THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S C Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
James C Wilhams, Jr , Circuit Court Judge

Case No 08-CP-38-826

KAREEM J GRAVES AND TARA GRAVES, INDIVIDUALLY AND AS DULY APPOINTED PERSONAL REPRESENTATIVES OF THE ESTATE OF INDIA IYANNA GRAVES — Appellants,

vs

CAS MEDICAL SYSTEMS, INC — Respondent

RESPONDENT'S BRIEF IN REPLY TO AMICUS CURIAE

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INTRODUCTION

Respondent, CAS Medical Systems, Inc ('CAS), submits this reply to address the arguments raised by Amicus Curiae Law Professors John F Vargo, Paul J Zwier II Richard W Wright, Frank J Vandall, Steven A Saltzburg, Jay M Feinman, Thomas A Eaton, and Carl T Bogus (collectively, "Amici') CAS believes this case is a straightforward one where the trial court properly granted summary judgment based on the record before it and long-established principles of South Carolina law

Contrary to the claims of the Amici, this case does not present novel issues, nor is it the test case for relaxing the burden of proof in product liability cases to what essentially amounts to an inference of a product defect every time a plaintiff claims the product malfunctioned, even in the absence of any additional proof These same arguments were recently made and rejected, at least implicitly, in *Watson v Ford Motor Co* , 389 S C 434, 699 S E 2d 169 (2010)

Here, there has been no spoliation, the product was not new, the product and its function are not within the experience of an average juror, and the Graves had ample ability to have the product investigated by the experts of their choice Those experts did not present any admissible theory of why the monitor malfunctioned, nor could they recreate the malfunction In contrast, there was ample evidence before the trial court that the software was testable, that if there was a defect it could have been located, and that computer science demands such testing to assign error to a piece of software code (*See* Pressman Affidavit 4/4/10, R at 579-583 at ¶¶ 4 0, 7 0-9 0, 11 0, 13 0-14 0)

Moreover, the Graves did not present any expert testimony on the causation element of their claim to show that a SIDS victim could have been revived with external

stimulation The Amici wholly overlook this glaring hole in the Graves's proof in order to push their agenda relating to a plaintiff's burden of showing a defect in products cases

STATEMENT OF THE CASE IN RESPONSE TO THE AMICI

CAS re-alleges its statement of the case and statement of facts from its respondent s brief It takes this opportunity to clarify the more significant misstatements and overstatements found in the brief of the Amici

I The testimony of the Graves, the parents of India Graves

Parroting the allegations in the complaint, Mrs Graves testified in her deposition that the monitor was properly turned on and hooked up but failed to alarm as India was declining (T Graves Dep , R p 705, lines 10-15, R p 893, lines 1-4) As discussed below, as recently as *Watson*, 389 S C at 455, 699 S E 2d at 180, this Court found that such testimony does not create a jury issue in a complex products liability case, *i e* , one where expert testimony is needed

II The testimony of responding EMT Anita Kelly

Kelly was one of two responding EMTs that night (Kelly Dep , R p 901 lines 15-25) Contrary to Amici's assertion that Kelly testified that when she looked around the room she saw the monitor with its lights on but not sounding, Kelly repeatedly testified that she did not remember whether she saw the monitor or not (*Id* at R p 908, lines 16-19, R p 914, lines 16-19 *see also id* at R p 909, line 15–p 910, line 2) Mrs Graves was also in the room, but Kelly did not remember Mrs Graves showing her anything (*Id* at R p 906, lines 8-17) and she likewise could not say whether notations about the monitor on her "run sheet" prepared that night (R p 1152) were her own observations or recounted to her by Mrs Graves (Kelly Dep , R p 911, lines 1-19)

Other notes such as 'Pt was a 25 week preemie of multiple birth triplet Pt was 1st baby Pt was illest [sic] baby ' clearly came from Mrs Graves, but the run sheet neither contains quotation marks nor does it otherwise denote what information was recounted by a third party to Kelly versus her own first hand observation (*Id* at R p 911, lines 1-19, *see* R p 1152) Although Kelly stated that her run sheet made her think she might have looked at the monitor, in the final analysis, she simply could not say she looked at it (Kelly Dep , R p 732, lines 11-24, p 911, lines 1-19) Therefore, her testimony is speculative at best and cannot independently create a question of fact on this point

III The testimony of Mrs Graves's sister, April Simmons

As a last effort to create a circumstantial case from the eyewitness testimony, Amici point to the testimony of Simmons, who was sleeping in the house that night Amici misstate that she was sleeping "in an adjacent bedroom " (Brief of Amici at p 10) In fact, Simmons was sleeping in a room downstairs from the Graves' bedroom where India slept (Simmons Dep , R p 992, lines 13-22) She did not hear the alarm, but with her asleep on a different floor of the house, her testimony that she would have heard it had it sounded is obvious speculation Further, Amici fail to address the fact that Simmons had no first hand knowledge about the function of the monitor that night because she did not look at it at it after India died and therefore could not know whether it was on but not alarming [1] Thus, her testimony, like that of Mrs Graves, does not create a question of fact in this case

[1] The monitor log reports that the monitor was powered off at 2 50 31 A M (R p 1020) (actually 3 50 31 corrected for Daylight Savings Time) about the same time the Graves called 911 (R p 1152)

IV Evidence relating to the Monitor

A There was no admissible evidence that the alarm previously failed to sound

The Amici argue that the monitor log showed that it had failed previously, based on the Graves's experts testimony This argument is inconsistent with the Graves's own testimony that the monitor worked before the night of India's death (T Graves Dep , R p 896, lines 10-18, K Graves Dep , R p 899, lines 3-12) The only testimony that these logs reflect a malfunction comes from the Graves's experts because the logs are created by computer code that cannot be interpreted by a lay jury without expert assistance Amici's reliance on expert testimony to create circumstantial evidence is inconsistent with the entire premise of their brief, that expert testimony is unnecessary for this case to go forward [2] At the same time, it reinforces CAS s position that this is a case that must be proven by expert testimony

Further, Amici misunderstand what the monitor log shows An "alarm not heard" indication literally means that the monitor microphone did not "hear" the alarm sounding, which can happen if the alarm is muffled somehow, as well as if the alarm has actually failed to go off (Lambert Dep , R p 929, lines 9-23, Appendix p 1, line 22--p 7, line 2)

Amici are correct that the alarm is loud and piercing They fail to point out, however, that the Graves heard the alarm numerous times In fact, as the logs show, the alarm on each monitor sounded many times every day (*See*, *e g* , R p 1019) Caregivers often manipulate the volume of these alarms With regard to the supposed earlier failures, the logs show that the monitor detected the alarm, then detected that one

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[2] Amici state in their brief that they do not contest the trial court's ruling excluding the Graves's experts, however, they go on to rely on the opinions of those experts throughout the brief (Brief of Amici at p 6, n 2)

or both alarms had been silenced, and then that the machine had been shut down (Lambert[3] Dep , Appendix p 1, line 22–p 7, line 2) The only reasonable inference to be drawn from this sequence of events is that the caretaker heard the alarm, muffled the loud noise and then turned the monitor off which required simultaneously pressing two buttons,[4] to correct the problem typically a loose monitor halter or belt This inference is corroborated by Simmons s testimony that she usually turned the monitors off during loose lead alarms before re-establishing the connection between the child and the monitor (*Id* at R p 1000, line 14–p 1001, line 6) The Graves's experts' opinions that these events were monitor failures are not supported by testing or review of the code responsible for the logging function This testimony that these events reflect a software defect is thus completely unverified, purely *ipse dixit*, opinion, was properly excluded by the trial court, and cannot support Amici s arguments

B The 2002 recall was for a hardware problem that was unrelated to the software problem alleged here

Amici incorrectly argue that the 2002 recall of this model monitor creates a factual issue in this case because it could cause the same kind of failure alleged here, relying on *Denton v Daimler-Chrysler Corp* , 645 F Supp 2d 1215, 1226 (N D Ga 2009) (Ga law) However, the Georgia case cited for this proposition by *Denton* holds that a recall is admissible only 'as long as there is first introduced some independent proof that the particular product in question suffered from the same defect ' *Rose v*

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[3] Amici mischaracterize Scott Lambert as a lay witness He is the inventor of the redundant alarm system in the AMI Plus monitor (Lambert Dep , R p 922, line 21–p 926, line 2) and has years of experience in monitor development, which informed the design of this monitor (*Id* , at R p 921, line 24–p 926, line 2) Of all the witnesses in the case, he has the most knowledge about this monitor

[4] The monitor was designed to avoid accidental shut-down by requiring two different buttons be pushed simultaneously (R p 1195)

Figgie Int l, 495 S E 2d 77, 84 (Ga Ct App 1997) Appellants' own experts resolved this question when they recognized that the static electricity or electrostatic discharge ("ESD") problem was a hardware issue and not the same as the software problem as they asserted As a result, they determined the ESD issue was not relevant to this case (Daugherity Dep , R p 848, lines 11-16, *see also* Elliott Dep , R p 883, line 10–p 884, line 8) This fact and appellants recognition of it explain why evidence on this issue is not included in the record on appeal (*See* Brief of Amici at p 13, n 4) Finally, there is no evidence that the recall was not completed to the FDA's satisfaction The recall simply has no bearing on the alleged defect here

Moreover, the ESD failures were characterized by the monitor cutting off without warning and thus not alarming for subsequent patient events (Elliott Dep , R p 883, line 10–p 884, line 8, Brief of Amici at 11, 48, n 48) The Graves presented almost an opposite scenario India's monitor was on, monitored her physiological events during her decline, and according to the log, alarmed exactly when it should have during her decline (Lambert Dep , R p 935 line 18–p 936, line 6) There is no allegation of a hardware issue in this case and Amici do not and cannot point to any evidence showing that ESD could cause this scenario Amici are thus incorrect in their claim that the recall and the facts of this case share "exactly the same failure " *Id* Accordingly, this evidence does not meet the requirements for an admissible recall in the authority cited by Amici, nor does not meet South Carolina's requirements for admitting evidence of previous accidents found in *Branham v Ford Motor Co* , 390 S C 203, 232, 701 S E 2d 5, 21 (2010) (dictating test as follows, "(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 the other accidents) (emphasis added)

C There is no record that other possible scenarios were eliminated The Graves's experts simply assumed a malfunction

Amici again turn to the Graves's unreliable experts as evidence that other causes of alleged alarm failure were eliminated from the case As previously briefed, the experts relied entirely on the Graves's testimony and assumed the alarm failed to sound They did so without understanding the logging function This assumption excluded at least one possibility—that the alarm worked as it should have This failure, along with all the other problems with the experts testimony noted by the trial court in its ruling, cannot create a question of fact here

D The monitor log confirms that the possibility that the monitor functioned correctly should have been considered

CAS presented the trial court with a properly made and supported motion for summary judgment The trial court provided the Graves with numerous opportunities to come forward with evidence showing a question of material fact for a jury They failed to do so

CAS does not argue that the monitor log alone proves the monitor worked properly The burden is not on CAS to show the monitor functioned, but rather on the Graves to show it did not The logging function is another computer-controlled operation of the monitor that the Graves failed to prove was defectively designed or manufactured The logging function of the monitor's software is a separate module' from its monitoring function (Lambert Dep , R p 938, lines 5-18) In fact, the Graves use the log to support their case as to the chronology of India's decline, however, they contest

the log's record with respect to alarm activity These inconsistent positions with respect to the log further highlight the need for expert testimony

When deposed, the Graves's experts were essentially unfamiliar with the logging function, and when they later filed affidavits trying to defeat summary judgment, they gave blanket opinions on the log's function without any testing of it Because their experts were disqualified as unreliable, in part because they conducted no testing of the logging function, the Graves were left with no evidence that the logging function of the monitor was defective

ARGUMENT IN REPLY

CAS incorporates the arguments contained in its respondent's brief and offers this additional argument to address the contentions of the Amici This case does not present any novel issues Moreover, this case does not present some of the difficulties raised by the cases cited by the Amici the monitor was not destroyed and the Graves's technical experts had ample opportunity to examine it and test their theories Their problem was not one of access Instead, the Graves could not pinpoint a defect or recreate a malfunction This is not a failure in the South Carolina products liability law as urged by the Amici but instead a classic failure of proof on the part of a plaintiff As such, the trial court properly granted summary judgment

I The Court need not reach the issue raised by the Amici because the Graves failed to present admissible evidence of causation

In a products liability action, the plaintiff 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

Branham, 390 S C at 210, 701 S E 2d at 4-5 This will necessarily include a showing of both a product defect and that the defect was the proximate cause of the alleged injury *Livingston v Noland Corp* , 293 S C 521, 524, 362 S E 2d 16, 18 (1987)

Here, the Amici focus exclusively on the product defect part of the equation CAS argues the Court need not reach the issue presented by the Amici because there is no admissible evidence showing that India could have been revived had her parents heard and responded to an alarm (*See* Respondent's Brief at pp 21-25) As established by the record, India's death was attributable to SIDS and part of the tragedy of SIDS is that SIDS infants are non-resuscitatable (Hunt Affidavit, R pp 598-599) Thus, the Graves's case fails for lack of evidence of causation

II The Graves failed to present evidence supporting a finding that the monitor was defective

South Carolina courts recognize claims for three types of product defects manufacturing, warning, and design *Watson*, 389 S C at 444, 699 S E 2d at 174 (reversing jury verdict in a vehicle acceleration case and directing that judgment be entered in favor of the defendant manufacturer) Here, the Graves pursued a design defect theory that the monitor malfunctioned because of a problem with the software [5] Proof of a design defect requires a showing of a defect and that the product was unreasonably dangerous by application of the risk-utility test, which requires a showing of a feasible alternative design *Branham*, 390 S C at 220, 701 S E 2d at 14 (finding consumer expectations test for defect inapplicable in South Carolina design defect cases)

[5] As previously briefed, the Graves's experts changed their opinion as to the nature of the software defect to avoid summary judgment

The role of expert testimony and circumstantial evidence in a products case was recently addressed by the Court in *Watson* The very issue raised by the Amici was also briefed by the parties in *Watson*, implicitly rejected by the Court, and addressed by the dissent in a lengthy quotation from the trial court s order[6] *Watson*, 389 S C at 461-62, 699 S E 2d at 183 (Pleicones, J, dissenting in part) The order on appeal in *Watson*, included the following findings, which mirror the arguments of Amici

> Accordingly, even if the jury rejected the expert s testimony, the circumstantial evidence was sufficient to support the verdict [Respondents] were not required to prove a specific defect in the vehicle and could properly prove that the vehicle was defective and unreasonably dangerous using circumstantial evidence *St Paul Fire and Marine Ins Co v American Ins Co* , 251 S C 56, 59-60, 159 S E 2d 921, 923 (1968) ('[a]ny fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of the facts), *McQuillen v Dobbs*, 262 S C 386, 391-92, 204 S E 2d 732 (1974) ("negligence may be proved by circumstantial evidence as well as direct evidence"), Restatement (Third) of Torts Product Liability § 3 Comment c (1998) ("No requirement that plaintiff prove what aspect of the product was defective The inference of defect may be drawn under this Section without proof of the specific defect)[4]
>
> [4] The Court emphasizes that this is an alternative ruling The Court finds that [respondents] did in fact present evidence sufficient for the jury to find that a specific defect in the Explorer -- the EMI interference which caused the acceleration -- proximately caused the accident With respect to the alternative ruling, however, the Court notes that [appellant's] reliance on cases recognizing that a malfunction alone is insufficient to send the case to the jury is misplaced This case involved evidence of a malfunction

[6] CAS requests that the Court take judicial notice of the briefs filed before this Court in *Watson* and specifically the arguments made at pp 29-35 of the Appellant's Brief and pp 10-14 of the Appellant's Reply Brief

> plus detailed evidence negating any cause of the sudden acceleration but a product defect

Id In that case, "Watson testified that when she entered the interstate, she promptly set the cruise control but shortly thereafter, the Explorer began to suddenly accelerate Watson testified that she reached down in an attempt to grasp the gas pedal, but was stopped by her seat belt and that she then pumped her brakes to no avail before crashing" *Id* at 442, 699 S E 2d at 173 In addition, Watson s father "testified that on two occasions prior to the accident, the Explorer suddenly accelerated while he was driving" Plaintiffs also attempted to introduce evidence of other incidents *Id* at 453 699 S E 2d at 179

On appeal this Court examined all of the evidence presented to the jury, including the expert testimony and the circumstantial evidence and found

> [T]he evidence submitted at trial was insufficient to support a verdict for Respondents and the evidence shows that Ford is entitled to a judgment as a matter of law Even if the trial court did not err in qualifying Williams as a cruise control expert, in admitting Dr Anderson s testimony, and in admitting evidence of similar incidents, the only reasonable inference that could have been drawn from the evidence presented at trial is that Respondents failed to establish, as a matter of law, that EMI caused an unintended acceleration which resulted in Respondents' accident and resulting injuries Nonetheless, as even the dissent concedes, neither of Respondents' experts presented admissible testimony Without such testimony, Respondents failed to present a case for products liability [8] Therefore, Respondents did not present admissible evidence that the cruise control system of the vehicle at issue was defective or unreasonably dangerous
>
> Furthermore, the only reasonable inference that can be drawn from the evidence presented at trial is that Respondents failed, as a matter of law, to prove an alternative feasible design with respect to the vehicle's cruise control system We find that, because the mere

> occurrence of an accident or existence of an alleged product malfunction does not establish the liability of a product manufacturer, the trial court erred by failing to enter a judgment in favor of Ford Therefore, we reverse and enter a judgment in Ford s favor
>
> [8] Additionally, none of Respondents' evidence concerning similar incidents was admissible, thus, given the evidence presented at trial liability could not have been found on any theory

Id at 455, 699 S E 2d at 180, *see also Campbell v Robbins Tire & Rubber Co* , 256 S C 230 233-34 182 S E 2d 73, 74-75 (1971) (holding plaintiff must prove a defect, not merely establish a malfunction), *Sunvillas Homeowners Ass n v Square D Co* , 301 S C 330, 333, 391 S E 2d 868, 870 (Ct App 1990) (holding the fact of malfunction does not show manufacturer negligence or product defect) Thus, the Court rejected the portion of the trial court's order above and the argument of the Amici here

A Expert evidence was required in this case

The Amici concede that whether expert testimony is required "depends on the facts and circumstances of each case (Brief of Amici at p 35) They further explain that expert testimony is unnecessary if jurors "are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training (*Id*) Of course, the converse is also true—some cases fall outside the province of lay jurors and require expert testimony *See Watson* 389 S C at 455, 699 S E 2d at 180, *see also Wood v Toyota Motor Corp* , 760 A 2d 315 (Md Ct App 2000) (finding that expert testimony was required to establish that a motorist's chemical burns were caused by a design defect), *Brooks v Colonial Chevrolet-Buick Inc* , 579 So 2d 1328 (Ala 1991) (upholding grant of summary judgment on products claim against manufacturer because plaintiff's failed to produce expert testimony on

operation of brake system), *Heaton v Ford Motor Co* , 435 P 2d 806, 809 (Ore 1967) (affirming involuntary nonsuit in case where plaintiff failed to present testimony that wheel was defective in part because [h]igh-speed collisions with large rocks are not so common, however, that the average person would know from personal experience what to expect under the circumstances Nor does anything in the record cast any light upon this issue The jury would therefore be unequipped, either by general background or by facts supplied in the record, to decide whether this wheel failed to perform as safely as an ordinary consumer would have expected To allow the jury to decide purely on its own intuition how strong a truck wheel should be would convert the concept of strict liability into the absolute liability of an insurer ")

Here, the product is a highly complex, technical device that most people have never encountered As in *Watson*, this claim involves sophisticated issues of engineering, science, and other complex concepts that are quintessentially beyond the ken of a lay person *Id* at 444, 699 S E 2d at 174 Given the technical nature of the product and the alleged defect in this case, a jury will require expert testimony *Id* For that reason, circumstantial evidence presented by lay witnesses without further interpretation or explanation as to those parts of the claim requiring expert testimony cannot satisfy the Graves's burden of proof

B There is no admissible evidence of similar incidents of monitor failure

In this case, there is no admissible evidence of similar incidents with respect to the monitor As explained above, the recall referenced by the Amici related to a hardware problem that caused the monitor to cut off, not a software problem that would

cause an otherwise functioning machine not to alarm When faced with a similar argument in *Watson*, the Court provided the following guidance

> Evidence of similar accidents, transactions, or happenings is admissible in South Carolina where there is some special relation between the accidents tending to prove or disprove some fact in dispute A plaintiff must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue In *Buckman v Bombardier Corp* , the District Court set forth factors that a court should consider when admitting evidence of other incidents to support a claim that the present accident was caused by the same defect (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 the other incidents 893 F Supp 547, 552 (E D N C 1995)

Id at 453, 699 S E 2d at 179 (citations omitted), *Branham*, 390 S C at 231-32, 701 S E 2d at 21

The Graves did not present to the trial court evidence of other incidents meeting this test As conceded by the Amici, the 2002 recall is not part of the record in this case (*See* Brief of Amici at p 13, n 4) The other complaints referenced in the Graves's appellants brief were not in the record before the trial court, much less shown to meet the test in *Watson* (Respondent's Brief at p 12, n 3) Therefore, the Graves did not present any admissible evidence of similar incidents

C The Graves were required to present evidence satisfying the risk/ utility test for showing the monitor was unreasonably dangerous, including identifying a defect and showing evidence of a reasonable alternative design

This Court expressly disapproved the consumer expectations test for determining whether a product contains a design defect *Branham*, 390 S C at 222, 701 S E 2d at 15 As defined by the Court, the consumer expectations test focused on "whether the product

is unreasonably dangerous to the consumer or user given the conditions and circumstances that foreseeably attend use of the product " *Id* at 218, 701 S E 2d at 13 This discredited test is very similar to the instruction found in Section 3, Comment b to the Restatement (Third) Torts, Products Liability § 3, which provides that an inference of defect is permissible if a plaintiff is harmed by the product's failure "to perform its manifestly intended function ' (*See* Brief of Amici at p 30)

In adopting the risk utility test instead, the Court concluded as follows

> In sum, in a product liability design defect action, the plaintiff must present evidence of a reasonable alternative design The plaintiff will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous This presentation of an alternative design must include consideration of the costs, safety and functionality associated with the alternative design

Id at 225, 701 S E 2d at 17-18 The Court in *Branham* was quite clear that proof in design defect requires a plaintiff to identify the defect and address how a reasonable alternative design would have prevented the product from being unreasonably dangerous Thus, Amici s arguments that a plaintiff does not need to identify a defect and does not need to show alternative designs are directly contrary to South Carolina law (*See* Brief of Amici at pp 33-37)

Amici have presented several appendices to attempt to persuade the Court that the overwhelming majority of other states follow the approach they suggest, however, a review of those appendices show that while most states allow a product defect, in a proper case, to be proven by circumstantial evidence, such proof is not always sufficient Courts look to variety of factors to determine the appropriateness of wholly circumstantial evidence including the nature of the defect alleged, the age of the product,

and whether the product was destroyed in the accident or there was spoliation of the evidence Moreover, the lists found in Appendix C ("Plaintiffs Need Not Identify Specific Design Defect") and Appendix D ("Circumstantial Evidence in a Design Defect Case), include only fourteen and eight states respectively Quite simply, the Products Restatement § 3 is not the law in most of the country with respect to design defect claims, and is directly contrary to the holding of this Court in *Branham*, which requires a plaintiff to show both a defect and engage in a risk/ utility analysis

D The testimony of the Graves, Simmons, and Kelly is insufficient to create a circumstantial defect case

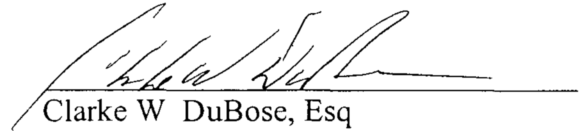
When the expert testimony and unfounded allegations of other complaints of monitor malfunction are removed, all that remains is the testimony cited above that the alarm did not sound during India's decline This standing alone is insufficient to create a material question of fact that the monitor was defectively designed There is even less evidence here than in *Watson* where the driver s testimony relating to unexplained acceleration was corroborated by her father's testimony of prior instances of similar unexplained acceleration *Watson*, 389 S C at 453, 699 S E 2d at 179 As in *Watson*, the mere occurrence of an accident or existence of an alleged product malfunction does not establish the liability of a product manufacturer *Id* at 455, 699 S E 2d at 180 Therefore, there is no question of material fact remaining for trial based on the circumstantial evidence presented by the Graves, and the trial court correctly granted summary judgment

CONCLUSION

There may be instances where a products liability claim can be proved by circumstantial evidence without any additional expert testimony, but this is not one of

those instances The trial court's grant of summary judgment is completely consistent with this Court's recent holdings in *Watson* and *Branham* For the above reasons and those contained in CAS's respondent's brief, the trial court's ruling must be affirmed

Respectfully submitted, this 2d day of September, 2011



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM ORANGEBURG COUNTY
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James C Wılhams, Jr , Cırcuıt Court Judge

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KAREEM J GRAVES AND TARA GRAVES, INDIVIDUALLY AND AS DULY APPOINTED PERSONAL REPRESENTATIVES OF THE ESTATE OF INDIA IYANNA GRAVES — Appellants,

vs

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CERTIFICATE OF SERVICE

I do hereby certify that I have thıs 2nd day of September, 2011, caused the foregoıng **Respondent's Reply to Brıef of Amıcus Curıae** to be served vıa U S maıl, postage prepaıd, on counsel of record at the addresses shown below

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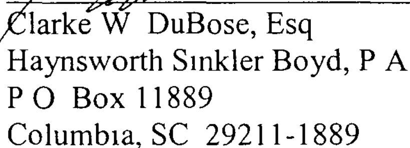

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