

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Court of Appeals Opinion No. 4862
Trial Court Case No. 2006-CP-10-04773

5 Star, Inc., Petitioner,

v

Ford Motor Company, Respondent.

Brief of Petitioner

June 27, 2013

Thomas R. Goldstein
Belk, Cobb, Infinger & Goldstein, P.A.
Attorneys for Appellant
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291
(843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net

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S.C. Supreme Court

INDEX

Table of Authorities	3
Questions Presented	4
Statement of Case	4
Arguments: The Court of Appeals erred in substituting its view of the evidence for that of the jury.	6
Argument 1. The plaintiffs experts were qualified to give opinions, and the Court of Appeals erred in finding that they are not qualified.	6
Argument 2. There is abundant evidence in the record to support the jury's finding that Ford Motor Company was negligent in designing a switch to handle 2 amperes of electricity and placing it in a 15-ampere circuit that remains continuously energized in close proximity to highly flammable brake fluid.	13
Conclusion	34

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JUL 01 2013

S.C. Supreme Court

TABLE OF AUTHORITIES

<i>Austin v. Specialty Trasp. Servs., Inc.</i> , 358 S.C. 298, 594 S.E.2d 867 (Ct. Ap. 2004)	20
<i>Curcio v. Caterpillar, Inc.</i> , 355 S.C. 316, 585 S.E.2d 272 (2003)	32
<i>Danley Williams v. Moore</i> , 400 S.C. 90, 732 S.E.2d 224 (Ct. App. 2012)	10
<i>Duncan v. Ford Motor Co.</i> , 385 S.C. 119, 682 S.E.2d 877 (Ct. App. 2009)	13, 22, 25
<i>Jamison v. The Pantry, Inc.</i> , 301 S.C. 443, 392 S.E.2d 474 (Ct. App. 1990)	21
<i>Madden v. Cox</i> , 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985)	13, 14, 15, 23
<i>Mickle v. Blackmon</i> , 252 S.C. 202, 166 S.E.2d 173 (1969)	32, 33
<i>Palsgraf v. Long Island R.R. Co.</i> , 248 N.Y. 339, 162 NE 99, 59 A. L.R. 1263 (1928)	31
<i>Pope v. Heritage Cmtys, Inc.</i> , 395 S.C. 404, 717 S.E.2d 765, (Ct. App. 2011)	10
<i>Reiland v. Southland Equip. Service</i> , 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998)	10
<i>Small v. Pioneer Machinery, Inc.</i> 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997)	10, 12
<i>State v. Commander</i> , 396 S.C. 254, 721 S.E.2d 413 (2011)	10
<i>Steele v. Rogers</i> , 306 S.C. 546, 413 S.E.2d 329 (Ct. App. 1992)	21
<i>Talkington v. Atria Reclamelucifers</i> , 152 F.3d 254 (4 th Circ. 1998)	30
<i>U. S. v. Carroll Towing</i> , 159 F.2d 169 (1947)	20
<i>Willis v. Floyd Brace Co.</i> , 279 S.C. 458, 309 S.E.2d 295 (App. 1983)	14
Other Authorities:	
Rule 702, <i>S. C. Rules of Evidence</i> , Testimony by Experts	11
<i>Prosser on Torts</i> “Limitations of Duty” Section 54	22
<i>Restatement 2d Torts</i> Section 398	33

QUESTIONS PRESENTED

1. Did the Court of Appeal err in concluding plaintiff's experts were not qualified to give opinions regarding Ford's conduct and did not offer evidence of Ford's conduct?
2. Did the Court of Appeals err in substituting its view of the evidence for the jury's view of the evidence?

STATEMENT OF THE CASE

Stan Shelby is the owner and operator of a landscaping company called Five Star. On Saturday, September 24, 2005, Stan parked the company's 1999 Ford F-250 pick-up truck in the landscaping business' garage at 2340 Midland Park Road. The garage contained Five Star's office, lawn equipment, and the Ford F-250. On Monday, September 26, 2005, Stan returned to the garage around 7:15 a.m., noticed smoke and called 911. (See Appendix R.O.A. p.522-523) The North Charleston Fire Department responded and extinguished the fire. The Battalion Chief on the scene suspected a Ford speed control deactivation switch fire and told Stan Shelby that was the cause of the fire.

On December 5, 2006, Five Star filed suit alleging negligence in the negligent design and installation of the speed control deactivation switch. The defendant answered, interposing 24 defenses, denying the material allegations of the complaint.

On April 2, 2008, Ford moved for summary judgment, which the Court denied.

On September 2, 2008, the case came before Judge Harrington and a jury, and after a three day trial, the jury returned a verdict for the plaintiff in the amount of \$41,000

actual damages. After Judge Harrington denied Ford's post-trial motions, Ford appealed on a number of grounds. On August 10, 2011, the Court of Appeals reversed the jury verdict because it found that plaintiff's experts were not qualified to give opinions, and because the plaintiff failed to present evidence in the record to establish the necessary elements of negligence in a products liability case because the plaintiff failed to prove that Ford knew its conduct was negligent. The Court of Appeals held:

In this case, Ford concedes the switch was defective. However, as we explained in the cases cited above, the focus of the fourth element is on the defendant's conduct, not on the product. Therefore, mere evidence of defect is not sufficient to satisfy 5 Star's burden of proof as to this element. Rather, 5 Star was obligated to offer evidence that Ford was negligent in its conduct. 5 Star not only failed to present any evidence that Ford's conduct in designing the switch was negligent, 5 Star failed to present any evidence of Ford's conduct whatsoever. Neither Norris nor Greene testified to a single fact or event at or before the manufacture of this truck and this switch. Neither witness was qualified as an expert in automotive design or any other area of expertise that would enable them to offer opinions as to whether Ford's conduct was negligent.
Opinion No. 4862 at page 5 of Appendix.

On August 23, 2011, Five Star moved for a rehearing and rehearing *en banc*, which the Court of Appeals denied on December 14, 2011. On January 12, 2012, the Petitioner asked this Court to review the decision of the Court of Appeals, and on May 1, 2013, this Court granted the Petition for *Certiorari*.

ARGUMENTS

1. THE COURT OF APPEALS ERRED WHEN IT FOUND THAT PLAINTIFF'S EXPERT WITNESSES WERE NOT QUALIFIED TO GIVE OPINIONS REGARDING FORD'S CONDUCT AND DID NOT OFFER EVIDENCE OF FORD'S CONDUCT.

2. THE COURT OF APPEALS INCORRECTLY SUBSTITUTED ITS VIEW OF THE EVIDENCE FOR THE JURY'S VIEW OF THE EVIDENCE.

The Court of Appeals reversed the jury's verdict on a single ground--that the record at trial does not support a verdict. The Court of Appeals held that the record contains no evidence of Ford's conduct because: (1) the plaintiff's experts were not qualified to give an opinion, and (2) even if they were qualified, the record contains no evidence of Ford's conduct at the time of manufacture. In its August 10, 2011, opinion, the Court of Appeals wrote:

In this case, there is no evidence that Ford was negligent in the designing of the speed control deactivation switch and thus, no evidence to support the ruling denying Fords' motion for a directed verdict and JNOV.

. . .

We focus our analysis on the fourth element. In order to satisfy this element in a negligent design case, the plaintiff must prove negligent conduct on the part of the defendant in the design of the product at or before the time of manufacture. *Branham*, 390 S.C. at 227, 701 S.E.2d at 17

. . .

[U]nder a negligent theory [of recovery], the plaintiff bears the additional burden of

demonstrating the defendant . . . failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the . . . manufacturer, and liability is determined according to fault.

(Opinion No. 4862, Appendix at pages 4-5, internal citations omitted)

As a threshold to finding no evidence of Ford Motor's "conduct," the Court of Appeals initially held that the plaintiff's electrical engineering expert lacked sufficient education or training to give an opinion about Ford's speed control deactivation switch: "Neither Norris nor Greene testified to a single fact or event at or before the manufacture of this truck and this switch. Neither witness was qualified as an expert in automotive design **or any other area of expertise that would enable them to offer opinions as to whether Ford's conduct was negligent.**" (Opinion 4862 at page 5 of the Appendix, emphasis added) The Court of Appeals conclusion is refuted by the record. Plaintiff's electrical engineer's, Greene's, qualifications are extensive: he is a "professional consulting engineer," (Appendix page 499); Bachelor of Science in electrical engineering from Georgia Tech (Appendix page 500); MBA from Univ. of Southern California (Appendix page 500); licensed by the state of South Carolina in electrical engineering (Appendix page 500); a member of numerous pertinent professional associations, including the Society of Automotive Engineers (Appendix page 500); and when offered as an "expert in fire origin and cause, as well as electrical component design, including but not limited to the investigation of a defective electrical product," (Appendix at page 500), Ford's counsel initially accepted his qualifications: "Your Honor, to renew the motion in limine we made yesterday regarding Mr. Greene's opinion, I do that at this point. If we need to go into that

on the record , we can, but it has to do with Rule 702 and 703.” (Appendix at page 504). Rule 702 is the rule that determines whether expert witness testimony is necessary, and Rule 703 is the rule that relieves an expert from placing all of his data in evidence prior to giving an opinion. Ford’s counsel initially informed the trial judge he had no objection to the expert’s qualifications, but later Ford’s counsel had a change of opinion and elected to *voir dire* the witness at pages 506 – 510. During *voir dire*, plaintiff’s expert revealed he:

- Worked for manufacturers of electrical components used in cars. (page 506)
- Worked for Delco Electric (page 507)
- Delco asked the witness to evaluate a failed alternator (page 507)
- Evaluated components for buses and other large motor vehicles (page 508)
- Published in the field of accident reconstruction. (pages 508-509)

Following *voir dire*, Ford’s counsel objected to the qualification of expert, which the trial judge overruled. Without explanation or analysis, the Court of Appeals found that the witness lacked sufficient experience to be qualified. In overruling the trial judge, the Court of Appeals never explains how the witness lacked sufficient credentials or how the trial court erred in qualifying him. (See full quotation from Court of Appeals’ opinion quoted above at page 5--the Court of Appeals’ analysis on this point is on pages 5-6 of the Appendix.) The pertinent language from the opinion is: “Neither witness was qualified as an expert in automotive design or any other area of expertise that would enable them to offer opinions as to whether Ford’s conduct was negligent. (Opinion No. 4862 at page 5 of Appendix) However, the record demonstrates that the witness was well-qualified, and the

trial court found him qualified. Without any analysis or explanation of how an electrical engineer with experience in automotive electrical systems is unqualified, the parties are left to speculate as to how the Court of Appeals found him unqualified:

Q. Mr. Greene, let me rephrase the question. Do you have an opinion to a reasonable degree of engineering certainty as to whether or not the switch that you've just described is or is not safely designed?

A. It's not.

Q. If you were designing the switch, okay, do you have the necessary expertise, training, as an electrical engineer to design such a switch?

A. Oh, yes.

Q. If you were designing such a switch, how would you design it differently to avoid the problem you just described?

A. First thing I would do is I would energize it via the ignition key so that the switch would not have power on unless the ignition for the automobile was on.

Second thing that I would do is I would put another small fuse in series with the switch which would limit the current to one to two amps, whatever the allowed limit was that would allow the switch to function effectively but not overload and overheat.

And, thirdly, I'd try to come up with some type of a better pressure switch that was separate from this electrical switch that would not allow a contamination of brake fluid into the electrical side of the switch.

Appendix page 516

“The qualification of an expert witness and the admissibility of his or her opinion are matters within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion and a showing of prejudice. As a gatekeeper, the trial court must examine the substance of the testimony to determine if it is reliable, regardless of whether the expert evidence is scientific, technical, or other specialized knowledge. *Danley Williams v. Moore*, 400 S.C. 90, 732 S.E.2d 224 (Ct. App. 2012), citing *Pope v. Heritage Cmty, Inc.*, 395 S.C. 404, 423-24, 717 S.E.2d 765, 775 (Ct. App. 2011). “The admission or exclusion of evidence is a matter within the trial court’s sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a ‘manifest abuse of discretion accompanied by probably prejudice.’” *State v. Commander*, 396 S.C. 254, 721 S.E.2d 413 (2011), citing *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). In reversing the jury verdict in this case, the Court of Appeals never explains how the trial judge erred in finding Mr. Greene’s experience or training sufficient or in allowing him to give an opinion or how Ford Motor Company negligently installed a 2-amp switch in a 15-amp circuit and left out a “protective device” to limit the electricity to the level Ford designed the switch to handle. Ford cannot possibly demonstrate prejudice from his testimony because, as the Court of Appeals noted: “Ford admits the switch is defective.” (Opinion No. 4862, Appendix at page 5) Moreover, Ford offered no theory of how the fire occurred, instead adopting a trial strategy of spoliation of evidence as its sole defense. (Since the Court of Appeals did not reverse the jury verdict on spoliation, petitioner does not repeat the spoliation arguments here, but the subject is exhaustively treated in the briefs to the Court of Appeals.)

The Court of Appeals usurped the trial judge's gatekeeping role and substituted its view of the witnesses' qualifications for that of the trial judge who was in a better position to observe the witness and the manner in which he delivered his testimony. In the Opinion under review, the Court of Appeals implies—but does not identify—some minimum prerequisite of expertise that is necessary for the witness to be qualified. When the Court of Appeals writes: "Neither witness was qualified as an expert in automotive design or any other area of expertise that would enable them to offer opinions as to whether Ford's conduct was negligent," the Court of Appeals applied criteria that are at variance with established case law. The plaintiff is not required to produce a witness who has designed a speed control deactivation switch, and such a narrow view of an expert's qualifications has never been the law. An expert may be qualified if his or her "knowledge, skill, experience, training, or education," qualifies him or her to have an opinion. (Rule 702 "Testimony by Experts") Mr. Greene, as an electrical and automotive engineer is competent to give an opinion about Ford's negligent design, and how Ford's negligent conduct created the defective electrical circuit that caused the fire. In fact, when Ford's counsel cross-examined the expert on this precise point, the expert clearly defined Ford's negligent conduct:

MR. OTT: So is it your testimony, Mr. Greene, that back in 1995, and actually even before that when the switch was designed, but '95 when they put it in this vehicle that Ford Motor Company should have called you and got your input on how to design the switch?

MR. GREENE: No. They should have had some internal review that would have

caught the fact that there was serious potential failure issues with this switch.

Appendix at pages 572-573

Ford's conscious decision to design a switch for 2-amperes, and place it in a 15-ampere circuit without any internal review is evidence of Ford's negligent conduct because it is, as testified to at trial, foreseeable that an overheating switch in close proximity to highly flammable brake fluid will ignite. When Leonard Greene testified about the switch, he said:

Well, it's a bad design. The way the switch is designed, it's got power on it all the time. It would have been inherently safer to have designed it so that it only had power on it when the ignition was on. And this is what's a key-off/power-on design, and it has power on it all the time. That's number one.

Number two is the fact that the protective device is not coordinated with the switch. The switch is rated for two amperes. The protective device is rated for 15 amperes. So the switch can really overheat and start a fire before the 15-ampere fuse would ever blow.

Number three, the design of the switch has both an electrical and a flammable liquid, hydraulic brake fluid, together, separated by a thin membrane. And it's very foreseeable that this thin membrane will leak eventually, because when you apply the brakes on the vehicle, brake pressure increases dramatically and pushes against this membrane which, in turn, pushes the switch and opens the switch.

So if you have a slight leak in this membrane, this flammable brake fluid will get on the other side where the electrical switch is, and you have a source of ignition, and then you have enclosing a whole assembly of insulating plastic which keeps the heat in there and causes the temperature to rise until it can eventually reach the ignition point and start a fire, and you then have brake fluid freely coming out into the switch, or what was the switch assembly which is now burning, and the fire rapidly accelerates from that point on.

Q. What is the fix for that problem?

A. It's about a \$2 fuse--

Appendix at pages 513-515

Not only did the expert testify about the bad design, the lack of foreseeability, and the grave potential for personal or property damage, he also explained Ford's conduct in not incorporating a simple and inexpensive fix even though Ford knew it was installing its switch in to a circuit delivering more electricity than it designed the switch to handle.

2. THE COURT OF APPEALS ERRED IN SUBSTITUTING ITS VIEW OF THE EVIDENCE FOR THAT OF THE JURY

In the Opinion under review, as quoted above on page 5, the Court of Appeals reversed the jury's verdict because it found there is no evidence of Ford's conduct, and thus, no evidence of negligence. The Court of Appeals erroneously equates "evidence"

with “confession.” Relying on the *Madden* and the *Duncan* cases, the Court of Appeals took its own view of the evidence in the record here and concluded that the plaintiff failed to offer any evidence of Ford’s “conduct.” Conduct is a noun that means “the act, manner, or process of carrying on: management; a mode or standard of personal behavior.” *Webster’s Seventh New Collegiate Dictionary*. As discussed throughout this brief, there is no dispute that Ford designed a switch to handle two amperes of electricity and then installed it in to an electrical circuit designed to deliver more electricity than the switch could handle and then placed it in proximity to highly flammable brake fluid. As the Court of Appeals noted, Ford concedes the switch design is defective. The question at trial was whether Ford knew or should have known this at the time it placed the 2-amp switch in a 15-amp circuit. Absent a confession, the only way to prove conduct is through the application of foreseeability, and the foreseeability standard is the quintessential jury question. Ford’s design and incorporation of the 2-amp switch in to a 15-amp circuit without a fuse is an “act” or “conduct,” which a jury could reasonably find to be a negligent act. Instead the Court of Appeals weighed the evidence and, in its view, found it wanting.

In reaching its finding that the plaintiff failed to produce evidence of “conduct,” the Court of Appeals relied primarily on two cases. The first case, *Madden v. Cox*, 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985) involved a products liability claim arising out of an injury to a employee when a steel tobacco bin fell on him. The jury returned a verdict of \$100,000.00 and in evaluating the sufficiency of the evidence in the case on appeal, the Court noted:

On appeal from a jury verdict, our review is limited to determining if there is any

evidence to support the verdict. *Willis v. Floyd Brace Co.*, 279 S.C. 458, 309 S.E.2d 295 (App. 1983). The evidence and all reasonable inferences arising therefrom must be viewed in the light most favorable to the respondent. *Buzhardt v. Cromer*, 272 S.C. 159, 249 S.E.2d 898 (978); *Merril Lynch, Pierce, Fenner & Smith, Inc. v. Bruce*, 325 S.E.2d 77 (S. C. App. 1985)

Madden at page 577.

The Court stated further:

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. See *Restatement 2d Torts*, Section 398 (1965). This burden may be met by showing that the manufacturer was aware of the danger and failed to take reasonable steps to correct it. See *Marchant v. Lorain Division of Koehrig*, 272 S.C. 243, 251 S.E.2d 189 (1979) (*Marchant II*).
Madden at 580

In the Opinion under review, the Court of Appeals erroneously limits proof of negligent conduct to discovery of an admission. While the burden may be met with admissions, *Madden* allows the option for other avenues to proving negligent conduct with its use of the word “may.” The next paragraph in *Madden* is critical and demonstrates how the Court of Appeals in this case applied an incorrect standard by substituting its view of the evidence for that of the jury:

Madden presented evidence at trial that the bolt and keyhole device used to connect the hoist bar to the bin was defective in its design. Dr. Melvin Richardson, Madden’s expert witness testified that Long’s design had no safeguard against partial engagement. Vance Long, Long’s vice president, testified that field testing had disclosed the bin could be lifted even when the bolt was only partially engaged. Dr. Harold Hawkins, Long’s expert testified that an unsafe condition would exist if a bin could be lifted when the bolt was only partially engaged.

Madden at page 580, emphasis added

Petitioner boldfaced the above portion of Judge Bell's analysis because the type of evidence in *Madden* is identical to the quality and quantity of evidence presented in this case. The trial judge found it sufficient to raise a question of fact, and all parties agree that questions of fact are within the exclusive province of the jury. Ford's decision to incorporate its two amp switch into its 15-amp circuit was a conscious design decision, and conduct is always proved through evidence of conduct. It is only the rarest case, usually reserved for television drama, in which the plaintiff produces a "smoking gun" admission. Here, the Court of Appeals substitutes "admission" for "conduct," but as every trial lawyer knows, the proof of intent is through evidence of conduct. Or, stated more simply, we are judged by what we do, not by what we say.

The jury heard and saw the witnesses, especially the equivocation of Ford's expert, Jon Olsen. Mr. Olsen testified he travels all over the country investigating speed control deactivation switch fires and never found a single one he attributed to Ford's negligence, despite, as the Court of Appeals noted, Ford's admission that the switch is defective. Mr. Olsen's final words to the jury are revealing:

Q. Let me ask you this. If you are investigating a vehicle fire, not this particular vehicle fire, a hypothetical vehicle fire, what documents would you rely upon in surveying the literature to make a determination as to the fire origin and cause?

A. The document?

Q. Yeah. What scholarly material, what external sources? Let me start over. Go back to tenth grade. Remember you're in tenth grade and you get an assignment and you get the encyclopedia, right? If your assignment is Picasso, you go get the "P," you open up to Picasso, and read about it, right?

A. Right.

Q. Isn't that fairly standard?

A. I guess so.

Q. Okay. And don't fire experts such as yourself in fire origin and cause, don't they have routine scholarly works that they refer to or sources of information that they rely upon in assessing a hypothetical fire?

A. I would agree that would be certainly part of your investigation.

Q. Okay. And it is part of your investigation?

A. Sure.

Q. You go and see what the literature holds, right?

A. And literature is a fairly broad term. And what I do or what I normally do if I'm asked to investigate a fire and unaware of what this vehicle is, is I'll start looking at our drawings or specifications. I'll find out about the vehicle, about how the systems work if I'm not familiar with them already. So I do prepare for the investigation.

Q. Okay.

A. It's not unusual for us to have a report from somebody such as Mr. Greene to say, well, we think it's this, and certainly that's something that I have available, and I utilize the tools that I have to—to conduct the investigation, but that is what I would consider to be

a starting point.

Q. Okay. You would consider the literature to be a starting point.

A. A starting point or a piece of the puzzle.

Q. Okay. And in a hypothetical fire, forget Mr. Shelby, just go with a hypothetical fire, would you go out and look at what the literature out there holds, whether or not there has been anything written in a scholarly peer reviewed periodical regarding a similar type of incident?

A. That is a possibility. It depends. It depends on what the—what the allegation is, if we happen to know the allegation. Sometimes it's Ford engineers who know a little bit more about the vehicle than—than others might. So we have a little bit of an opportunity to use our knowledge, and I think that's why I'm in the position I'm in.

Q. Okay. Last question. In your capacity to have superior knowledge as being a Ford design engineering—

A. I'm not sure I'd characterize it as superior. I'd—

Q. All right. Well, familiarity with Ford vehicles?

A. That's all right.

Q. Wouldn't you agree with me that you have been aware for many years that there is a defect in the Ford speed control deactivation switch?

A. I don't when when you—when you talk about many years, I'm not exactly sure about that. I know that we've seen instances of this maybe more than we did, let's say, in 1995 if that's what you mean.

(Appendix pages 494-497 [record pages 295-298])

While the above testimony is dry on the printed page, the jury paid close attention. The fact that Mr. Olson acknowledged he has "seen instances of this" for many years, but yet could not derive an explanation for Mr. Shelby's fire was compelling evidence that Ford looks at everything except the evidence. Mr. Olson even initially denied that Ford's 2-amp switch was in a 15-amp circuit, but backed down after further cross-examination:

Q. And as Ford installed it [speed control deactivation switch] into its vehicles, in particular the vehicle owned by Mr. Shelby, it was wired into the brake light circuit, isn't that correct?

A. I believe that's true, yeah.

Q. All right. And that's a 15-amp circuit; isn't that right?

A. I believe that's true.

Q. Okay. So you've got 15 amperes of electricity running through a two-amp switch, is that correct?

A. No that is not true.

(Appendix at page 409)

Later, the same witness concedes that, in fact, the switch is continuously energized by 15 amperes:

Q. And the speed deactivation control which is energized by electricity, correct?

A. Yes.

Q. We've already established that, 15 amps, right?

A. Yes.

(Appendix at page 488)

In essence, Mr. Olsen testified that Ford has been aware of the problem since 1995—the year Ford built petitioner's truck, and did nothing to assist Mr. Shelby until his unattended vehicle burst in to flames ten years later in February 2005. The evidence of Ford's defective design, manufacture, and lack of action is evidence of conduct—or lack of conduct—that supports a jury's finding of negligence.

The common law has struggled with the correct formulation to evaluate when lack of conduct gives rise to a claim for damages. It is much easier to prescribe what to do than it is what not to do. In a runaway barge case from Pennsylvania, Judge Learned Hand articulated an algebraic formula for evaluating the quantum of inaction that gives rise to a claim for negligence. What Learned Hand derived was the formula assigning weight to the variables of defective design, cost to guard against harm and the value of resulting damage resulting from a failure to guard. In this algebraic formula, where the manufacturing decision to forego an inexpensive fix causes damage, the decision to forego a cheap guard is evidence of negligent conduct. See *U. S. v. Carroll Towing*, 159 F.2d 169 (1947): “. . . to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. . . . liability depends upon whether B[burden] is less than L[inability] multiplied by P[robability].” Here, Ford decided to deliver 15 amps of electricity through a switch it designed to handle 2 amps and then place the overloaded switch in

close proximity to highly flammable brake fluid without a protective device to limit electricity to the safe level for the switch. In any negligence case, the jury is permitted to weigh the evidence of conduct and determine if there is sufficient evidence to demonstrate Ford acted negligently. The test that distinguishes ordinary conduct from negligent conduct is foreseeability, and foreseeability is always a jury question. "Ordinarily, foreseeability is a question of fact to be decided by the jury. See *Jamison v. The Pantry, Inc.*, 301 S.C. 443, 392 S.E.2d 474 (Ct. App. 1990)" *Steele v. Rogers*, 306 S.C. 546, 413 S.E.2d 329 (Ct. App. 1992) Here, there is no question but that the record establishes conclusively that Ford's negligent conduct was designing and incorporating a 2-amp switch into a 15-amp circuit without a fuse placed next to highly flammable brake fluid. Thus the Court of Appeals erred in overruling the jury's view of the evidence that this design was negligent conduct. Ford failed to limit the electricity to the level it designed its switch to absorb safely and failed to incorporate a safety device—a fuse. As the Court of Appeals said, Ford admits the switch is defective; thus, the question for the jury became: Was Ford's design negligent because it was foreseeable that delivering 15 amperes of electricity to a 2-amp switch without a protective device would lead to overheating and ultimately ignition?

Like Shakespeare before him, Dean Prosser in his seminal book on Torts, also evaluated the consequences of a failure to act in the face of a duty to act and evaluated when a failure to act gives rise to a negligence case. In tort law, the difference between action and non-action is no difference at all:

Liability for nonfeasance was therefore slow to receive recognition in the law. It first

appears in the case of those engaging in “public” callings, who, by holding themselves out to the public, were regarded as having undertaken a duty to give service, for the breach of which they were liable.

During the last century, liability for “nonfeasance” has been extended still further to a limited group of relations, in which custom, public sentiment and views of social policy have led the courts to find a duty of affirmative action. It is not likely that this process of extension has ended. For the most part such a duty has been imposed where the relation is of some actual or potential economic advantage to the defendant, and the expected benefit justifies the requirement of special obligations.

Prosser on Torts Limitations of Duty, § 54. Acts and Omissions

The trial judge correctly charged the jury on negligence and the necessary elements of negligence. Under any analysis of conduct--or lack of conduct--there is sufficient evidence in this record to allow a jury to evaluate and decide if Ford’s conduct in designing a circuit to deliver more electricity than the switch can handle without a protective device is or is not a negligent act. Greene’s explanation is evidence of the precise conduct that the Court of Appeals erroneously concluded is lacking. Likewise, there is abundant evidence in the record that Ford intentionally abandoned an inexpensive fix for the dangerous condition, and this too is evidence of Ford’s negligent conduct. Lastly, the Learned Hand algebraic formula allows a jury to find evidence of negligent conduct by evaluating nothing more than the potential for severe harm against the minimal cost to Ford to prevent it, and

this too is evidence of a conscious disregard for Ford's customers' safety, and therefore sufficient evidence for a jury to determine if Ford's conduct were or were not negligent.

The second case relied upon by the Court of Appeals in finding that the plaintiff failed to produce evidence of Ford's conduct is *Duncan v. Ford Motor Co.*, 385 S.C. 119, 682 S.E.2d 877 (Ct. App. 2009). In *Duncan*, the plaintiff produced a 1999 Special Investigation Team Report (SIT Report) as evidence of Ford's conduct. Here, the Court of Appeals erroneously concludes that the production of a memo is the only method of proving negligent conduct. That is, without a "smoking gun" memo, the plaintiff must necessarily fail in proving negligence. This standard has never been the law. See *Madden v. Cox*, 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985): "This burden **may** be met by showing that manufacturer was aware of the danger and failed to take reasonable steps to correct it. See *Marchant v. Lorain Division of Koehrig*, 272 S.C. 243, 251 S.E.2d 189 (1979) (*Marchant II*)." (emphasis added) In the Opinion under review, the Court of Appeals erroneously limits proof of negligent conduct to discovery of an admission. In other words, absent some statement against interest, a plaintiff cannot recover. This has never been the law.

As the record demonstrates, Ford adopts a shifting position based on a trial strategy of whether it desires to use the recall notice as a sword or a shield. When Ford's expert was on the stand, he admitted, despite all his training and expertise, and investigation of the fire reports and photographs, he still had no theory anything:

Q. Mr. Olson, do you know what caused the fire on September 26th? If I say

September 26th, that's the day the fire department got there. Do you know what caused the fire to Stan Shelby's truck?

A. I do not.

Appendix at page 430

Without going through every line of Mr. Olson's testimony, it is fair to say that the jury was not impressed with his opinions, or lack of opinions, especially for a highly compensated "design analysis engineer" (Appendix 400) who Ford sends around the country to investigate vehicle fires. (Appendix 401) Ford's counsel qualified Mr. Olson as an expert in "fire origin and cause and in particular as to vehicles." (Appendix page 443) At the time of trial, Olson testified for Ford "15-20 times" in depositions and "twice" in court. (Appendix 404) Later, when being examined by Ford's counsel, Mr. Olson admitted that he had inspected vehicle fires for Ford in 200-300 vehicles. (Appendix page 455.) The variance in Olson's testimony runs throughout his time on the stand, and it is evidence of equivocation. (As President Nixon famously remarked: "It's not the crime that kills you, it's the cover up.") The Court of Appeals held, that without an admission by Ford, the plaintiff cannot show conduct, when the whole purpose of a trial and cross-examination is to demonstrate equivocation—or cover up—from which the jury could find evidence of Ford's covering up its conduct. In a trial, believability and credibility are key. Mr. Olson is Ford's "design analysis engineer," and yet he attempted to disavow any knowledge about the defective design at every point in his testimony. Such unbelievable denials permit a jury weighing his testimony to determine Ford is covering up what it knew to be negligent

conduct. In law like in logic, proof can be direct or indirect. The Court of Appeals overstepped its powers as an appellate court in weighing this testimony, which is the exclusive province of the jury. At almost every point in his testimony, Ford's expert found himself in contradictions saying, for example, that it is important to talk to the first responders but he did not do that in this case (Appendix page 430), or that he was prejudiced by not having the truck available while simultaneously testifying that the best evidence of the scene are the photographs because "especially with digital cameras these days, do really provide a lot information. And sometimes it's not unusual to even see things in those photos when you get back that you might not have observed when you're at the scene." (Appendix at page 456) Then Mr. Olson denied that Stan Shelby provided him any digital photos to work from, but upon closer inspection admitted he was wrong even about that. (Appendix page 462) Mr. Olson listed all of the possible causes of the fire:

- Accidental ignition
- Arson
- Wiring failure
- Modification of component parts
- After market modifications
- Fluid leaks
- Other defects

(Appendix page 422-23)

When asked how many of the 200-300 vehicle fires he inspected did he conclude were occasioned by Ford's negligence, this is his answer:

A. The answer is that for some of them I could not rule it out. So I would say that it is—it is one of the possibilities. I've never definitely concluded that, at least in my involvement, that the switch was at issue.

Appendix at 461

This testimony is just as compelling as the evidence produced by the plaintiffs in *Duncan*, for it shows the lengths Ford will go to avoid any discussion of what it knows is the defect. Ford never offered any explanation as to how the fire started. Ford relied entirely on attacking the plaintiff, his witnesses, and his counsel. As discussed above, the Court of Appeals found that the record contains no evidence of Ford's conduct and thus no evidence of negligence. According to the Court of Appeals, the **only** witness in the case who was in a position to offer evidence of Ford's conduct was its expert, Jon Olson. Yet as the above quotations of Jon Olson's testimony demonstrates, he was the plaintiff's best witness, and his constant equivocation demonstrated to the jury the manufacturer's disregard for the safety of its customers. Olson's testimony, and the manner in which he delivered it about Ford's negligent design of the switch in question is evidence of Ford's conduct. Olson testified that he personally has been aware of the defect since 1995, but the company took no steps to correct the defect, which brings the analysis to an aberration in Ford's trial strategy. Ford fought vigorously to suppress its recall notice to Stan Shelby, obviously because he did not receive it. However, in an act of industry hubris—and an irony lost on Ford—it admitted that where it can prove the claimant received the recall notice before the fire, it introduces it to assert comparative negligence because the recipient has

failed to follow the instructions contained therein. Ford's duality over the recall notice is crystallized in its admission that it uses the recall notice as evidence of comparative negligence if it can prove the owner received it before the fire. "We've tried other cases where we get in closing and let the jury know right off the bat that this part had been recalled, but it's only in .999999—you know—7 percent of these vehicles never have a problem with the switch, it's a rare occurrence even within the recall population, and make them prove their case under these facts because they've destroyed their evidence." Appendix at page 475. This statement to the lower court is shocking in light of the bloated record below devoted to Ford's numerous efforts to keep the recall notice out of evidence, a strategy in conflict with Ford's representations to the federal court. In 2005, Ford was so certain that all of its speed control deactivation switch fires involve common questions of fact, that it persuaded the United States Federal Court to consolidate all of the federal speed control deactivation switch cases in a single forum on the ground that they all contain "common questions of fact." In seeking consolidation Ford told the Judicial Panel on Multidistrict Litigation:

Ford contends all of the seventy-seven cases involve Ford's speed control deactivation switch (switch(es)) in various motor vehicles. The switches are alleged to be defective and allegedly caused the specific fire and attendant damages in each case. Ford asserts each case shares "common questions of fact in that they are all premised on the same alleged defect." According to Ford, each case seeks to determine whether the "cause and origin of the vehicle fires was at the [switches] and the extent of damage caused by the fire." These questions concern the design, manufacture, testing, installation, advertising, and performance of the switches. additionally, Ford says plaintiffs "are likely to seek information concerning the timing and motivation behind Ford's 05S28 recall [of the switches]." Ford asserts its position will be "identical" as to all of "these underlying causation issues." Finally Ford advise us that the Federal Judicial Panel on Multidistrict Litigation has determined that "more than 50" cases in federal court involving the switches are appropriate for consolidation and has transferred them to the United States District

Court for the Eastern District of Michigan. *In re Ford Motor Co. Speed Control Deactivation Switch Prods. Liab. Litig.*, 398 F. Supp. 2d 1365 (J.P.M.L. 2005)
(Consolidation Order at page 265 of Appendix.)

Since Ford is so sure it knows that all the switch fire cases involve common factual issues, it sheds some light on its trial strategy in this case to deprive the plaintiff of compensation for his loss by attacking the plaintiff rather than focusing on what it knows caused the fire.

As set forth above, the record is bursting with evidence of Ford's conduct; Lenny Greene is more than qualified to offer evidence of the electrical component that failed and to offer testimony regarding Ford's conduct in designing an unsafe circuit. Chief Norris is more than competent to offer evidence of the origin of the fire. In light of this convincing evidence, the Court of Appeals erred in sifting the record to substitute its view of the evidence for that of the jury.

South Carolina law has never required that conduct be proved by an admission or confession. Conduct is proved by acts—or lack of action—not by words. It is undisputed that Ford designed and had built to its specifications a switch designed to handle two amperes of electricity. Ford then took its two amp switch, installed it in to a continuously energized 15-amp circuit, and placed the switch in direct contact with highly flammable brake fluid, separated by only a thin membrane. Plaintiff's expert testified that the fix for such an arrangement was the inclusion of a two ampere fuse, which would prevent the flow of electricity if the switch began to fail. On page 314 of the Appendix, the plaintiff's expert defined the defect and the cause:

Q. How does that [the switch fire] happen?

A. Well, it's a bad design. The way the switch is designed, it's got power on it all the time. It would have been inherently safer to have designed it so that it only had power on it when the ignition is on. And this is what's a key-off/power-on design, and it has power on it all the time. That's number one.

Number two is the fact that the protective device is not coordinated with the switch. The switch is rated for two amperes. The protective device is rated for 15 amperes. So the switch can really overheat and start a fire before the 15-ampere fuse would ever blow.

Number three, the design of the switch has both an electrical and a flammable liquid, hydraulic brake fluid, together, separated by a thin membrane. And it's very foreseeable that this thin membrane will leak eventually, because when you apply the brakes on the vehicle, brake pressure increases dramatically and pushes against this membrane which, in turn, pushes the switch and opens the switch.

So if you have a slight leak in this membrane, this flammable brake fluid will get on the other side where the electrical switch is, and you have a source of ignition, and then you have enclosing a whole assembly of insulating plastic which keeps the heat in there and causes the temperature to rise until it can eventually reach the ignition point and start a fire, and you then have brake fluid freely coming out into the switch, or what was the switch assembly which is now burning, and the

fire rapidly accelerates from that point on.

Q. What is the fix for that problem?

A. It's about a \$2 fuse.

Appendix pages 314, line 18 through 515, line 5 (R.O.A. pages 375, line 18 – 316, line 5)

In finding that there is no evidence in the record to support any evidence of Ford's conduct, the Court of Appeals deviates from the well-established test of conduct. The law requires different standards of proof of conduct in negligence cases for actual damages than for punitive damages. In order to obtain a punitive damage award, a plaintiff is required to prove reckless or willful conduct by a clear and convincing standard. See *Fairchild v. Dept. of Transp.*, 398 S.C. 90, 727 S.E.2d 407 (2012). Here the jury did not award punitive damages. Rather, the jury awarded actual damages, and the universal rule for proving conduct of simple negligence is by reference to a foreseeability standard. In 1998, the Fourth Circuit summarized the law in South Carolina as follows:

In negligence, the plaintiff must prove fault of the manufacturer, which is an element not required in strict liability law. The scope of inquiry, however, expands because of the duty to unintended but foreseeable users. Although the results may very well often be the same in strict liability and negligence under a given set of facts, the focus of each claim is different, and therefore proof of negligence maybe be possible without a finding of strict liability.

To make out a negligence claim in South Carolina, a plaintiff must prove three elements: "(1) a duty of care owed by ether defendant to the plaintiff; (2) a breach of that duty by a negligent actor or omission; and (3) damage proximately resulting from the breach of that duty." *Rickborn v. Liberty Life Ins. Co.*, 321 S.C.

291, 468 S.E.2d 292, 298 (1966).” A breach of duty exists when it is foreseeable that one’s conduct may likely injure the person to whom the duty is owed.” *Horne v. Beason*, 285 S.C. 518, 331 S.E.2d 342, 344 (1985) (emphasis added); see also *Visnon v. Hartley*, 324 S.C. 389 S.E.2d 715, 720 (1996)
Talkington v. Atria Reclamelucifers, 152 F.3d 254 (Fourth Cir. 1998)

In the first semester of law school, every torts professor torments her students with the analysis of foreseeability in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 N.E. 99 (N.Y. 1928) because the failure to act in the face of a foreseeable harm is conduct for which the law provides a remedy. In *Palsgraf*, Judge Cardozo framed the famous standard that “If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. This concept of foreseeability in tort law tends to limit liability to the consequences of an **act** that could reasonably be foreseen rather than every single consequence that follows.” (emphasis added) Thus, when Ford, not only admitted that its switch was defective, but more importantly admitted that it designed a switch to handle two amperes of electricity and then knowingly placed it in a circuit delivering 77% more electricity than it designed it to handle and placed this switch in direct contact with highly flammable liquid, this evidence of an act that “had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended.” Ford’s manufacturing decision is “conduct,” because it was foreseeable that such an arrangement would ultimately fail. Ford knowingly put a switch into a circuit it knew the switch cannot handle. This manufacturing decision is evidence of conduct, just as is the manufacturing decision not to protect the switch with a fuse that limits the flow of

electricity to a level Ford designed it to handle. Thus there is overwhelming evidence in this record to allow the jury to decide whether there was or was not sufficient evidence to support a finding of negligence.

In determining whether there was or was not evidence in the record to support the jury's conclusions regarding Ford's conduct, the appellate court is always concerned with the existence of evidence, not the weight of the evidence, or the credibility of witnesses. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272 (2003) (adequacy of warning is a jury question). In *Mickle v. Blackmon*, 252 S.C. 202, 166 S.E.2d 173 (1969) the Supreme Court evaluated the evidence in the failure of gear shift knob. In finding that the record contained sufficient evidence for a jury to make the determination, the Supreme Court said:

The mere passage of time confers no immunity upon a negligent wrongdoer; but it has relevance to the likelihood, depending upon the circumstances of a particular case, that deterioration due to use, perhaps accelerated by misuse, will be mistaken by a jury for defect due to negligent manufacture or fabrication. On the evidence before us in this case, we cannot say the jury went beyond permissible and rational inference in attributing the accident to Farrington's negligent fabrication of the skid iron, which cracked and came apart, despite at least two and one-half years of apparently safe use and normally rough handling." 227 F.2d at 4523.

The above excerpt from *Frederick's* was quoted with approval in *Carney v. Sears Roebuck & Co.*, 309 F.2d 300, 305 (4th Cir.), in which plaintiff was injured by the collapse of a ladder after fifteen month's use, and there was evidence that a defective rivet gave way under continued strain to the cause of the collapse.

Here, as in the cases just referred to, there was evidence of an original weakness in the gearshift assembly which caused the collapse of the protective knob. The deterioration of the product and its consequent failure was the very risk created by the negligent choice of material, or the jury could so find. The rule relied upon, that a manufacturer is not liable for the failure of a product due to deterioration from ordinary wear and tear or misuse, simply does not fit these facts.

We readily concede that the passage of thirteen years between the marketing of a product and its injury-producing failure is a formidable obstacle to fastening liability upon the manufacturer. However, **it may be reasonably be inferred in this case that the advanced age of the ball was coincidental with its failure rather than the cause of it, and the knob would have shattered upon a comparable impact had it occurred much**

earlier in the life of the car. The important inquiry is not how long the knob lasted but what caused its failure. Mere passage of time should not excuse Ford if its negligence was the cause. Since this conclusion finds support in the evidence, the issue was for the jury.

Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969) (emphasis added)

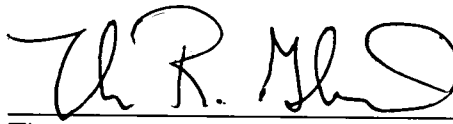
These and other cases universally hold that the question of negligence may be proved by direct or circumstantial evidence. *Mickle v. Blackmon* also analyzes the “balancing test,” which allows an inference of conduct based on the jury’s weighing such evidence as establishes on the one hand, the seriousness and likelihood of harm against the burden of feasible precautions to avoid or minimize harm. See *Restatement (Second)* § 398. Thus, the jury was well within its rights as the finder of fact to conclude that Ford’s deliberate placement of an over-energized switch in close proximity to highly flammable brake fluid when juxtaposed against the un-contradicted evidence that Ford could avoid the entire danger by implementing a fuse in the circuit that would limit the amount of energy in the circuit to the amount of energy Ford designed its switch to handle. This balancing test and the implementation of a two amp switch in a 15-amp circuit is evidence of conduct, and it was up to the jury to decide if the evidence was or was not sufficient to sustain its finding of negligence. There is not a single case in the well-developed body of negligence law in this state that holds a plaintiff can have a jury decide his or her case if, and only if, the plaintiff develops evidence of an admission of wrong doing. In reversing the trial court and the jury verdict, the Court of Appeals substituted its view of the evidence for that of the jury, and this error requires reversal of the decision below.

CONCLUSION

For the reasons stated, petitioner asks the Court to grant to reverse the Court of Appeals and reinstate the verdict of \$41,000.00 and costs awarded at trial.

Respectfully submitted,

June 27, 2013



Thomas R. Goldstein
Belk, Cobb, Infinger & Goldstein, P.A
P. O. Box 71121
Charleston, S. C. 29415-1121
(843) 554-4291
tgoldstein@cobblaw.net
Attorneys for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Kristi L. Harrington, Circuit Court Judge

Court of Appeals Opinion No.: 4862
Case No. 2006-CP-10-4773

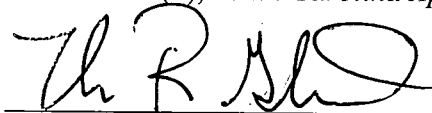
Five Star, Inc.,Petitioner,

vs.

Ford Motor Co.,Respondent.

CERTIFICATE OF COUNSEL

I certify that the Petitioner's Brief complies with rule 211(b), *South Carolina Appellate Court Rules*.



Thomas R. Goldstein

Other counsel of Record:
Curtis L. Ott, David C. Marshall
Turner, Padget, Graham & Laney, PA
P.O. Box 1473
Columbia, SC 2920
cott@turnerpadget.com
Attorneys for the Appellant
(803) 227-4292

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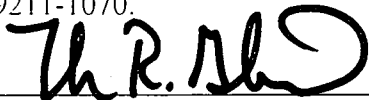
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CERTIFICATE OF SERVICE

I certify that I have served one copy of the Petitioner's Brief by depositing a copy in the United States Mail, postage prepaid, on June 28th, 2013, addressed to David Marshall, Turner Padgett, at P.O. Box 1473, Columbia, S.C. 29202 and C. Mitchell Brown, Nelson Mullins Riley & Scarborough, LLP, at P.O. Box 11070, Columbia, SC 29211-1070.


Thomas R. Goldstein

Other counsels of Record:
Curtis L. Ott, David C. Marshall
Turner, Padgett, Graham & Laney, PA
P.O. Box 1473
Columbia, SC 2920
cott@turnerpadgett.com
Attorneys for the Respondent
(803) 227-4292

C. Mitchell Brown
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29211-1070
mitch.brown@nelsonmullins.com
Attorneys for the Respondent
(803) 799-2000

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