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Products Liability Law for Design Defects in South Carolina: The Aftermath of Branham v. Ford Motor Co.

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PRODUCTS LIABILITY LAW FOR DESIGN DEFECTS IN SOUTH CAROLINA: THE AFTERMATH OF *BRANHAM V. FORD MOTOR CO.*

I. INTRODUCTION

August 16, 2010 is a date that very likely will be remembered for years to come by anyone practicing products liability law in South Carolina. The South Carolina Supreme Court's decision in *Branham v. Ford Motor Co.*[1] is thought to be among the most substantial contributions to products liability law in this state

1. 390 S.C. 203, 701 S.E.2d 5 (2010).

in the last three or more decades.[2] In the case, the court redefined, clarified, and reaffirmed many areas of South Carolina's substantive products liability law, evidentiary rules in products liability cases, and procedural rules for South Carolina's courts.

Branham v. Ford Motor Co. was an action brought by Mr. Jesse Branham, Jr. as guardian ad litem for his son, Jesse Branham, III (Branham).[3] In June of 2001, Branham, who was twelve years old at the time,[4] was riding in the back of Ms. Cheryl Hale's (Hale) 1987 Ford Bronco II when she inadvertently veered slightly off the road.[5] Hale responded by overcorrecting, and the Bronco II rolled over.[6] An unbuckled Branham was ejected from the vehicle and suffered brain injuries.[7] At trial in Hampton County, South Carolina,[8] the jury awarded Branham $16 million in actual damages and $15 million in punitive damages,[9] and defendant Ford appealed.[10]

On appeal, the South Carolina Supreme Court decided many novel issues, clarified some murky issues, and reaffirmed both well-founded and possibly forgotten legal principles in multiple areas of South Carolina law. This Note will discuss the court's multiple holdings and each of their respective effects on South Carolina law, focusing on products liability law in particular. After detailing the relevant history of South Carolina products liability law and the facts of *Branham* in Part II, this Note will provide an in-depth analysis of the substantive products liability issues addressed by the court, as well as their foreseeable effects. The Note will then discuss the evidentiary and procedural issues addressed by the court and each of their effects on both products liability law in South Carolina and general legal practice.

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2. *See, e.g.*, Joel H. Smith & Courtney Crook Shytle, *South Carolina Supreme Court Provides Clarity and Direction in Four Significant Product Liability Cases*, WESTLAW J. AUTOMOTIVE, Sept. 14, 2010, at *1, *available at* 2010WL3540903 ("For the last 30 years, while product liability law has been evolving through court decisions and legislative enactments, the South Carolina appellate courts have been inconsistent or generally silent—until now.").

3. *Branham*, 390 S.C. at 203, 701 S.E.2d at 5.

4. Ted Frank, *Jesse Branham v. Ford: Bad Mom Hurts Kid, Ford Blamed to Tune of $31M*, OVERLAWYERED (Dec. 12, 2006), http://overlawyered.com/2006/12/jesse-branham-v-ford-bad-mom-hurts-kid-ford-blamed-to-tune-of-31m/.

5. *Branham*, 390 S.C. at 208–09, 701 S.E.2d at 8.

6. *Id.* at 209, 701 S.E.2d at 8.

7. *Id.* at 209, 235, 701 S.E.2d at 8, 22.

8. *Id.* at 209, 701 S.E.2d at 8. Hampton County is known among trial lawyers as one of the most plaintiff-friendly places in South Carolina to try a case. *See* Smith & Shytle, *supra* note 2.

9. *Branham*, 390 S.C. at 208, 701 S.E.2d at 7.

10. *Id.* at 209, 701 S.E.2d at 8.

II. BACKGROUND

A. Relevant South Carolina Products Liability Law Prior to Branham

Products liability is defined as "liability for harm to persons or property caused by the use of or exposure to products."[11] South Carolina tort law recognizes claims for manufacturing defects, design defects, and warning defects.[12] Additionally, a plaintiff may pursue each of these claims under multiple theories, such as negligence or strict liability.[13]

A plaintiff pursuing a products liability claim under a theory of strict liability in South Carolina must show:

> (1) that he was injured by the product; (2) that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant; and (3) that the injury occurred because the product was in a defective condition unreasonably dangerous to the user.[14]

A plaintiff bringing a claim under a negligence theory must also prove that the injuries were "proximately caused by a defective condition which could have been prevented by the defendant by the use of reasonable care."[15]

In 1974, the South Carolina General Assembly adopted strict liability of sellers for harm caused by their products; in enacting the Defective Product Act, the legislature adopted "nearly verbatim" the language of *Restatement (Second) of Torts* section 402A.[16] Additionally, the Act expressly incorporated the comments to section 402A by reference as evidence of legislative intent.[17] For years, this Act has been the source of products liability law in South Carolina.[18] However, as this Note will discuss, this is no longer the case.

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11. F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 251 (3d ed. 2004).

12. *Id.* at 297.

13. *See id.* at 255–97. The authors also mention theories of liability based on warranty, *id.* at 258, improvement to realty, *id.* at 283–84, and fraud or other misrepresentation, *id.* at 295–97.

14. Madden v. Cox, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985) (citing WILLIAM L. PROSSER, THE LAW OF TORTS § 103, at 671–72 (4th ed. 1971)).

15. HUBBARD & FELIX, *supra* note 11, at 254.

16. *Id.* at 276 (citing S.C. CODE ANN. § 15-73-10 to 30 (1976)). The Defective Product Act codified a theory of strict liability, which assigned responsibility for selling "unreasonably dangerous" products, even if "[t]he seller has exercised all possible care in the preparation and sale of his product." *Id.* at 276–77 (quoting S.C. CODE ANN. § 15-73-10 (2005)).

17. *See id.* at 277–78 (quoting S.C. CODE ANN. § 15-73-30 (2005)).

18. *See, e.g.*, Claytor v. Gen. Motors Corp., 277 S.C. 259, 262, 286 S.E.2d 129, 131 (1982) ("Strict liability in tort for defective products is recognized under § 15-73-10, Code of Laws of South Carolina (1976)."); Rife v. Hitachi Const. Mach. Co., 363 S.C. 209, 215, 609 S.E.2d 565, 569 (Ct. App. 2005) (citing Code § 15-73-10 as the source for the rule on products liability).

B. Description of the Facts and Holding in Branham

The allegedly defective products in *Branham* stemmed from an 1987 Bronco II 4x2 manufactured by Ford Motor Co. (Ford) in 1986.[19] In 1999, either Hale or her husband purchased the vehicle for approximately $150 with 137,500 miles on it.[20] Two years later, on June 17, 2001, Hale was driving her daughter and several other "excited" children including plaintiff Branham, to her house; none of the passengers were wearing a seat belt.[21] While driving—allegedly in clear weather conditions and at the speed limit—Hale took her eyes off the road to turn around and quiet the children.[22] In doing so, the Bronco II veered toward the shoulder of the road, and the right tire left the roadway, alerting Hale of her mistake.[23] She overcorrected by turning the wheel back toward the road, which caused the Bronco II to shake and subsequently to roll over.[24] During the incident, Branham was thrown from the vehicle and suffered brain injury.[25]

Branham, through his father as guardian ad litem, sought damages from Ford under South Carolina's products liability law for a defective seat belt sleeve and a defective "handling and stability" design; Branham pursued both allegations under theories of negligence and strict liability.[26] With regard to the seat belt sleeve negligence claim, Branham claimed that Ford was negligent for having sold the 1987 Bronco II with defective rear seat belts.[27] Although Branham's amended complaint did not specify the alleged negligence in the design, he did claim at trial that "Ford was negligent in failing to adequately test the seatbelt sleeve."[28] Branham also pursued this claim under a theory of strict liability;[29] however, the trial court granted Ford's motion for a directed verdict on the strict liability claim because it found, as a matter of law, that the seat belt sleeve was not "unreasonably dangerous to the user at the time of manufacture."[30]

The heart of Branham's case was the "handling and stability" design defect claim.[31] Branham relied primarily on internal Ford documents and testimony from two experts—former vice president of Ford, Mr. Thomas Feaheny, (Feaheny), and Dr. Melvin Richardson (Richardson)—to prove this claim.[32] Feaheny testified that the Bronco II was a product of Ford's "YUMA Program,"

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19. Branham v. Ford Motor Co., 390 S.C. 203, 208, 701 S.E.2d 5, 7 (2010).
20. *Id.* at 208 & n.1, 701 S.E.2d at 7–8 & n.1.
21. *Id.* at 208, 701 S.E.2d at 8.
22. *Id.*
23. *Id.* at 208–09, 701 S.E.2d at 8.
24. *Id.* at 209, 701 S.E2d at 8.
25. *Id.* at 209, 235, 701 S.E.2d at 8, 22.
26. *Id.* at 209, 701 S.E.2d at 8 (internal quotation marks omitted).
27. *Id.*
28. *Id.*
29. *Id.* at 209–10, 701 S.E.2d at 8.
30. *Id.* at 210, 701 S.E.2d at 8.
31. *See id.* at 212, 701 S.E.2d at 10.
32. *See id.* at 213–18, 701 S.E.2d at 10–13.

a project that began in the late 1970s.[33] Richardson explained that the YUMA project set out to develop the design of small trucks (such as the Bronco II) and that the suspension in such trucks was important to their handling and stability,[34] "stability index,"[35] and center of gravity.[36] The YUMA prototypes for the future Bronco II initially had MacPherson front suspensions—this was the type of suspension Ford engineers requested when communicating with Ford management about how to address early handling and stability issues with the prototypes.[37] According to Feaheny, the MacPherson suspension was the "best, most feasible suspension from a functional standpoint and also from a cost and weight standpoint."[38]

Ford corporate executives, however, disagreed with the engineers and Feaheny; they believed the well-promoted, Twin I-Beam suspension should be used instead of the MacPherson suspension because of the "major marketing advantage" it served.[39] Feaheny explained his and the engineers' reasons for disagreeing with the Ford executives' decision—he testified that essentially the Twin I-Beam suspension was much larger than the MacPherson suspension, which caused the entire vehicle to be lifted higher.[40] This resulted in a higher center of gravity for the Bronco II and negatively affected the vehicle's stability.[41] Additionally, Feaheny testified that the Twin I-Bean suspension had a tendency for "jacking"—the vehicle would "slide out in a severe handling maneuver," causing "an instantaneous raising of the center of gravity," making the vehicle more top heavy and increasing "the propensity for rollover."[42]

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33. *Id.* at 213, 701 S.E.2d at 10. YUMA was a code name developed by Ford for its study of small trucks that led to the development of the Ford Ranger and Bronco II. *Id.*

34. *Id.* at 213, 215, 701 S.E.2d at 10–11. Richardson explained that "a vehicle with a *stable* suspension is [better] able to make a turn in the road" because as a vehicle goes around the turn and starts to lean over, the tires remain "the same distance apart where they touch the ground." *Id.* at 213, 701 S.E.2d at 10 (emphasis added) (internal quotation marks omitted). Conversely, when a vehicle with an *unstable* suspension goes around the same turn, the tires will "scrub" the ground, which decreases the vehicle's stability and handling. *See id.* (emphasis added).

35. *Id.* at 212, 701 S.E.2d at 10. The stability index,—essentially a comparison of a vehicle's height and width—is a term used to describe a vehicle's overall stability. *Id.* at 212–13, 701 S.E.2d at 10.

36. *Id.* at 213, 701 S.E.2d at 10. Center of gravity relates to the commonly-used description of a vehicle as "top heavy or stable." *Id.* (internal quotation marks omitted). The lower a vehicle's center of gravity is, the more stable it is, whereas the higher a vehicle's center of gravity, the more top heavy, or less stable, it is. *Id.*

37. *Id.* at 213–14, 701 S.E.2d at 10.

38. *Id.* at 214, 701 S.E.2d at 10 (internal quotation marks omitted).

39. *Id.* at 215, 701 S.E.2d at 11 (internal quotation marks omitted). Since the 1960s, the Twin I-Beam suspension had been used in Ford's bigger full-sized trucks, and marketing executives considered it to be "part and parcel of a tough truck." *Id.*

40. *Id.* at 214, 701 S.E.2d at 11. The engine had to be lifted approximately two to three inches to make room for the Twin I-Beam suspension, which necessarily caused the transmission, the hood, and the seating to be raised, all in order to accommodate the larger suspension. *Id.*

41. *See id.*

42. *Id.* (internal quotation marks omitted).

Richardson's testimony bolstered the views expressed by Feaheny; he testified that use of the Twin I-Beam suspension made the Bronco II unreasonably dangerous.[43] Richardson testified as to the existence of a document, dated February 5, 1981, that discussed the stability index of the Bronco II and potential methods for improvement.[44] The document contained multiple design alternatives for improving the stability index from 1.85 to 2.25, without the development of a new concept vehicle.[45] Ford chose the proposal that increased the stability index to 2.02.[46] Richardson also testified to a variety of other Ford documents, including documents discussing how to proceed with the steering and suspension design following "J" turn testing,[47] the stability index of the Bronco II prior to the final engineering sign-off,[48] and the need to improve the Bronco II during its life cycle.[49] Following Richardson's discussion of the last document, Branham asked if there were any improvements made to the Bronco II after its release, and Richardson indicated that the company could not have made any improvements that would have corrected the defects.[50]

The fact that Hale's Bronco II was two-wheel drive (4x2) was also relevant, and was discussed in the case. The Bronco II 4x2 model was lighter than the 4x4 model, which resulted in the 4x2 model having a higher center of gravity and inferior stability as compared to the 4x4.[51]

In addition to the aforementioned testimony of Feaheny and Richardson, Branham introduced memoranda and at least one video tape prepared after the manufacture of Hale's 1987 Bronco II.[52] One memorandum, dated April 14, 1989, dealt with a meeting between three Ford engineers and representatives from Consumer Reports.[53] The memorandum discussed the engineers' belief that—to Ford's advantage—they had "clouded" the minds of the Consumer Reports representatives about the negative aspects of the Bronco II, one of which was data showing that the Bronco II's rollover rate was three times higher than that of the Chevrolet S-10 Blazer.[54]

Through Richardson, Branham introduced a film taped in 1989 comparing the Bronco II and Chevy S-10 Blazer along with a corresponding report

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43. *See id.*

44. *Id.* at 215–16, 701 S.E.2d at 11–12.

45. *Id.*

46. *Id.* at 216, 701 S.E.2d at 12. Although none of the proposals included a different suspension, Richardson opined that, with a different suspension, such as the MacPherson, the Bronco II "could have achieved a stability index of 2.25." *Id.*

47. *Id.* at 216–17, 701 S.E.2d at 12. "J" turn testing is a method employed by Ford engineers to test a vehicle's stability; the vehicle is driven in a straight line and then quickly turned and held at a predetermined angle "for the remainder of the turn." *See id.* at 213, 701 S.E.2d at 10.

48. *See id.* at 217, 701 S.E.2d at 12.

49. *See id.*

50. *Id.* (internal quotations marks omitted).

51. *Id.*

52. *See id.* at 227–29, 701 S.E.2d at 18–19.

53. *Id.* at 227–28, 701 S.E.2d at 18.

54. *Id.*

indicating that Ford had requested "additional 'J' turn tests"[55] in May of 1989 "for various vehicles, including a 1989 Bronco II 4x4."[56] The tape revealed that the 1989 Chevy S-10 Blazer handled better than the 1989 Bronco II.[57] Richardson also testified to the existence of a document comparing a 1989 Bronco II with a prototype of what became the Ford Explorer.[58] The document discussed the Bronco II's rollover tendency, as shown by an analysis of its past accident summaries.[59] Additionally, another memorandum was introduced that discussed an accident that occurred in February of 1989, when a Bronco II rolled over during a test of a prototype antilock braking system; the rollover occurred while the vehicle was being operated on an ice surface.[60]

At the trial in Hampton County, the jury awarded Branham $16 million in actual damages as well as $15 million in punitive damages.[61] On direct appeal from the circuit court,[62] the South Carolina Supreme Court made the following conclusions, each of which will be discussed in turn:

- In products liability design defect cases, South Carolina follows the view of the *Restatement (Third) of Torts* that a plaintiff must show a reasonable alternative design and analyze the alternative design's reasonableness according to the "risk-utility test;"[63]

- There is no separate "failure to test" cause of action in South Carolina, other than the failure to design a safe and not unreasonably dangerous product;[64]

- Products liability design defect actions brought under strict liability and negligence theories share some of the same elements, and a failure to prove one of the elements common to both, causes both claims to fail;[65]

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55. *Id.* at 228, 701 S.E.2d at 18 (internal quotation marks omitted).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 228–29, 701 S.E.2d at 18–19.
60. *Id.* at 229, 701 S.E.2d at 19. The supreme court noted that these were just a few examples of the "post-manufacture" and "post-distribution evidence" introduced by plaintiff Branham at the trial. *Id.*
61. *Id.* at 208, 701 S.E.2d at 7.
62. *Id.*
63. *Id.* at 222, 701 S.E.2d at 15; *see also* discussion *infra* Part III.A.
64. *Id.* at 210, 701 S.E.2d at 9 (internal quotation marks omitted); *see also* discussion *infra* Part III.B.
65. *See id.* at 210, 701 S.E.2d at 8; *see also* discussion *infra* Part III.C.

- Evidence not reasonably attainable prior to the distribution of a product, (i.e., "post-distribution evidence") is inadmissible;[66]

- Evidence of "other similar incidents" is allowable, provided that the evidence is substantially similar and is not post-distribution evidence;[67]

- Closing arguments may not arouse passion or prejudice in a jury; if a closing argument arouses passion or prejudice to the point that a party was denied a fair trial, then a new trial is appropriate;[68]

- Evidence of a defendant's net worth and derivations of net worth are allowable, but likely nothing further;[69]

- A court may not punish a defendant for "harm to others" who are not a party to the action;[70]

- A trial court has the power to realign parties;[71]

- For causes of action occurring prior to July 1, 2005, allocation of fault between joint tortfeasors is improper;[72]

III. SUBSTANTIVE PRODUCTS LIABILITY LAW ADDRESSED IN *BRANHAM* AND ITS EFFECT

In 1974, the South Carolina General Assembly adopted "nearly verbatim" the language of *Restatement (Second) of Torts* section 402A and the accompanying comments for products liability causes of action.[73] Based on this framework, courts in South Carolina have held that plaintiffs in design defect cases must show, among other things, that they were injured because of an unreasonably dangerous product.[74]

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66. *Id.* at 227; 701 S.E.2d at 17; *see also* discussion *infra* Part IV.A.

67. *Id.* at 232, 701 S.E.2d at 20 (internal quotation marks omitted); *see also* discussion *infra* Part IV.B.

68. *See id.* at 234–35; 701 S.E.2d at 21–22; *see also* discussion *infra* Part IV.C.

69. *See id.* at 239–41, 701 S.E.2d at 24–25; *see also* discussion *infra* Part IV.D.

70. *Id.* at 238, 701 S.E.2d at 24 (internal quotation marks omitted); *see also* discussion *infra* Part IV.E.

71. *See id.* at 241–43, 701 S.E.2d at 25–26; *see also* discussion *infra* Part IV.F.

72. *See id.* at 235–37, 701 S.E.2d at 22–23; *see also* discussion *infra* Part IV.G.

73. *See supra* notes 16–17 and accompanying text.

74. *See, e.g.*, Madden v. Cox, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985) (citing WILLIAM L. PROSSER, THE LAW OF TORTS § 103, at 671–72 (4th ed. 1971)) (discussing the elements plaintiffs must show in any products liability action).

A. The "Risk-Utility" Test and Evidence of a Reasonable Alternative Design in Design Defect Actions

Since the adoption of section 15-73-10 through section 15-73-30, courts have interpreted the unreasonably dangerous product requirement by relying on the comments to section 402A of the *Restatement (Second) of Torts*.[75] From these comments, South Carolina courts formulated the consumer-expectation test to determine when a product would be considered unreasonably dangerous.[76] The supreme court established the consumer-expectation test in *Young v. Tide Craft, Inc.*,[77] which focused on whether the product in question was more dangerous than the ordinary consumer would expect it to be.[78] The test evolved, however, and in 1982 the supreme court considered a balancing test in *Claytor v. General Motors Corp.*[79] In its analysis of whether the product at issue was unreasonably dangerous, the court listed many factors, which were essentially equivalent to the risk-utility test recently adopted in *Branham*.[80]

Additionally, while South Carolina courts have never, prior to *Branham*, expressly required a feasible or reasonable alternative design as proof of a product being unreasonably dangerous, on multiple occasions the courts have noted the absence or existence of a feasible alternative design in their rulings.[81]

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75. *See, e.g.*, Claytor v. Gen. Motors Corp., 277 S.C. 259, 264, 286 S.E.2d 129, 131–32 (1982) ("The seller is not liable when he delivers the product in a safe condition and subsequent mishandling or other causes make it harmful by the time it is consumed." (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965))); Young v. Tide Craft, Inc., 270 S.C. 453, 471, 242 S.E.2d 671, 680 (1978) ("The question that presents itself is whether the absence of the kill switch *per se* rendered the boat dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with knowledge common to the community as to its characteristics." (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965)) (internal quotation marks omitted)).

76. *See Branham*, 390 S.C. at 220, 701 S.E.2d at 14.

77. 270 S.C. 453, 242 S.E.2d 671 (1978).

78. *See id.* at 471, 242 S.E.2d at 680 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965)).

79. *See* 277 S.C. 259, 265, 286 S.E.2d 129, 132 (1982); HUBBARD & FELIX, *supra* note 11, at 303.

80. *Claytor*, 277 S.C. at 265, 286 S.E.2d at 132 ("[N]umerous factors must be considered, including the usefulness and desirability of the product, the cost involved for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger."); *see also Branham*, 390 S.C. at 225 & n.16, 701 S.E.2d at 16 & n.16 (2010) (citing *Claytor*, 277 S.C. at 265, 286 S.E.2d at 132).

81. Evidence of a reasonable alternative design has been sufficient to uphold verdicts in favor of a plaintiff under product liability theories. *See, e.g.*, Kennedy v. Custom Ice Equip. Co., 271 S.C. 171, 176, 246 S.E.2d 176, 178 (1978) ("[T]he failure to anticipate the foreseeable use of a catwalk by placing protective shields on the conveyor rendered the design of the conveyor defective."); Mickle v. Blackmon, 252 S.C. 202, 234, 166 S.E.2d 173, 187 (1969) ("Without an adequate protective knob, the [gearshift] lever was quite capable of piercing the body of any person who might be thrown upon it, and the jury could reasonably have concluded that the rod presented an unreasonable risk of injury unless effectively guarded."). Conversely, South Carolina appellate courts have also noted a plaintiff's lack of evidence of a reasonable alternative design in affirming

Thus, prior to *Branham*, South Carolina courts used both the consumer-expectation test and the balancing test to determine whether a product was unreasonably dangerous,[82] but the tests were applied inconsistently and how much weight should be given to each test was unclear.[83] The South Carolina Supreme Court in *Branham* clarified this issue by expressly adopting the risk-utility test and its requirement that plaintiffs present a feasible alternative to the allegedly defective design.[84] Under the new rule, a plaintiff in a products liability design defect action must: 1) "point to a design flaw" in the allegedly defective product; 2) "present evidence of a reasonable alternative design"; and 3) "show how his alternative design would have prevented the [allegedly defective] product from being unreasonably dangerous."[85] The risk-utility test will be employed to show that the alternative design is reasonable as compared to the allegedly defective design, and the plaintiff's showing "must include consideration of the costs, safety and functionality associated with the alternative design."[86] Additionally, the requirements and factors of *Branham*'s formulation of the risk-utility test are illuminated by previous definitions offered by the supreme court and the court of appeals.[87]

The court in *Branham* noted that this new rule is in accord with the *Restatement (Third) of Torts*.[88] In adopting the *Restatement* view, the court stated its belief that the new rule is essentially what trial and appellate courts have been using and is in accord with the trend of products liability law in South Carolina.[89]

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defense verdicts. *See, e.g.*, Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 546, 462 S.E.2d 321, 330 (Ct. App. 1995) ("[Plaintiff] Bragg failed to introduce evidence of a feasible design alternative. Bragg's hydraulics expert conceded the device he designed and advanced as a nondefective alternative was simply for demonstration purposes and would not work."); Sunvillas Homeowners Ass'n v. Square D Co., 301 S.C. 330, 334, 391 S.E.2d 868, 870 (Ct. App. 1990) ("[Plaintiff] Sunvillas's expert did not testify about design alternatives. He did not identify a specific defect in the circuit breaker which was the result of a manufacturing error by [defendant] Square D. At most the jury would be left to speculate how Square D failed to exercise due care. The trial court was correct in granting the directed verdict.").

82. *See Branham*, 390 S.C. at 218, 701 S.E.2d at 13.

83. *See id.* at 218–22, 701 S.E.2d at 13–15. *See generally* HUBBARD & FELIX, *supra* note 11, at 303 ("The South Carolina [courts] have not articulated a specific test of 'unreasonably dangerous.' Instead, the cases contain reference to both the expectation test and the risk-benefit test.").

84. *Branham*, 390 S.C. at 220, 701 S.E.2d at 14.

85. *Id.* at 225, 701 S.E.2d at 16.

86. *Id.*

87. *See id.* at 218, 701 S.E.2d at 13 (quoting Claytor v. Gen. Motors Corp., 277 S.C., 259, 265, 286 S.E.2d, 129, 132 (1982)); *id.* at 218–19, 701 S.E.2d at 13 ("[A] product is unreasonably dangerous and defective if the danger associated with the use of the product outweighs the utility of the product." (alteration in original) (quoting Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 543, 462 S.E.2d 321,328 (Ct. App. 1995))).

88. *Id.* at 223–24, 701 S.E.2d at 16 (quoting RESTATEMENT (THIRD) OF TORTS § 2(b) (1998)).

89. *Id.* at 222, 701 S.E.2d at 15.

It should be noted, however, that although the court's new rule appears to simply be an evolution of judicial common law, its effect on the provisions of the Defective Product Act—which adopted the view of the *Restatement (Second)*—was not directly resolved by the court and remains unclear.[90]

Had the new standard enunciated by the court been in place at the time of previously decided design defect cases, the outcomes in those cases probably would not have been affected significantly. Although not identical, the standards for liability under the *Restatement (Second)* and the *Restatement (Third)* are very similar.[91] Professors James A. Henderson and Aaron D. Twerski assert that "even [state] courts that apply a consumer-expectation test rarely do so without tempering it with significant risk-utility balancing."[92] This view accurately describes the test's use in South Carolina, as it had not been the exclusive and determinative test prior to *Branham*.[93] The Reporters' notes to the *Restatement (Third)* bolster this opinion.[94]

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90. *See id.* at 220, 701 S.E.2d at 14. The supreme court reasoned that when the General Assembly enacted South Carolina's version of section 402A of the *Restatement (Second)* in 1974, it adopted the comments as indicative of legislative intent. *See id.* Since then, the *Restatement (Third)* was published, and "[t]he third edition effectively moved away from the consumer expectations test for design defects, and towards a risk-utility test." *Id.* Because the legislature directed courts to look to the comments of the Restatement, the court concluded, "We thus believe the adoption of the risk-utility test in design defect cases in no manner infringes on the Legislature's presence in this area." *Id.* In other words, the court concluded that its holding would not infringe upon the legislative function and that adopting the view of the *Restatement (Third)* would actually be in line with legislative intent. *See id.*

91. For purposes of this analysis, both views essentially boil down to a requirement that the product have been unreasonably dangerous; the differences arise with respect to the level of proof required. *Compare* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. d (1998) ("[T]he test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design by the seller or a predecessor in the distributive chain rendered the product not reasonably safe."), *and id.* cmt. f ("To establish a prima facie case of defect, the plaintiff must prove the availability of a technologically feasible and practical alternative design that would have reduced or prevented the plaintiff's harm."), *with* RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965) ("One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused . . . ."), *and id.* cmt. g ("The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.").

92. James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1533 (1992).

93. *See, e.g.*, Bragg v. Hi–Ranger, Inc., 319 S.C. 531, 544, 462 S.E.2d 321, 328 (Ct. App. 1995) ("[I]n South Carolina we balance the utility of the risk inherent in the design of the product with the magnitude of the risk to determine the reasonableness of the manufacturer's action in designing the product." (citing Claytor v. Gen. Motors Corp., 277 S.C. 259, 265, 286 S.E.2d 129, 132 (1982))).

94. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 reporters' note cmt. d (1998); *see also* Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1722 (2003) ("In the view of the Reporters, courts that purport to apply a consumer expectations test largely can be grouped into one of two categories: those that simply cloak a risk-utility test with consumer expectations language, and those that emphasize consumer expectations only in the context of

Practically speaking, it appears that the results of typical products liability design defect actions will be similar to the results before *Branham*; nevertheless, other lingering questions remain to be answered by future litigation or legislation. The first of these questions involves determining the role of the consumer-expectation test in future products liability design defect cases. As discussed above, the consumer-expectation test has not been used as the exclusive test in South Carolina for quite some time, but it was at the least a substantial factor in the court's prior decisions. In the post-*Branham* era, however, the consumer-expectations test may have a somewhat different role. In adopting the risk-utility test as the "exclusive test in a products liability design case," the *Branham* court explained that the consumer-expectations test "is ill-suited in design defect cases."[95] Notwithstanding the court's language, because the consumer-expectations test is folded into the risk-utility test, its reasoning may continue to inform judicial decisions. The comments to the *Restatement (Third) of Torts*—which the supreme court noted are indicative of legislative intent—are instructive. In particular, one comment addresses the issue of consumer expectations, stating:

> Consumer expectations, standing alone, do not take into account whether the proposed alternative design could be implemented at reasonable cost, or whether an alternative design would provide greater overall safety. Nevertheless, consumer expectations about product performance and the dangers attendant to product use affect how risks are perceived and relate to foreseeability and frequency of the risks of harm, both of which are relevant . . . . Thus, although consumer expectations do not constitute an independent standard for judging the defectiveness of product designs, they may substantially influence or even be ultimately determinative on risk-utility balancing in judging whether the omission of a proposed alternative design renders the product not reasonably safe.[96]

Further confusion remains with respect to the defenses to design defect products liability actions—specifically, whether assumption of risk or comparative negligence are viable defenses. The comments to section 402A of the *Restatement (Second)*, which are included as part of section 15-73-30 of the South Carolina Code, state that contributory negligence is generally not an available defense.[97] South Carolina has since adopted comparative negligence,[98]

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product malfunctions that would equally merit an inference of defect under the *Restatement*'s section 3." (footnote omitted)).

95. *Branham* 390 S.C. at 220, 701 S.E.2d at 14 (2010).

96. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § cmt. g (1998).

97. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n. (1965) ("Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect of the product, or to guard against the possibility of its existence."). However, the assumption of

but the courts have but not ruled on its applicability to the context of design defect products liability cases.[99] Although the court in *Branham* did not directly address the issue, the comments to the *Restatement (Third)* presumably will be instructive because they allow comparative negligence to reduce a plaintiff's recovery and refer to a plaintiff's "misuse, modification, and alteration" of a product as relevant to the issues of causation, defect, and fault.[100]

In addition to the points discussed above, other issues need resolution as well: What will be the effect of the "state of the art" defense?[101] What will happen to the "heeding presumption" in South Carolina?[102] Will reasonably alternative designs be required for manifestly unreasonable designs,[103] defective food products,[104] or prescription drugs and medical devices?[105]

B. The "Failure to Test" Claim in Design and Manufacturing Defect Cases

Branham's case centered on his design defect claim with respect to the Bronco II's suspension,[106] but Branham also claimed that Ford was liable under negligence and strict liability theories for the "defective rear occupant restraint system" (seat belt sleeve).[107] Although Branham did not challenge the design of

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risk defense is available to defendants and it can operate as a total bar to a plaintiff's recovery in products liability actions; the comment explains, "If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery." *Id.*; *see also* S.C. CODE ANN. § 15-73-20 (2005) (codifying assumption of risk as a defense).

98. *See* Nelson v. Concrete Supply Co., 303 S.C. 243, 244, 399 S.E.2d 783, 784 (1991); HUBBARD & FELIX, *supra* note 11, at 183.

99. *See* HUBBARD & FELIX, *supra* note 11, at 183–86 (providing an extensive review of South Carolina cases on comparative negligence that shows no instance of a court directly ruling on the applicability of the doctrine to design defect products liability cases).

100. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. p (1998). As with assumption of risk, disproving the element of causation would in effect result in a total bar to recovery. *See id.*

101. *See generally id.* cmt. d ("Defendants often seek to defend their product designs on the ground that the designs conform to the 'state of the art.' The term 'state of the art' has been variously defined to mean that the product design conforms to industry custom, that it reflects the safest and most advanced technology developed and in commercial use, or that it reflects technology at the cutting edge of scientific knowledge.").

102. The "heeding presumption" provides, "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965).

103. *See generally* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. e (1998) ("Several courts have suggested that the designs of some products are so manifestly unreasonable, in that they have low social utility and high degree of danger, that liability should attach even absent proof of a reasonable alternative design.").

104. *See id.* cmt. h.

105. *See id.* § 6.

106. *See* Branham v. Ford Motor Co., 390 S.C. 203, 212, 701 S.E.2d 5, 10 (2010). The design defect claims with respect to the Bronco II's suspension resulted in a $31 million jury reward at trial. *See id.* at 209, 701 S.E.2d at 8.

107. *Id.* at 209, 701 S.E.2d at 8 (internal quotation marks omitted).

the seat belt sleeve, he did claim that "Ford was negligent in failing to adequately test the seat belt sleeve.[108] At trial, the strict liability claim was dismissed, but the negligence claim went forward.[109] On appeal, Ford successfully argued that in a products liability action "there is no separate 'failure to test claim' apart from the duty to design and manufacture a product that is not defective and unreasonably dangerous."[110] In accepting this proposition, the court viewed the failure to test claim as an issue of proximate cause—if the product was unreasonably dangerous, then under products liability law, the manufacturer would be liable.[111] However, if the product was not unreasonably dangerous, then presumably no amount of testing by the manufacturer would have prevented the accident.[112] Therefore, the defendant's alleged failure to test could not be considered the proximate cause of the plaintiff's injuries.[113]

While this holding is generally in accord with traditional South Carolina law, it also clarified some ambiguity. More than forty years ago, prior to the General Assembly's enactment of the products liability laws, in *Nelson v. Coleman Co.*,[114] the South Carolina Supreme Court recognized a "general rule that manufacturers have a duty to test and inspect their products."[115] Some years later, in *Young v. Tide Craft, Inc.*,[116] the supreme court recognized a plaintiff's failure to test claim, but dismissed it because the underlying design defect was not the proximate cause of the injury.[117] Because the underlying design defect claim was dismissed, the court held that the manufacturer's failure to test the product could not have been the proximate cause of the plaintiff's injuries.[118] Based on this discussion, one could deduce that the failure to test claim would be incorporated into the design defect claim, but this conclusion was not implicit in the court's holding.[119]

More recently, in *Duncan v. Ford Motor Co.*,[120] the South Carolina Court of Appeals recognized a manufacturer's duty to test and inspect components incorporated into its products.[121] In so doing, the court referenced section 15-73-

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108. *Id.*

109. *Id.* at 210–11, 701 S.E.2d at 8–9.

110. *Id.* at 210, 701 S.E.2d at 9.

111. *See id.*; RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (1998).

112. *See Branham*, 390 S.C. at 210, 701 S.E.2d at 9 ("[I]f a product is not in a defective condition unreasonably dangerous to the user, an alleged failure to test cannot be the proximate cause of an injury.").

113. *See id.* at 210–11, 701 S.E.2d at 8–9.

114. 249 S.C. 652, 155 S.E.2d 917 (1967).

115. *Id.* at 657, 155 S.E.2d at 920.

116. 270 S.C. 453, 242 S.E.2d 671 (1978).

117. *See id.* at 470, 242 S.E.2d at 679.

118. *Id.*

119. *See id.*

120. 385 S.C. 119, 682 S.E.2d 877 (Ct. App. 2009).

121. *Id.* at 133, 682 S.E.2d at 884 (citing Nelson v. Coleman Co., 249 S.C. 652, 657, 155 S.E.2d 917, 920 (1967)).

10 of the South Carolina Code, and thereby implied that a manufacturer's duty to test had been incorporated into current statutory products liability law.[122] Additionally, federal district courts applying South Carolina law have recognized a manufacturer's duty to test products, though again, not separately from a products liability claim.[123] In *Branham*, the court cleared up this uncertainty by expressly adopting Ford's argument that "there is no separate 'failure to test claim' apart from the duty to design and manufacture a product that is not defective and unreasonably dangerous."[124]

Some uncertainty remains over the implications of the court's rule, however, such as whether a claim based on a manufacturer's failure to test prescription drugs and medical devices would be recognized by South Carolina courts. Presumably, the prohibition on a separate failure to test claim would apply in this context as well. This prohibition would thus have the potential to negatively impact plaintiffs' abilities to recover because the failure to test claim has become an important theory of liability in the prescription drug and medical devices areas.[125] As previously discussed in Part III.A, the South Carolina Supreme Court in *Branham* formulated the rule for design defect products liability in accordance with section 2 of the *Restatement (Third) of Torts*. However, section 2 does not apply in the context of prescription drugs and medical devices—rather, section 6 does.[126] In section 6, the standard for liability in design defect actions is similar to that in section 2—both require a showing that the product is unreasonably dangerous in light of the foreseeable harms and benefits.[127] Consequently, if a court looks to *Restatement* section 6 in future design defect products liability cases involving prescription drugs or medical devices, then it will likely apply the reasoning from *Branham* and refuse to allow a separate failure to test claim.

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122. *See id.* at 134, 682 S.E.2d at 884 (citing S.C. CODE ANN. § 15-73-10 (2005)). Although the court of appeals cited *Nelson* in support of its position, as previously stated, *Nelson* was decided prior to the statutory adoption of products liability law in South Carolina. *See supra* note 114 and accompanying text.

123. *See, e.g.*, Baughman v. Gen. Motors Corp., 780 F.2d 1131, 1132 (4th Cir. 1986) ("A manufacturer or assembler who incorporates a defective component part into its finished product and places the finished product into the stream of commerce is liable for injuries caused by a defect in the component part. The fact that the manufacturer or assembler did not actually manufacture the component part is irrelevant, as it has a duty to test and inspect the component before incorporating it into its product." (citing *Nelson*, 249 S.C. at 657, 155 S.E.2d at 920).

124. Branham v. Ford Motor Co., 390 S.C. 203, 210, 701 S.E.2d 5, 9 (2010).

125. *See, e.g.*, Brian A. Comer, *Ten Takeaways from Branham v. Ford Motor Co.*, S.C. PRODS. LIAB. L. BLOG (Aug. 27, 2010, 8:43 AM), http://scproductsliabilitylaw.blogspot.com/2010/08/ten-takeaways-from-branham-v-ford-motor.html ("[F]ailure to test has become a prevalent theory, especially in drug and medical device cases." (internal quotation marks omitted)).

126. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 6 (1998).

127. *See id.* § 2, § 6. However, the standard for design defects in prescription drugs and medical devices in section 6 is somewhat higher—the test asks whether "reasonable health-care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for *any* class of patients." *Id.* § 6(c) (emphasis added).

In sum, a future plaintiff may not simply claim a manufacturer is liable for breaching its duty to test a product; rather, a plaintiff must claim that the manufacturer breached its duty to design and manufacture a product that is not defective and unreasonably dangerous to the user, which includes a duty to conduct reasonable tests.

C. The Relationship Between Negligence and Strict Liability Claims in Products Liability

As mentioned in the previous section, Branham brought an action for damages based on strict liability and negligence for a defective seat belt sleeve.[128] In dismissing the strict liability claim but allowing the negligence claim to go forward, the trial court relied on the South Carolina Court of Appeals's decision in *Bragg*,[129] which held, "Strict liability and negligence are not mutually exclusive theories of recovery . . . and failure to prove one theory does not preclude proving the other."[130] Although as a general matter the court in *Branham* agreed, it cautioned against such a broad reading and narrowed the *Bragg* ruling by stating:

> An analytical framework that turns solely on whether strict liability and negligence are mutually exclusive theories of recovery may miss the mark. . . . Where one claim is dismissed and a question arises as to the continuing viability of the companion claim, the critical inquiry is to ascertain the basis for the dismissal.

The rule to take away from this analysis is quite simple—"If one claim is dismissed and the basis of the dismissal rests on a common element shared by the companion claim, the companion claim must also be dismissed."[131]

Essentially, a plaintiff in any strict liability design defect action must prove three elements—first, "that he was injured by the product"; second, "that the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant"; and third, "that the injury occurred because the product was in a defective condition unreasonably dangerous to the user."[132] The only difference with a claim based on a negligence theory is that the plaintiff must additionally show that the defendant "failed to exercise due

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128. *Branham*, 390 S.C. at 209–10, 701 S.E.2d at 8.

129. *Id.* at 211, 701 S.E.2d at 9.

130. Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995) (citing Davis v. Globe Mach. Mfg. Co., 684 P.2d 692, 696 (Wash. 1984)).

131. *Id.* at 211–12, 701 S.E.2d at 9.

132. Madden v. Cox, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985) (citing WILLIAM L. PROSSER, THE LAW OF TORTS § 103, at 671–72 (4th ed. 1971)).

care in some respect."[133] As a result, if the plaintiff does not prove one of the first three required elements, then neither a claim based on strict liability nor one based on negligence can succeed. In *Branham*, the trial court dismissed the plaintiff's strict liability claim based on an element that was also required for the plaintiff's negligence claim; thus, the negligence claim should also have failed.[134]

Although this rule appears simple enough, it actually clarifies a quite murky and seemingly inconsistent analysis from the court of appeals in *Bragg*. In *Bragg*, the court held that "it is possible under certain circumstances for a supplier of products to be held liable under a negligence theory even though the supplier is not strictly liable."[135] There, the estate of an employee of an electrical contractor brought a products liability action for damages against the manufacturer of an aerial device under theories of negligence and strict liability.[136] The trial court granted the defendant's motion for a directed verdict with respect to the strict liability claim, but not for the negligence claim.[137] The case went to the jury on the negligence claim, and the jury returned a verdict in favor of the defendant.[138] On appeal, the plaintiff challenged the dismissal of the strict liability claim, arguing that because the evidence was sufficient to overcome the directed verdict on the negligence claim, the strict liability claim—with all elements in common—should have survived directed verdict as well.[139] The court of appeals did not agree with the argument.[140]

Essentially, the court of appeals held that under a theory of negligence—although "the plaintiff bears the additional burden of demonstrating the defendant (seller or manufacturer) failed to exercise due care in some respect"—the focus of the analysis is on the conduct of the defendant.[141] By contrast, the

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133. *Bragg*, 319 S.C. at 539, 462 S.E.2d at 326 (citing *Madden*, 284 S.C. at 579, 328 S.E.2d at 112).

134. *See Branham*, 390 S.C. at 212, 701 S.E.2d at 9.

135. *Bragg*, 319 S.C. at 541, 462 S.E.2d at 327.

136. *Id.* at 534–35, 462 S.E.2d at 323. The plaintiff also brought suit against the distributor of the device, but the parties settled and the trial court dismissed the distributor from the case. *Id.* at 534 & n.1, 462 S.E.2d at 323 & n.1. Additionally, the plaintiff initially claimed that the defendants breached certain implied warranties, but those were dismissed at trial and were not at issue on appeal. *See id.* at 534 & n.2, 462 S.E.2d at 323 & n.2.

137. *Id.* at 534, 462 S.E.2d at 323.

138. *Id.*

139. *See id.* at 538, 426 S.E.2d at 325. The plaintiff's argument was that the decision of the trial court "to grant the motion for directed verdict on strict liability, while denying the motion for directed verdict on negligence, was logically inconsistent and reversible error because those claims [were] virtually identical and require[d] the same proof." *Id.* In *Branham*, defendant Ford took a completely opposite position using essentially the same logic. On appeal, Ford argued that because the trial court dismissed Branham's strict liability claim, it should also have dismissed his companion negligence claim. *See Branham*, 390 S.C. at 209–11, 701 S.E.2d at 8–9.

140. *See Bragg*, 319 S.C. at 538, 462 S.E.2d at 325.

141. *Id.* at 539, 426 S.E.2d at 326 (citing Sunvillas Homeowners Ass'n, 301 S.C. 330, 335, 391 S.E.2d 868, 871 (Ct. App. 1990); Madden v. Cox, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985)).

court stated that under a strict liability theory in a design defect case, the focus of the analysis is on the product and whether or not, "as designed, [it] was in an unreasonably dangerous or defective condition."[142] In light of these apparently fundamental differences between strict liability and negligence claims, the court of appeals concluded that granting "a directed verdict on the strict liability claim . . . was not, as a matter of law, logically inconsistent with allowing the negligence claim to be submitted to the jury."[143] In determining that a fundamental difference existed between strict liability and negligence theories in products liability, the court seemed to have perceived a lack of clarity surrounding the issue.[144]

The South Carolina Supreme Court's opinion in *Branham*, however, clarifies and simplifies the uncertainties regarding the underlying nature of negligence and strict liability claims in products liability actions. The *Branham* rule stands for the proposition that the core elements of a design defect products liability claim, whether under a theory of negligence or strict liability, are treated identically—there is no "shift" in the focus for these elements.[145] Under either theory, *Branham* requires the same showing, and a failure to prove any of the core three requirements will automatically result in a rejection of both the negligence and strict liability claims.[146]

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142. *Id.* at 540, 462 S.E.2d at 326 (citing Reed v. Tiffin Motor Homes, Inc., 697 F.2d 1192, 1196 (4th Cir. 1982)).

143. *Id.* at 541, 462 S.E.2d at 327.

144. *See id.* at 537–42, 462 S.E.2d at 325–26. *Compare Sunvillas*, 301 S.C. at 333, 391 S.E.2d at 870 ("To establish negligence the plaintiff must prove the defendant failed to exercise due care in some respect. The focus is upon the action of the defendant."), *with Madden*, 284 S.C. at 579–80, 328 S.E.2d at 112 ("In an action based on strict tort or warranty, plaintiff's [design defect] case is complete when he has proved the product, as designed, was in a defective condition unreasonably dangerous to the user when it left the control of the defendant, and the defect caused his injuries. Liability for negligence requires, in addition to the above, proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design." (citations omitted)). *See generally* John E. Montgomery & David G. Owen, *Reflection on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. REV. 803, 824 (1976) ("The confusion between the strict tort liability theory predicated upon unreasonable danger with the negligence basis of liability springs from the fundamental similarity underlying both theories of liability which in turn accounts for the similarity in the language used in the formulations of the separate tests of liability.").

145. *See* Branham v. Ford Motor Co., 390 S.C. 203, 211–12, 701 S.E.2d 5, 9 (2010).

146. *See id.*; Brian A. Comer, *Case Brief:* Branham v. Ford Motor Co., S.C. PRODUCTS LIABILITY L. BLOG (Aug. 24, 2010, 8:13 AM), http://scproductsliabilitylaw.blogspot.com/2010/08/case-brief-branham-v-ford-motor-co.html (stating that the element of fault in an action alleging negligence "is not even reached if a plaintiff cannot prove the predicate element of defective and unreasonably dangerous condition of the product").

IV. OTHER EVIDENTIARY AND PROCEDURAL ISSUES ADDRESSED IN *BRANHAM* AND THE EFFECT ON PRODUCTS LIABILITY LAW

Along with the substantive design defect products liability law issues addressed above, the supreme court addressed many other issues in *Branham* that will have a significant impact on other aspects of South Carolina products liability law and the litigation process in general. These important issues include the limits on various types of admissible evidence in products liability actions, the trial court's authority to realign parties, and the appropriateness of certain verdict forms.

A. Inadmissibility of "Post-Distribution Evidence"

The general public policy behind the ban on post-distribution evidence is that manufacturers should be encouraged "to continue to improve their products in terms of utility and safety free from prior design decisions judged through the lens of hindsight."[147] *Branham* essentially restated the same rule that the court had established earlier in *Claytor*—a plaintiff "must show that the product was in a defective condition at the time that it left the hands of the particular seller . . . and unless evidence can be produced which will support the conclusion that it was *then* defective, the burden is not sustained."[148] "Simply defined," the *Branham* court stated, "post-distribution evidence is evidence of facts neither known nor available at the time of distribution."[149] The rule that follows from the court's analysis is that a manufacturer must be judged "based on what was known or 'reasonably attainable' at the time of manufacture."[150] Moreover, in a footnote, the court elaborated that its intention for this rule was not to exclude any evidence created after the date of manufacture, but rather evidence of knowledge not "reasonably attainable" at the time of distribution.[151]

The *Branham* rule adopts the *Restatement (Third)* view on post-distribution evidence.[152] Another comment to the *Restatement* may also shed light on this rule—comment *m* states that the plaintiff bears the burden of establishing that the "relevant manufacturing community" knew or should have known of the particular risk,[153] and further, that a manufacturer is not liable for unforeseeable

147. *Branham*, 390 S.C. at 230, 701 S.E.2d at 19.

148. *Id.* at 226, 701 S.E.2d at 17 (quoting Claytor v. Gen. Motors Corp., 277 S.C. 259, 264, 286 S.E.2d at 131–32 (1982)) (omission in original) (internal quotation marks omitted).

149. *Branham*, 390 S.C. at 227, 701 S.E.2d at 17.

150. *Id.*

151. *Id.* at 227 n.17, 701 S.E.2d at 18 n.17 ("If information on a product is reasonably attainable, then a manufacturer is charged with such knowledge at the time of manufacture. The rule prohibiting the introduction of post-distribution evidence does not permit a manufacturer to turn a blind eye to reasonably available information regarding the safety or danger of its product.").

152. *See id.* at 227 & n.17, 701 S.E.2d at 17–18 & n.17 (citing RESTATEMENT (THIRD) OF TORTS § 2 cmt. a (1998)).

153. RESTATEMENT (THIRD) OF TORTS § 2 cmt. m (1998).

harms.[154] The comment goes on, however, to establish that sellers bear a "responsibility to perform reasonable testing . . . to discover risks and risk-avoidance measures that such testing would reveal."[155] Also, sellers will be "charged with knowledge of what reasonable testing would reveal."[156] While the court in *Branham* did not expressly cite to comment m, the decision's implication is that South Carolina courts may charge manufacturers with the knowledge of risks and risk-avoidance measures that reasonable testing would reveal.[157]

B. Evidence of "Other Similar Incidents"

The court in *Branham* also clarified the rules on the admissibility of evidence of "other similar incidents."[158] In 2005, in *Whaley v. CSX Transportation, Inc.*,[159] the South Carolina Supreme Court reiterated the general rule that "[e]vidence of similar accidents, transactions, or happenings is admissible in South Carolina where there is some special relation between them tending to prove or disprove some fact in dispute."[160] The court, noting the potential for this type of evidence to be "highly prejudicial,"[161] set the standard for admissability of evidence of other similar incidents—plaintiffs "must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue."[162] Most recently, in a case decided the same year as *Branham*, the South Carolina Supreme Court elaborated on this standard in *Watson v. Ford Motor Co.*[163] The *Watson* court set forth the following factors to determine whether evidence satisfies the "substantially similar" standard—"(1) the products are similar; (2) the alleged defect is similar; (3) causation related to the defect in the other incidents; and (4) exclusion of all reasonable secondary explanations for the cause of other incidents."[164]

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154. *See id.*

155. *Id.*

156. *Id.*

157. As discussed in Part III.B, this is not to say that a cause of action exists against a manufacturer in a design defect case for failing to test its product, but only that a plaintiff may charge the manufacturer with the knowledge that reasonable testing would have revealed. This knowledge could then be used in the risk-utility analysis to determine whether the product was unreasonably dangerous to the user at the time that it left the manufacturer's hands.

158. Branham v. Ford Motor Co., 390 S.C. 203, 232, 701 S.E.2d 5, 20 (2010) (internal quotation marks omitted); *see also id.* at 230–34, 701 S.E.2d at 19–21.

159. 362 S.C. 456, 609 S.E.2d 286 (2005).

160. *Id.* at 483, 609 S.E.2d at 300 (citing Brewer v. Morris, 269 S.C. 607, 610, 239 S.E.2d 318, 319 (1977)).

161. *Id.*

162. *Id.* (quoting Buckman v. Bombardier Corp., 893 F. Supp. 547, 552 (E.D.N.C. 1995)) (internal quotation marks omitted).

163. 389 S.C. 434, 699 S.E.2d 169 (2010).

164. *Id.* at 453, 699 S.E.2d at 179 (citing *Buckman*, 893 F. Supp. at 552). In *Branham*, Branham introduced evidence at trial that compared the handling of the Chevy S-10 Blazer to the handling of the Bronco II. *See* Branham v. Ford Motor Co., 390 S.C. 203, 227–28, 701 S.E.2d 5, 18

In light of its recent holding on post-distribution evidence in *Watson*, the court in *Branham* added the following clarification—even if evidence is sufficient to meet the substantially similar threshold, "[p]ost-manufacture evidence of similar incidents is not admissible to prove liability."[165] Substantially similar pre-distribution evidence, however, should be admissible; the court couched this allowance by noting that ruling on objections to the introduction of other similar incidents is within the trial court's discretion due to "its potential to be 'highly prejudicial,' thereby implicating Rule 403, SCRE."[166] In *Branham*, the court applied the substantially similar standard and used the factors delineated in *Watson* to determine whether admission of the plaintiff's evidence of other similar incidents was appropriate.[167] For example, where the precise cause of the accident was unknown, the court concluded, "Bronco II rollover accident data [prior to the distribution date] has relevance when compared to rollover accident data of other vehicles in class. This relevance is linked directly to Branham's claim that the design of the Bronco II caused it to have an unreasonably dangerous tendency to rollover."[168] Finally, the court in *Branham* noted that the admissibility of pre-manufacture rollover data is necessary in light of the risk-utility test for products liability design defect cases.[169] Provided that the substantially similar threshold is met, this presumably means that pre-manufacture rollover data would be relevant to the risk-utility test.

C. The Appropriateness of Closing Arguments

In *Branham*, the plaintiff's closing argument relied heavily on improper evidence and essentially asked the jury to punish the defendant for the hardships it had caused the plaintiff and others.[170] In formulating the rule for how to treat

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(2010). To have satisfied the substantially similar standard for the admission of this evidence, Branham would have had to show that—(1) the Bronco II was similar to the Chevy S-10; (2) the defective suspension in the Bronco II was similar to the the allegedly defective suspension in the Chevy S-10; (3) the defective suspension in the Bronco II and in the Chevy S-10 caused the rollovers; and (4) one could not reasonably argue that another defective component caused the rollovers. *See id.* at 231–34, 701 S.E.2d at 20–21 (citing *Watson*, 389 S.C. at 453, 699 S.E.2d at 179).

165. *Branham*, 390 S.C. at 231, 701 S.E.2d at 20. Additionally, the post-manufacture evidence in *Branham* constituted post-distribution evidence because the distribution and the manufacture of the Bronco II both occurred in 1986. *See id.* at 229–30, 701 S.E.2d at 19.

166. *Id.* at 232, 701 S.E.2d at 20; *see also* S.C. R. EVID. 403 ("Although relevant, *evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice*, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (emphasis added)).

167. *See Branham*, 390 S.C. at 230–34, 701 S.E.2d at 19–21.

168. *Id.* at 233, 701 S.E.2d at 21.

169. *Id.* at 234, 701 S.E.2d at 21.

170. *See id.* at 234–35, 701 S.E.2d at 21–22. For example, at one point Branham's counsel stated, "This is how Ford looks at this. That little bit of thirty people being killed every year didn't matter." *Id.* at 234, 701 S.E.2d at 21. At another point during its closing argument, plaintiff's

these types of closing arguments, the South Carolina Supreme Court cited two court of appeals cases[171]—a 1984 case, *Gathers v. Harris Teeter Supermarket, Inc.*,[172] and a 1996 case, *Scoggins v. McClellion*.[173] In *Gathers*, the court of appeals stated, "In a closing argument to the jury, an attorney may not make such remarks which are unfairly calculated to arouse passion or prejudice."[174] Additionally, the court in *Scoggins* stated, "The test for granting a new trial on the basis of improper closing argument by opposing counsel is whether the complaining party was prejudiced to the extent that he or she was denied a fair trial."[175] The supreme court in *Branham* quoted these rules and concluded that the plaintiff's closing argument "was designed to inflame and prejudice the jury,"[176] and that it "invited the jury to base its verdict on passion rather than reason."[177] Consequently, the court held that there was sufficient evidence to show that the defendant had been denied a fair trial because of plaintiff's closing argument,[178] and it remanded the case for a new trial. [179]

D. Admissibility of Evidence Relating to Defendant's Wealth

Determining the admissibility of evidence relating to a defendant's wealth is a murky endeavor in South Carolina, even after the *Branham* decision. In *Branham*, the court first made it clear that, given the potential of punitive damages to infringe on a defendant's due process rights under the Fourteenth Amendment, the United States Supreme Court is the ultimate "arbiter of determining what financial evidence is proper in assessing punitive damages."[180] After reviewing the relevant United States Supreme Court cases on the issue, the *Branham* court concluded that in the context of punitive damages, "[e]vidence

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counsel stated "Branham is here today with a brain injury and six hundred other people, or however many it is, lost their lives, and . . . have extremely serious injuries. We believe that you should tell Ford Motor Company what you think about this kind of thing." *Id.* at 235, 701 S.E.2d at 22.

171. *See id.* at 234–35, 701 S.E.2d at 21–22.

172. 282 S.C. 220, 317 S.E.2d. 748 (Ct. App. 1984).

173. 321 S.C. 264, 468 S.E.2d 12 (Ct. App. 1996) (per curiam).

174. *Gathers*, 282 S.C. at 231, 317 S.E.2d at 755 (citing Cont'l Cas. Co. v. Wilson-Avery, Inc., 156 S.E.2d 152, 156 (Ga. Ct. App. 1967); Shell Oil Co. v. Pou, 204 So. 2d 155, 157 (Miss. 1967); Fid. & Cas. Co. of N.Y. v. Johnson, 419 S.W.2d 352, 355 (Tex. 1967)).

175. *Scoggins*, 321 S.C. at 269, 468 S.E.2d at 15 (citing State v. Durden, 264 S.C. 86, 93, 212 S.E.2d 587, 590–91 (1975)).

176. *Branham*, 390 S.C. at 234, 701 S.E.2d at 21.

177. *Id.* at 235, 701 S.E.2d at 22.

178. *Id.* (citing *Scoggins*, 321 S.C. at 269, 468 S.E.2d at 15).

179. *Id.* at 243, 701 S.E.2d at 26. The supreme court seemed to find many of the inflammatory and prejudicial statements made by plaintiff's counsel during its closing argument particularly reprehensible, stating, "It is unmistakable that the closing argument relied heavily on inadmissible evidence. . . . [M]uch of the prejudice resulting from the improper evidence was merged in closing argument with Branham's pursuit of punitive damages in requesting that the jury punish Ford for harm to Branham *and others*." *Id.* at 235, 701 S.E.2d at 22.

180. *Id.* at 239–40, 701 S.E.2d at 24–25; *see also* U.S. CONST. amend. XIV, § 1 ("nor shall any state deprive any person of life, liberty, or property, without due process of law").

concerning net worth appears the safest harbor"[181] because Supreme Court jurisprudence "militates against venturing beyond net worth and extrapolations from net worth."[182] Therefore, the court ultimately held that a plaintiff may introduce evidence of a defendant's net worth and extrapolations thereof, but not evidence of the salaries and compensation paid to a defendant's corporation.[183] Because "Branham went far beyond the pale in submitting evidence of Ford's senior management compensation" disguised as a picture of the defendant's financial condition, the supreme court concluded that admission of such evidence "was error and highly prejudicial."[184]

E. Punishing a Defendant for "Harm to Others"

While the court held that the trial court properly submitted the issue of punitive damages to the jury, it agreed with Ford that the jury's $15 million punitive damages award could not withstand constitutional scrutiny.[185] The court observed that the prejudice resulting from the improper allowance of post-manufacture evidence, especially in the pursuit of punitive damages, was perhaps most clearly shown by the repeated urgings of Branham's counsel for the jury to punish Ford for the harm done to Branham *and to others*.[186] Previously, in *Durham v. Vinson*,[187] the supreme court held that a punitive damages award was improper where the trial court had "allowed the jury to punish [a defendant] for a bad act unrelated to his actions toward [the plaintiff]."[188] Even though the trial court in *Branham* "charged the jury not to punish Ford for other 'conduct,'"[189] the instruction still "invited the jury to punish Ford for all Bronco rollover deaths and injuries."[190] Consequently, the

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181. *Branham*, 390 S.C. at 240, 701 S.E.2d at 25. The South Carolina Supreme Court noted, "Punitive damages pose an acute danger of arbitrary deprivation of property. . . . [A]nd the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Id.* at 239, 701 S.E.2d at 24 (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994)) (internal quotation marks omitted). Additionally, the court quoted cautionary language from *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), which stated that "reference to [the defendant's] assets . . . ha[s] little to do with the actual harm sustained by the [plaintiff]." *Branham*, 390 S.C. at 240, 701 S.E.2d at 25 (alterations and omission in original) (quoting *State Farm*, 538 U.S. at 427) (internal quotation marks omitted).

182. *Branham*, 390 S.C. at 240, 701 S.E.2d at 25 (citing *State Farm*, 538 U.S. at 427).

183. *See id.* at 240–41, 701 S.E.2d at 25.

184. *Id.*

185. *Id.* at 237–38, 701 S.E.2d at 23. Importantly, however, the supreme court expressly declined to address whether the damages awards were excessive because it remanded the case for a new trial. *Id.* at 237, 701 S.E.2d at 23.

186. *Id.* at 238, 701 S.E.2d at 23.

187. 360 S.C. 639, 602 S.E.2d 760 (2004).

188. *Id.* at 653, 602 S.E.2d at 767.

189. *Branham*, 390 S.C. at 238, 701 S.E.2d at 24.

190. *Id.* at 239, 701 S.E.2d at 24.

court concluded that the jury charge in *Branham* ran afoul of *Durham*'s "harm to others prohibition."[191]

F. Courts' Authority to Align Parties

In addition to bringing an action against Ford, Branham also brought suit against the driver of the Bronco II, Hale.[192] Hoping not to share the limited number of peremptory jury strikes, Ford requested that the defendant Hale be realigned as a plaintiff.[193] The trial court refused, even though Ford was clearly the "only *bona fide* defendant."[194]

Although the issue of whether the trial court erred in refusing to realign Hale was not preserved for review, the South Carolina Supreme Court nevertheless addressed Ford's realignment challenge because it presented a "novel issue."[195] Moreover, it expressly held that "[t]rial judges in South Carolina have the authority to realign parties."[196] The court reasoned that a trial court has this authority under Rule 21 of the South Carolina Rules of Civil Procedure, which provides for the joinder of parties,[197] and also has "inherent authority to manage and conduct a trial."[198] Rule 21 of the South Carolina Rules of Civil Procedure has the same purpose as Rule 21 of the Federal Rules of Civil Procedure,[199] which the federal courts have repeatedly interpreted as granting them authority to

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191. *Id.* at 238–39, 701 S.E.2d at 24 (internal quotation marks omitted); *see also* Phillip Morris USA v. Williams, 549 U.S. 346, 353 (2006) ("[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.").

192. *Branham*, 390 S.C. at 209, 701 S.E.2d at 8.

193. *See id.* at 241, 701 S.E.2d at 25.

194. *Id.* Examples of conduct by counsel for Hale and Branham at trial demonstrate that although Hale was named as a codefendant, her interests clearly were more aligned with the plaintiff than with Ford. *See id.* at 241–42, 701 S.E.2d at 25. *See generally* Ted Frank, *Update: Branham v. Ford*, OVERLAWYERED (Aug. 19, 2010), http://overlawyered.com/2010/08/update-branham-v-ford/ ("Though Hale was a co-defendant, she cooperated with the plaintiffs throughout the trial in their case against Ford, even sitting at the plaintiff's table; but because the judge classified Hale as a co-defendant, it meant that Hale got half of the [peremptory] challenges of the 'defense.'").

195. *Branham*, 390 S.C. at 241, 701 S.E.2d at 25. The court's stated purpose in doing so was "in the hope that [its] speaking to the matter [would] aid the bench and bar." *Id.*

196. *Id.* at 242, 701 S.E.2d at 26.

197. *See id.* ("Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately." (quoting S.C. R. CIV. P. 21)).

198. *Id.*

199. *See* FED. R. CIV. P. 21 ("Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.").

realign parties.[200] Additionally, the court found the Georgia Supreme Court's decision in *Cawthon v. Waco Fire & Casualty Insurance Co.*[201] to be particularly instructive on the issue.[202] In *Cawthon*, the trial court stated that it lacked authority to realign the parties after a codefendant contended that it would be prejudiced by having to share jury strikes.[203] As was the case in *Branham*, one codefendant's interests were more aligned with the plaintiff than with the other codefendant.[204] On appeal, the Georgia Supreme Court, relying on Georgia's version of Rule 21, held that "trial courts . . . have the discretion to realign parties in the interest of justice."[205] The court in *Branham* expressly adopted the Georgia's court's reasoning and defined the appropriate standard of review—"The decision whether to realign the parties lies within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion and resulting prejudice."[206]

G. Verdict Forms with Joint Tortfeasors

The *Branham* court's holding regarding verdict forms with joint tortfeasors is somewhat unclear. When the accident occurred in 2001, South Carolina law held multiple tortfeasors to be jointly and severally liable for any and all damages.[207] It follows that determining the relative fault between the defendants was not relevant to finding that the defendants were jointly and severally liable—any apportionment of fault between defendants Ford and Hale would not have affected the plaintiff's ability to collect on a judgment.[208]

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200. *Branham*, 390 S.C. at 242, 701 S.E.2d at 26; *see also, e.g.*, In-Tech Mktg. Inc. v. Hasbro, Inc., 685 F. Supp. 436, 442 n.19 (D.N.J. 1988) ("Rule 21 permits this Court, *sua sponte* to realign *any* party at *any* time."); First Nat'l Bank of Shawnee Mission v. Roeland Park State Bank & Trust Co., 357 F. Supp. 708, 711 (D. Kan. 1973) ("Pursuant to Rule 21 of the Federal Rules of Civil Procedure, the court may order a realignment of the parties on such terms as are just." (internal quotation marks omitted)).

201. 386 S.E.2d 32 (Ga. 1989).

202. *Branham*, 390 S.C. at 243, 701 S.E.2d at 26.

203. *Cawthon*, 386 S.E.2d at 32–33.

204. *See id.*

205. *Id.* at 33.

206. *Branham*, 390 S.C. at 243, 701 S.E.2d at 26.

207. *Id.* at 235–36, 701 S.E.2d at 22; *see also id.* at 236 n.21, 701 S.E.2d at 22 n.21 ("A provision applicable in 2001 provided that '[i]n determining the pro rata shares of tortfeasors in the entire liability . . . [,] their relative degrees of fault shall not be considered.'" (alterations and omission in original) (quoting S.C. CODE ANN. § 15-38-30 (2005))).

208. *See id.* at 235–36, 701 S.E.2d at 22–23. Had the accident in *Branham* occurred after July 2005, however, apportionment of fault between the defendants probably would have been appropriate. *See generally id.* at 236 n.21, 701 S.E.2d at 22 n.21 ("The current version of the Contribution Among Tortfeasors Act became effective for cases arising after July 1, 2005. The 2005 amendment to the Act provides that a 'less than fifty percent' at-fault defendant 'shall only be liable for that percentage of the indivisible damages determined by the jury.'" (quoting S.C. CODE ANN. § 15–38–15(A) (Supp. 2008))).

Even so, the trial court, over defendant Ford's objection, required that the jury apportion liability between Hale and Ford using a standard verdict form for comparative negligence cases.[209] The supreme court concluded that this allocation "served no legitimate purpose"[210] and instead exposed Ford to "the very real risk that the jury (unaware of joint and several liability principles) would take a cue from the apportionment question and inflate the actual damage award to ensure Branham received a full recovery from the one deep-pocket defendant."[211] Moreover, the court implied that the amount of actual damages the jury awarded to Branham was evidence of the verdict form's prejudicial effect.[212]

Thus, for accidents occurring prior to July 1, 2005, a verdict form that asks the jury to allocate liability between multiple defendants is improper and will likely constitute reversible error.[213] For accidents occurring after July 1, 2005, however, joint tortfeasors that are less than 50% at fault are only liable for their relative share of the damages, and a verdict form that asks the jury to allocate liability among defendants may be proper, as the allocation would serve a legitimate purpose to the plaintiff.[214]

V. CONCLUSION

The South Carolina Supreme Court's opinion in *Branham* will have a substantial effect on design defect products liability law in South Carolina for the foreseeable future. Not only did this case mandate use of the risk-utility test and the feasible alternative design requirement, but it also clarified the relationship between negligence and strict liability theories in design defect actions and expressly declared the unavailability of a separate failure to test claim. Further, the court established evidentiary and procedural rules that will have a substantial impact on products liability suits as well as litigation in general.

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209. *Id.* at 235–36, 701 S.E.2d at 22. For example, one of the questions on the verdict form asked, "Taking the combined negligence that proximately caused the parties' injuries as one hundred percent (100%), what percentage of that negligence is attributable to Defendant Ford Motor Company and what percentage is attributable to the Defendant Cheryl Jane Hale?" *Id.* at 236, 701 S.E.2d at 22.

210. *Id.* The supreme court easily dismissed the trial court's attempt to explain why it refused Ford's request for a special verdict form, stating, "The trial court justified the apportionment question on the basis of a need to ensure that any punitive damage award was supported by a negligence cause of action, and not the strict liability claim. The trial court's reasoning is not persuasive." *Id.*

211. *Id.* at 237, 701 S.E.2d at 23.

212. *Id.*

213. *See id.* at 235, 701 S.E.2d at 22 ("[A] special verdict question may be so defective in its formulation that its submission results in a prejudicial effect which constitutes reversible error." (alteration in original) (quoting S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 303, 641 S.E.2d 903, 907–08 (2007)) (internal quotation marks omitted)).

214. *See* S.C. CODE ANN. § 15–38–15(A) (Supp. 2008).

Although this case shed light on many aspects of South Carolina products liability law, some areas still need to be clarified and further developed, either through litigation or by the General Assembly. Regardless, this case represents a significant turning point in South Carolina design defect products liability law.

J. Rhoades White, Jr.

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