaths"). Moreover, this Court has emphasized its preference for exercising "restraint when undertaking the amorphous inquiry of what constitutes public policy" based upon our understanding that the General Assembly is the principal source of public policy declarations. *Taghivand v. Rite Aid Corp.*, 411 S.C. 240, 244, 768 S.E.2d 385, 387 (2015).

CONCLUSION

For the reasons stated above, we answer both certified questions, "no."

BEATTY, C.J., FEW, J., and Acting Justice Clifton Newman, concur. KITTREDGE, J., concurring in a separate opinion.

JUSTICE KITTREDGE: Accepting the foundational premise of the academic question posed by the federal district court, I concur in result.[5] I find Justice Hearn's majority opinion scholarly and well-reasoned.

At times, certified questions place this Court in the position of answering questions in the abstract. We do so in furtherance of our prerogative to declare the law of South Carolina, and the federal courts' respectful deference to our authority to do so. Certified questions are, of course, best suited for questions of law. We are often presented with ostensible questions of law that are predicated on certain factual assumptions. We must answer those questions narrowly and recognize that even a slight tilting of the facts can impact the analysis and alter the conclusion. I believe the primary certified question today presents such a situation.

I agree with the majority in the abstract that in a true crashworthiness case, the alleged comparative fault of the plaintiff in causing the initial collision is not relevant and "that manufacturers are only liable for enhanced damages caused by a design defect when the defect does not cause the initial collision." My concern here is that today's apparent categorical rule may be applied to preclude a manufacturer from asserting a valid defense, which in my judgment would implicate due process considerations. For example, where a manufacturer does not accept the plaintiff's framing of the issue and presents evidence that the plaintiff's comparative fault in the initial collision was a proximate cause of the so-called "enhanced injuries," is the manufacturer entitled to present evidence of the plaintiff's comparative fault? I would say yes. It is for this reason I would caution courts from reading today's result too broadly. I would limit the holding to true crashworthiness cases where it is established as a matter of law that the plaintiff's comparative fault was not a proximate cause of the "enhanced injuries."

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[5] I concur without reservation as to Question 2 concerning the purported "public policy bar."

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Paula Fullbright and Mark Fullbright, Plaintiffs,

v.

Spinnaker Resorts, Inc., d/b/a Spinnaker Resorts South Carolina, Inc., Defendant.

Appellate Case No. 2016-001765

AND

Paul Chenard and Rebecca Chenard, Plaintiffs,

v.

Hilton Head Island Development Co., L.L.C., d/b/a Coral Resorts and Sunrise Vacation Properties, Ltd., d/b/a Coral Resorts, Defendants.

James Nichols and Irene Nichols, Plaintiffs,

v.

Hilton Head Island Development Co., L.L.C., Sunrise Vacation Properties, Ltd., Sherri J. Smith, Patrick Budnik, and Robert Lauderman, d/b/a Coral Resorts, Defendants.

Linda Renchkovsky, Plaintiff,

v.

Coral Resorts, L.L.C. and Sunrise Vacation Properties,

Ltd., d/b/a Coral Resorts, Defendants.

Robert Curry, Jr. and Monica R. Curry, Plaintiffs,

v.

Hilton Head Island Development Co., L.L.C., d/b/a Coral Resorts and Sunrise Vacation Properties, Ltd., d/b/a Coral Resorts, Defendants.

Charles Olenick and Karen Maniscalco, Plaintiffs,

v.

Coral Resorts, L.L.C. and Sunrise Vacation Properties, Ltd., d/b/a Coral Resorts, Defendants.

Phillip Ross and Kimberly Ross, Plaintiffs,

v.

Hilton Head Island Development Co., L.L.C., Sunrise Vacation Properties, Ltd., Sherri J. Smith, David Watson, and Sheldon Stanhope, Defendants.

Appellate Case No. 2016-001766

CERTIFIED QUESTIONS

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
Patrick Michael Duffy, United States District Judge

Opinion No. 27720
Heard February 8, 2017 – Filed May 17, 2017

CERTIFIED QUESTIONS ANSWERED

Joseph DuBois and Zach S. Naert, both of Naert & DuBois, L.L.C., of Hilton Head Island, for Plaintiffs.

Barry L. Johnson, of Johnson & Davis, P.A., of Bluffton, for Defendant Spinnaker Resorts, Inc., d/b/a Spinnaker Resorts South Carolina, Inc. Nekki Shutt, Kathleen M. McDaniel, and Jacqueline M. Pavlicek, all of Callison Tighe & Robinson, L.L.C., of Columbia, for Defendants Coral Resorts, L.L.C. and Hilton Head Island Development Co., L.L.C.; Thornwell F. Sowell, III and Bess J. DuRant, both of Sowell Gray Stepp & Laffitte, L.L.C., of Columbia, for Defendants Sunrise Vacation Properties, Ltd., Sherri J. Smith, David Watson, Sheldon Stanhope, and Robert Lauderman; and James E. Smith, Jr., of James E. Smith, Jr., P.A., of Columbia, for Defendants.

Angus H. Macaulay and Michael P. Scott, both of Nexsen Pruet, LLC, of Columbia, for amicus curiae, American Resort Development Association. R. Hawthorne Barrett, of Turner Padget Graham & Laney, P.A., of Columbia, for amicus curiae, Myrtle Beach Area Chamber of Commerce.

JUSTICE KITTREDGE: The Court agreed to answer the following certified questions from the United States District Court for the District of South Carolina:

1. Does the South Carolina Real Estate Commission have exclusive jurisdiction to determine whether a violation of the South Carolina Vacation Time Sharing Plans Act[1] (the Timeshare Act) has occurred?

2. Is the South Carolina Real Estate Commission's determination of a violation of the Timeshare Act a condition precedent to a purchaser bringing a private cause of action to enforce the provisions of the Timeshare Act?

3. Are the South Carolina Real Estate Commission's determinations as to whether the Timeshare Act was violated binding on courts of the judicial branch?

These questions arose from two sets of litigation (*Fullbright* and *Chenard*) in the federal district court involving individuals (collectively, Plaintiffs) who entered into contracts with developers (collectively, Defendants) to purchase interests in vacation time sharing plans (timeshare plans) for real estate on Hilton Head Island. As these cases present the same legal questions, they were consolidated for oral argument before the Court. We now resolve them in a single opinion.

Because the Timeshare Act contains an unambiguous provision authorizing a purchaser or lessee to bring a private action to enforce the Act, we are constrained to answer the first two questions "no." We also answer the third question "no," provided the South Carolina Real Estate Commission's decision has not been subjected to judicial review.

I.

On June 24, 2014, Paula and Mark Fullbright (the Fullbrights) entered into a contract with Spinnaker Resorts, Inc. (Spinnaker) to purchase an interest in a

[1] S.C. Code Ann. §§ 27-32-10 to -410 (2007 & Supp. 2016).

timeshare plan for the company's Hilton Head resort, Bluewater by Spinnaker (Bluewater). The Fullbrights commenced a purported class action against Spinnaker on April 2, 2015, and filed an amended complaint on May 20, 2015, alleging Spinnaker violated the Timeshare Act by failing to comply with the Act's registration requirements.[2] The Fullbrights sought the return of all money paid under the contract, with interest, as well as a declaration that the contract was invalid and nonbinding.

After the Fullbrights filed the lawsuit, the South Carolina Real Estate Commission (the REC) issued an order dated September 15, 2015,[3] stating that Bluewater had been issued an order of registration effective September 2, 2014. Significantly, the REC order provided that Bluewater's registration was retroactive to March 15, 2006. The retroactive registration was significant in that the REC sought to deem Bluewater's registration in effect on the date of the Fullbrights' purchase. Spinnaker moved to dismiss the complaint for lack of subject matter jurisdiction, but the federal district court, believing the case involved novel questions of South Carolina law, denied the motion.

Like the Fullbrights, the plaintiffs in the *Chenard* cases are individuals that entered into contracts to purchase interests in timeshare plans for Hilton Head resorts. In addition to claims for violations of the Timeshare Act, they brought claims for, among other things, fraud, negligent misrepresentation, and violations of the South Carolina Unfair Trade Practices Act.[4] Their claims under the Timeshare Act

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[2] These requirements are discussed *infra*, Part II.B.

[3] Although the final order was dated September 15, the REC apparently reached this decision at a meeting held on August 20. The Fullbrights accuse Spinnaker of going behind their backs by seeking to have this meeting occur in private. In any event, the parties agree that the Fullbrights did not attend the meeting and they were unsuccessful in their attempts to intervene and appeal the REC's decision.

[4] S.C. Code Ann. §§ 39-5-10 to -180 (1985 & Supp. 2016). Whatever relief the *Chenard* plaintiffs may be entitled to on these claims, we make clear now that the remedy for a violation of the Timeshare Act is limited to that found in the Act itself—the rescission of the purchase contract and a refund of all consideration

included allegations that the timeshare plans they agreed to were not properly registered with the REC, and they sought to void their purchase contracts. The *Chenard* defendants moved to dismiss the Timeshare Act claims, arguing that the REC has exclusive jurisdiction to investigate violations of the Act and, therefore, the court lacked subject matter jurisdiction. The court denied the motion, stating that the Timeshare Act "also contemplates a private right of action." *Chenard v. Hilton Head Island Dev. Co.*, No. 9:14-3347-SB, 2016 WL 7183047, at *3 (D.S.C. Mar. 30, 2016). The court also noted that there were cases involving similar allegations currently pending in state court and, to minimize conflicts between the ongoing state and federal litigation on this novel issue, solicited proposed questions for certification to this Court. *See id.* at *1, *3 n.4.

After further briefing by the parties, the court issued certification orders, and we agreed to answer the questions listed above. In answering these questions, we express no opinion as to the merits of Plaintiffs' claims, the resolution of which remains in the federal district court.

II.

The questions posed to the Court are aimed at clarifying the extent of the REC's authority to regulate the time sharing industry and what role, if any, the courts have in that process. Plaintiffs argue they have a constitutional and statutory right to initiate judicial proceedings without regard for the REC's actions, whereas Defendants argue public policy requires the REC have broad and exclusive jurisdiction to enforce the Timeshare Act.

A.

In resolving this dispute, we must be cognizant of our role as a court. Defendants frame these certified questions in terms of public policy, appeals to which dominate their arguments. Determinations of public policy, however, are chiefly within the province of the legislature, whose authority on these matters we must respect. *See, e.g.*, *Taghivand v. Rite Aid Corp.*, 411 S.C. 240, 244, 768 S.E.2d 385,

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paid. *See id.* § 27-32-120(C) (2007).

387 (2015) (recognizing that the "'primary source of the declaration of the public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration'" (quoting *Citizens' Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925))). "The General Assembly has a right to pass such legislation as in its judgment may seem beneficial to the State, and to create such agencies of government as may be necessary to carry out its purpose, unless expressly prohibited by the Constitution." *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 438–39, 181 S.E. 481, 485 (1935).

When examining statutes, "[t]he cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 439, 581 S.E.2d 836, 838 (2003) (citing *Charleston Cty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993)). "If a statute's language is plain, unambiguous, and conveys a clear meaning[,] 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" *Id.* (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "On the other hand, where a statute is ambiguous, the Court must construe the terms of the statute." *Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *State v. Henkel*, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015) (citation and internal quotation marks omitted). "Moreover, it is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Beaufort County v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011).

B.

The Timeshare Act establishes procedures governing the offering and sale of timeshare plans in South Carolina. These plans, which may or may not include an ownership interest in the subject property, are arrangements by which the purchaser acquires the right to use real estate and associated facilities for a period of time during the year. S.C. Code Ann. § 27-32-10(7)–(9) (2007). "[T]he [REC],

as part of its regulatory mandate, scrutinizes the practices and procedures of persons developing or selling interests in vacation time sharing plans in this State . . . ." *Id.* § 27-32-405(L) (Supp. 2016).

The Timeshare Act prohibits developers from advertising or selling plans that have not been registered with the REC. *Id.* § 27-32-20(1) (2007); *see also id.* § 27-32-190(A) (2007). To register a plan, the applicant must submit numerous documents to the REC, including copies of the proposed sales contract, advertising materials, and any regulations on the use of the property the applicant intends to impose. *Id.* § 27-32-20(2) (2007). If the REC determines the materials comply with the Timeshare Act, the REC is directed to issue an order approving their use, at which point the plan is considered registered. *Id.* § 27-32-20(3) (2007).

Section 27-32-190 of the South Carolina Code describes the application process and the REC's duties in more detail. Among other things, the REC must examine the applicant's advertising materials to ensure they are not misleading, make sure neither the seller nor any officer or principal thereof has been convicted of certain crimes within the past ten years, and satisfy itself that there are no encumbrances on the property that could diminish the purchaser's interest in, or use of, the property. *Id.* § 27-32-190(A)(1) (2007).

> Within thirty days from the date the [REC] receives an application for registration, the [REC] must enter an order registering the vacation time sharing plan or rejecting the registration. If an order of rejection is not entered within thirty days from the date of application, the vacation time sharing plan is considered registered unless the applicant has consented in writing to a delay.

Id. § 27-32-190(A)(2) (2007). In addition to the initial registration, a seller must obtain the REC's approval before making any substantial changes to a registered plan. *See id.* § 27-32-190(B)(5)(c) (2007).

To perform its duties, the REC is empowered to conduct investigations, issue subpoenas and cease-and-desist orders, and seek court orders compelling compliance with the REC's requests. *Id.* § 27-32-190(B) (2007). The REC can revoke a registration for a variety of reasons, including failing to comply with a

cease-and-desist order or concealing a material fact in an application. *Id.* § 27-32-190(B)(7) (2007). As part of its "responsib[ility] for the enforcement and implementation of" the Timeshare Act, the REC can also direct the Department of Licensing, Labor and Regulation to prosecute violations of the Act. *Id.* § 27-32-130 (2007). Critically for purposes of the certified questions before the Court, this authority "do[es] not limit the right of a purchaser or lessee to bring a private action to enforce the provisions of [the Timeshare Act]." *Id.*

III.

A. Jurisdiction and Condition Precedent (Certified Questions 1 and 2)

The answers to the first two certified questions flow directly from the language of section 27-32-130 of the South Carolina Code: "The provisions of this section do not limit the right of a purchaser or lessee to bring a private action to enforce the provisions of [the Timeshare Act]."

The first certified question asks us to determine whether the REC has exclusive jurisdiction to determine if a person has violated the Timeshare Act. Plaintiffs contend they have a clear statutory right to bring an action in the courts to seek redress for violations of the Timeshare Act. Defendants discount the clear language in section 27-32-130 and would have us declare the statute ambiguous, thereby allowing us to consider their argument that the state's public policy—as evidenced by the extensive regulatory framework created by the Timeshare Act—requires the REC's jurisdiction to be exclusive.

To the extent we decide courts have subject matter jurisdiction over these matters, the second certified question asks us if a finding by the REC of a violation is a condition precedent to bringing a claim under the Timeshare Act. Plaintiffs contend their right to file suit exists independently of the REC's authority, while Defendants argue the ability to file suit is contingent on a favorable ruling from the REC.

1. Jurisdiction

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Dema v. Tenet Physician*

Servs.-Hilton Head, Inc., 383 S.C. 115, 120, 678 S.E.2d 430, 433 (2009) (citing *Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 93, 668 S.E.2d 795, 796 (2008)). In South Carolina, the circuit courts "are vested with general original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts." *Id.* (citing S.C. Const. art. V, § 11). "In determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute." *Id.* at 121, 678 S.E.2d at 433.

The REC "is responsible for the enforcement and implementation of [the Timeshare Act] and the Department of Labor, Licensing and Regulation, at the request of the [REC], shall prosecute a violation under [the Timeshare Act]." S.C. Code Ann. § 27-32-130. For example, as noted above, the Timeshare Act requires all timeshare plans to be registered with the REC, and it tasks the REC with reviewing those plans. *Id.* § 27-32-190(A). The REC also has authority to investigate alleged violations[5] of the Timeshare Act and to issue orders and take other actions to ensure compliance with the Act's provisions. *Id.* § 27-32-190(B).

Defendants argue that this conferral of authority on the REC precludes the courts from hearing disputes arising under the Timeshare Act. Defendants note that the Timeshare Act is a comprehensive regulatory scheme intended both to protect consumers from unscrupulous business practices and to provide stability for developers. *Compare id.* § 27-32-405(E) (Supp. 2016) (acknowledging that "the purchaser of an interest in a vacation time sharing plan in this State is afforded significant and unique consumer protections not available to purchasers of other forms of real property"), *with id.* § 27-32-405(M) (Supp. 2016) (recognizing that "the economic health and continued stability of the vacation time sharing industry should be subject to the clear identification of various procedures involved in the purchase and sale of an interest in a vacation time sharing plan").

Defendants contend that the vitality of the timeshare industry relies on the REC's decisions being respected by the courts. If individuals are allowed to initiate

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[5] These include any "act of fraud, misrepresentation, or failure to make a disclosure of a material fact." S.C. Code Ann. § 27-32-110(11) (2007).

proceedings in court, Defendants claim, the timeshare industry will be destabilized, with resulting negative impacts on the entire South Carolina economy. Defendants also argue that allowing disgruntled purchasers to institute judicial proceedings will threaten the property rights of those that wish to maintain their timeshare interests.

We readily acknowledge there is considerable merit to Defendants' concerns, and we do not reject them lightly. However valid Defendants' concerns may be, they must yield to the plain language of a statute that commands a different result. *See Brown*, 354 S.C. at 439, 581 S.E.2d at 838 ("If a statute's language is plain, unambiguous, and conveys a clear meaning[,] the rules of statutory interpretation are not needed and the court has no right to impose another meaning." (citation and internal quotation marks omitted)). As Plaintiffs point out, the statute that gives the REC authority to enforce the Timeshare Act makes it clear that grant of authority does not interfere with their ability to bring a private action to do the same. *See* S.C. Code Ann. § 27-32-130. Given this unambiguous language, we would exceed our judicial role were we to allow Defendants' policy arguments to override the policy expressed by the General Assembly in section 27-32-130. Our rules of statutory interpretation thus require us to answer the first certified question "no."

2. Condition Precedent

For the same reasons, a finding by the REC of a statutory violation cannot be a condition precedent to bringing a private suit under the Timeshare Act. The plain language of section 27-32-130 imposes no such limit, and we are not free to judicially engraft the Defendants' desired limitation onto the statute. *See Grier v. Amisub of S.C., Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012) ("[W]hen a statute is clear on its face, it is improvident to judicially engraft extra requirements to legislation . . . ." (internal quotation marks omitted)). "The legislature could very easily have created a condition precedent if it had so desired, in plain and unmistakable words; but it has not done so." *Small v. Nat'l Sur. Corp.*, 199 S.C. 392, 397, 19 S.E.2d 658, 660 (1942). Indeed, imposing the condition precedent Defendants seek would do precisely what section 27-32-130 prohibits—"limit the right of a purchaser or lessee to bring a private action to enforce the provisions of [the Timeshare Act]."

Again, we defer to the plain language of the Timeshare Act, which expressly recognizes a person's right to bring a civil action without regard for the REC's findings. *Cf. Ross v. Waccamaw Cmty. Hosp.*, 404 S.C. 56, 64, 744 S.E.2d 547, 551 (2013) (stating that "the Legislature would have used more exacting language had it intended . . . to forever divest the circuit court of jurisdiction"). If the courts' jurisdiction to hear claims for violations of the Timeshare Act is to be limited—whether based on Defendants' public policy concerns or for any other reason—it must be the legislature that does so. Therefore, we answer the second certified question "no."

B. Effect of the REC's Findings on the Courts (Certified Question 3)

The third certified question asks us to declare what effect a decision by the REC has on the judicial branch. Plaintiffs argue they have a constitutional right to challenge the REC's findings in court. Defendants cite two principles they claim require courts to accept the REC's findings: the "filed rate doctrine" and the doctrine of primary jurisdiction.

We are mindful that this question implicates the separation of powers vital to the proper functioning of our government[6] and reiterate that "the judicial branch retains the ultimate authority in deciding when agency decisions comport with established law. Thus, judicial review of administrative decisions requires a balancing between an agency's specialization and authority, and the checks and balances deeply rooted in our democratic government." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 53, 766 S.E.2d 707, 728 (2014) (Toal, C.J., dissenting). We therefore hold that the REC's decisions must be subject to judicial review and answer the third certified question "no," as qualified below.

The state constitution declares, "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . , and he shall have in all such

[6] *See* S.C. Const. art. I, § 8 (requiring "the legislative, executive, and judicial powers of the government" to "be forever separate and distinct from each other").

instances the right to judicial review." S.C. Const. art. I, § 22. The Administrative Procedures Act[7] (the APA) provides that "[i]n a contested case,[8] all parties must be afforded an opportunity for hearing after notice of not less than thirty days."[9] S.C. Code Ann. § 1-23-320(A) (Supp. 2016). "A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review . . . ." *Id.* § 1-23-380 (Supp. 2016). This entitlement "does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law." *Id.* A court can reverse an agency's decision if, for example, the agency's decision was contrary to constitutional or statutory provisions or otherwise affected by an error of law. *Id.* § 1-23-380(5)(a), (d) (Supp. 2016); *see also id.* § 1-23-610(B)(a), (d) (Supp. 2016) (establishing the same grounds for reversal of a decision of the administrative law court).

Citing the filed rate doctrine and the doctrine of primary jurisdiction, Defendants argue the REC's decisions should not be subject to such review. The filed rate doctrine "stands for the proposition that because an administrative agency is vested with the authority to determine what rate is just and reasonable, courts should not adjudicate what a reasonable rate might be in a collateral lawsuit." *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 391 (2005) (citation and internal quotation marks omitted). However, the instant dispute clearly does not involve a challenge to a rate established by an administrative agency, and it appears Defendants' real aim in citing the doctrine is to leapfrog into policy arguments. Defendants argue the policy goals served by the doctrine——stability, uniformity, and finality—would also be served by giving the REC's decisions

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[7] S.C. Code Ann. §§ 1-23-10 to -680 (2005 & Supp. 2016).

[8] A "contested case" is any "proceeding . . . in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." *Id.* § 1-23-310(3) (2005).

[9] We recognize that Plaintiffs were not parties in the proceedings before the REC. The Fullbrights attempted to intervene and appeal the REC's decision to the administrative law court but were prevented from doing so. *See supra* note 3.

binding effect on the courts. Defendants argue a contrary ruling will have widespread negative impacts on all regulated industries. Although we are not indifferent to these concerns, as we have already noted, Defendants' policy arguments are more appropriately addressed to the legislature. *See Taghivand*, 411 S.C. at 244, 768 S.E.2d at 387 (citation omitted).

The second doctrine cited by Defendants, the doctrine of primary jurisdiction,

> applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956) (citation omitted). The United States Supreme Court has stated that primary jurisdiction "does more than prescribe the mere procedural timetable of the lawsuit. It is a doctrine allocating the law-making power over certain aspects of commercial relations. It transfers from court to agency the power to determine some of the incidents of such relations." *Id.* at 65 (citation and internal quotation marks omitted). The Supreme Court has therefore indicated that, in some situations, courts are precluded from interpreting statutory language that an agency is tasked with implementing. *See id.* at 65–66 (quoting *Great N. Ry. Co. v. Merchs.' Elevator Co.*, 259 U.S. 285, 291 (1922)) (citing *Tex. & Pac. Ry. Co. v. Am. Tie & Timber Co.*, 234 U.S. 138 (1914)); *see also Slocum v. Del., Lackawanna & W. R.R. Co.*, 339 U.S. 239, 245 (1950) (Reed, J., dissenting) (arguing that a literal reading of the majority's opinion would lead to the National Railway Adjustment Board's decisions being largely free from judicial review); *id.* at 252–53 ("[T]he Court says that Congress has forced the parties into a forum that has few of the attributes of a court, but which may be the final judge of the rights of individuals.").

Regardless of whether applying the doctrine of primary jurisdiction as expressed in *Western Pacific Railroad Co.* would lead to Defendants' desired outcome, they have cited no South Carolina precedent adopting this expansive version of the doctrine, nor have we found any that would justify insulating the REC's decisions

from judicial review and ignoring the plain language of the Timeshare Act.[10] The doctrine of primary jurisdiction is justified, at least in part, on the basis of furthering legislative intent. *See, e.g., W. Pac. R.R. Co.*, 352 U.S. at 64 (noting the doctrine exists because "agencies created by Congress for regulating the subject matter should not be passed over" (citation omitted)). Yet declaring the REC's decisions to be binding on the courts would frustrate legislative intent as expressed in both the Timeshare Act, which contemplates a private right to initiate judicial proceedings notwithstanding the REC's actions, and the APA, which expressly provides for judicial review of an administrative agency's decisions. *Cf.* S.C. Code Ann. § 27-32-130 (directing the REC to promulgate regulations "*subject to*" the APA (emphasis added)). Moreover, to declare the REC's adjudicative decisions immune from judicial review would effectively nullify the Court's answers to the first two certified questions, at least in situations where the REC determines no violation has occurred—if the REC's decisions were binding, judicial proceedings alleging a violation of the Timeshare Act would be meaningless. In short, the courts should provide the REC's decisions the same deference as any other agency's, no more and no less. *See* S.C. Code Ann. §§ 1-23-380(5), 1-23-610(B) (Supp. 2016).

That said, if a court, either in a proceeding brought pursuant to the APA or in the underlying litigation, declares the REC acted within its lawful authority in issuing a particular decision, the REC's decision is then binding on the courts. Our law only requires there be some avenue for a court to determine the validity of the

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[10] Defendants cite the court of appeals' decision in *Medical University of South Carolina v. Taylor*, 294 S.C. 99, 362 S.E.2d 881 (Ct. App. 1987). In that case, the court held the circuit court erred in granting declaratory and injunctive relief where there were pending administrative proceedings between the same parties involving the same issue. *Id.* at 105, 362 S.E.2d at 884–85. Thus, *Taylor* stands for the proposition that courts should not interfere with proceedings that are already underway in "the administrative agency vested with primary jurisdiction of the question in issue." *Id.* Simply put, the *Taylor* court held that parties are required to follow the review procedures established by statute. *Id.* at 105, 362 S.E.2d at 885. *Taylor* does not provide support for the broader proposition that an administrative agency's decisions are not reviewable by the courts.

REC's ruling. If the court satisfies itself that the decision was lawful, there will be no further inquiry into the wisdom of the REC's decision. This procedure properly balances a person's constitutional and statutory right to challenge an administrative agency's decision with the deference that should be given to an agency tasked by the legislature with administering a particular statutory scheme. *See Kiawah Dev. Partners, II*, 411 S.C. at 53, 766 S.E.2d at 728 (Toal, C.J., dissenting).

IV.

As Defendants have made clear, these certified questions have serious public policy implications. Defendants would have us declare section 27-32-130 ambiguous, thereby allowing us to take those concerns into consideration when answering these questions. However, the statute is not ambiguous, and our rules of statutory interpretation require us to give effect to its unambiguous language. We leave Defendants' policy concerns for the legislature. *See Taghivand*, 411 S.C. at 244, 768 S.E.2d at 387 (recognizing the General Assembly as the primary source of the state's public policy (citation omitted)); *see also State v. Duncan*, 269 S.C. 510, 519, 238 S.E.2d 205, 209 (1977) (noting that the state constitution does not require magistrates be attorneys and any such requirement would have to come from the legislature); *cf. Freeman v. J.L.H. Invs., L.P.*, 414 S.C. 362, 381 n.21, 778 S.E.2d 902, 912 n.21 (2015) (inviting the General Assembly to correct the Court's interpretation of a statute if it disagreed with the Court's ruling); *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) (stating that "the General Assembly is free to correct any misinterpretation [of a statute] on our part"). Accordingly, we hold that (1) the REC does not have exclusive jurisdiction to hear claims for violations of the Timeshare Act, (2) a finding by the REC of a Timeshare Act violation is not a condition precedent to bringing a private cause of action under the Act, and (3) the REC's decisions are not binding on the courts unless they have been subjected to judicial review and found to be lawful.

CERTIFIED QUESTIONS ANSWERED.

BEATTY, C.J., HEARN, FEW, JJ., and Acting Justice Thomas Anthony Russo, Sr., concur.

The Supreme Court of South Carolina

Re: Amendments to Rule 407, South Carolina Appellate Court Rules

Appellate Case No. 2017-000476

ORDER

The South Carolina Bar has filed a petition to amend Rule 5.1 of the Rules of Professional Conduct, contained in Rule 407 of the South Carolina Appellate Court Rules, to detail the responsibilities of a supervising lawyer who elects to employ a lawyer who has been suspended from the practice of law.

We adopt the Bar's proposed amendment to Rule 5.1 of the Rules of Professional Conduct, with minor modifications. Additionally, we amend Rule 5.3 of the Rules of Professional Conduct to include similar language as in Rule 5.1.

The amendments, which are set forth in the attachment to this Order, are effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
May 17, 2017

Rule 5.1(b), RPC, Rule 407, SCACR, is amended to provide:

> (b) A lawyer having direct supervisory authority over another lawyer, including a suspended lawyer employed pursuant to Rule 34, RLDE, Rule 413, SCACR, shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Comment 10 is added to Rule 5.1, RPC, Rule 407, SCACR, and provides as follows:

> [10] Under limited circumstances, a suspended lawyer may be employed by a lawyer, law firm, or any other entity providing legal services during the period of suspension. See Rule 34, RLDE, Rule 413, SCACR. In such circumstances, the supervising lawyer shall be solely responsible for the supervision of the suspended lawyer. If the suspended lawyer violates the rules allowing for employment during suspension or any other rule while under the supervision of the supervising lawyer, the supervising lawyer shall be subject to discipline.

Rule 5.3(b), RPC, Rule 407, SCACR, is amended to provide:

> (b) a lawyer having direct supervisory authority over the nonlawyer, including a suspended lawyer employed pursuant to Rule 34, RLDE, Rule 413, SCACR, shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

Comment 3 is added to Rule 5.3, RPC, Rule 407, SCACR, and provides as follows:

> [3] Under limited circumstances, a suspended lawyer may be employed by a lawyer, law firm, or any other entity providing legal services during the period of suspension. See Rule 34, RLDE, Rule 413, SCACR. In such circumstances, the supervising lawyer shall be solely responsible for the supervision of the suspended lawyer. If the suspended lawyer violates the rules allowing for employment during suspension or any other rule while under the supervision of the

supervising lawyer, the supervising lawyer shall be subject to discipline.