THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Circuit Court of Common Pleas

Hon James C Williams, 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, Plaintiffs/Appellants,

vs

CAS MEDICAL SYSTEMS, INC , Defendant/Respondent

BRIEF OF *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

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INTRODUCTION, IDENTITY AND INTEREST OF *AMICUS CURIAE,* AND SUMMARY OF ARGUMENT

Amicus curiae—John F Vargo, Paul J Zwier, II, Richard W Wright, Frank J Vandall, Stephen A Saltzburg, Jay M Feinman, Thomas A Eaton, and Carl T Bogus—are law professors who research, teach, and write about torts, products liability, evidence, and constitutional law[1] Their *curriculum vitae* are provided in Appendix A to this brief and summarized in their attached Motion for Leave to File this brief

Amici have no stake in the outcome of the lawsuit at bar and have not been compensated for their work on this brief They do, however, have a strong interest in the proper development, exposition, and application of legal principles, rules, and precedents regulating the use and development of tort and evidence law in state and federal courts, an interest that they expressed long before this case commenced

The appeal before this Court arises from a strict products liability case in which the Circuit Court granted summary judgment for the defendant after concluding that the plaintiffs should not be able to use circumstantial evidence to prove their case Although South Carolina courts always have held that circumstantial evidence may be used in every kind of civil and criminal case, this case raises a question of first impression because neither this Court nor the Supreme Court has determined if such evidence may be used to prove a product is defective in a strict liability cause of action

The Circuit Court's conclusion was based on assumptions that do not withstand scrutiny, including the evident views that circumstantial evidence is no different from *res ipsa loquitur* and is much weaker (in reliability and probative value) than direct evidence The Circuit Court

[1] The views expressed in this brief are those of the individual *amici* and their law school affiliations are included for identification purposes only

also ignored the fact that circumstantial evidence is admissible and routinely used in every other kind of case—civil, administrative, and criminal—in South Carolina The Circuit Court's decision also is contrary to the decisions of courts of the forty-seven (47) States that have considered the question—decisions that expressly hold that circumstantial evidence may be used in products liability cases

As detailed below, these decisions are based on the crucial distinction between circumstantial evidence and *res ipsa* while both depend on inferences, they differ on the nature and bases of the inferences being drawn Thus, *res ipsa* is widely disdained in products cases because it allows the existence of negligence or a defect, as well as causation, to be inferred in the particular case from abstract hypotheses about what "usually" or "generally" may occur in an "ordinary" or "typical" case, without requiring any evidence specific to the particular case On the other hand, circumstantial evidence is universally accepted in products cases as in all others, because it allows inferences of a defect and causation only if such inferences are reasonably based on concrete evidence, that is, on facts specifically moored to the unique circumstances of a particular case

Lastly, the Circuit Court mischaracterized and therefore discounted the plaintiffs' concrete, circumstantial evidence—the testimony of four eyewitnesses who recounted what they specifically saw and heard in this case, that an infant apnea/heart monitor never sounded an alarm—as nothing but *res ipsa* conjectures regarding the non-sounding of the alarm, due to a defect, while the Circuit Court inexplicably credited the defendant's equally circumstantial evidence—the testimony of two lay witnesses who interpreted the apnea/heart monitor's "own record," the machine's internal computer event log, as "indicat[ing]" the monitor had performed perfectly by sounding on this occasion, despite evidence of imperfect performance on other

occasions (log indications of activation of the alarm but not of hearing its sounding) Accordingly, *amici* respectfully suggest that this Court should reverse the grant of summary judgment and hold that, once all of evidence in this case is considered—including both the plaintiffs' circumstantial evidence and the defendant's own circumstantial evidence—a genuine dispute of material fact exists regarding whether the apnea/heart monitor failed (and, if so, how and why), a dispute that a jury should resolve

Section I of this brief submits that this Court should reverse the decision below because the Supreme Court of South Carolina, like the United States Supreme Court, has long recognized that there are critical differences between circumstantial evidence and *res ipsa loquitur* Both Courts consistently have held that, unlike *res ipsa*, circumstantial evidence is just as reliable, just as probative, and "just as good" as direct evidence

Section II contends that this Court should reverse the decision below because South Carolina law does not distinguish between the weight or value given to direct and circumstantial evidence, and because the State Supreme Court invariably has allowed the use of circumstantial evidence in all kinds of cases—criminal, administrative, and civil (including in the kinds of negligence and breach of warranty causes of action the plaintiffs have asserted in this case)

Section III argues that this Court should reverse the decision below because the State Supreme Court pays extremely close attention to the decisions of other state courts on novel questions of law and rarely adopts a position that is outside the mainstream That is significant in this case because courts in each of the 47 States that have considered whether circumstantial evidence should be admissible in causes of action for strict products liability expressly have held that plaintiffs may use circumstantial evidence to prove defects in such cases Conversely stated, no State rejects the use of circumstantial evidence in strict products liability causes of action

Section IV demonstrates that this Court should reverse the decision below because barring the use of circumstantial evidence to prove a strict products liability cause of action in products liability cases will confuse juries and burden courts This is because plaintiffs already are allowed to use circumstantial evidence to prove their negligence and breach of warranty claims in products liability cases, which are often pleaded along with strict liability claims, as in fact they were pleaded by the plaintiffs in this case

Section V suggests that the Circuit Court's decision is constitutionally problematic Although the plaintiffs in this case have not challenged the constitutionality of the Circuit Court's rulings, *amici* articulate why categorically precluding plaintiffs from using circumstantial evidence in products liability actions violates the federal and state constitutional guarantees of access to the courts and equal protection of the laws

Finally, Section VI contends that the Circuit Court erred in granting summary judgment for the defendant because the circumstantial evidence put forward by the plaintiffs clearly conflicts with the circumstantial evidence introduced by the defendant and therefore establishes a genuine dispute regarding material facts, the resolution of which is constitutionally entrusted to juries, not the courts

STATEMENT OF THE ISSUE ON APPEAL

This case presents a question of first impression

> Should South Carolina allow litigants to use circumstantial evidence to prove (or defeat) strict products liability claims, just as civil litigants are allowed to do in negligence, wrongful death, breach of warranty, and every other type of civil claim in the State, just as prosecutors and defendants are permitted to do in every criminal case in the State, and just as parties are allowed to do in products liability cases in every one of the forty-seven (47) States that have considered the question?

STATEMENT OF THE CASE

This appeal arises from a lawsuit filed on April 7, 2006 in the Circuit Court of Common Pleas for Orangeburg County by Plaintiffs/Appellants Kareem J Graves and Tara Graves, individually and as representatives of the Estate of India Iyanna Graves (their infant daughter) against Defendant/Respondent CAS Medical Systems, Inc ("CAS") The Graves seek compensatory and punitive damages pursuant to four causes of action (1) products liability/strict liability, (2) negligence, (3) breach of implied warranties of fitness and merchantability, and (4) wrongful death Each of these claims is based on the Graves' allegations that their infant daughter, India, died because of defects in an AMI Plus Model 9700 Apnea/Heart Rate Monitor (the "Monitor") that CAS designed, manufactured, marketed, and sold

The Graves allege these defects caused the Monitor to fail in its essential purpose to sound an alarm loud enough to wake them when India suffered several separate respiratory and cardiac "patient events" between 2 00 and 3 00 a m on the morning of April 11, 2004, events which worsened, lengthened, and cumulatively caused her breathing to cease and her heart to stop India Graves was four months old when she died

The Graves relied on both lay and expert witnesses to establish that the CAS Model 9700 Monitor was defective, and thus to meet part of their burden of proof on all four causes of action First, they relied on the direct testimony of four eyewitnesses Mr and Mrs Graves, Mrs

Graves' sister, and Anita R Kelly, an Orangeburg County Emergency Medical Services ("EMS") paramedic who was the "first responder" on the morning India died The essence of their testimony and the reasonable inferences from that testimony was that at all relevant times (1) the Monitor's respiratory and cardiac electrodes were properly attached to India's chest, (2) the electronic cables connecting the electrodes to the Monitor were properly plugged in, (3) the Monitor was adequately powered, (4) no one altered or misused the Monitor, (5) the Monitor detected India's respiratory and cardiac distress (as evidenced by the fact that at least one of the Monitor's emergency alert LED lights was illuminated) but nonetheless failed in its fundamental task of sounding an audible alarm when India stopped breathing properly and her heart stopped beating properly, and (6) the Monitor's failure resulted from a product defect

Second, in addition to and as an alternative to this lay testimony, the plaintiffs relied on the expert testimony of two computer scientists and a biomedical engineer, who found the Monitor had timely detected India's repeated bouts of respiratory and cardiac distress but had failed to sound the alarm (or failed to do so adequately) because of flaws in the "structure" and "lines" of code in the Monitor's computer software

CAS moved to exclude the Graves' expert testimony as unreliable, pursuant to Rule 702, South Carolina Rules of Evidence By Order dated April 8, 2009, the Circuit Court granted that motion and barred the testimony of all of the Graves' experts, stating that the "experts' methodology does not meet the tests of reliability set forth in *State v Council* 335 S C 1, 515 S E 2d 508 (1999) " April 8th Order at 6 [2]

CAS also moved for summary judgment, pursuant to Rule 56(e), South Carolina Rules of Civil Procedure The Circuit Court's April 8th Order granted that motion, too, and dismissed all

[2] Although this brief does not take issue with that ruling, *amici s* silence should not be construed as agreeing with the Circuit Court's decision or the Court's reasoning

causes of action on the grounds that the Graves needed to "identify the specific defect" in the CAS Monitor, April 8th Order at 9 (citations omitted), and to prove the viability of an "alternative design" for an infant apnea/heart monitor *Id* at 10-11 (citations omitted) The Circuit Court concluded that "[w]ithout testimony from their computer and biomedical experts, plaintiffs cannot carry their burden of proof that a defect in the monitor caused the injury " *Id* at 10 The Circuit Court's April 8th Order did not mention the Graves' circumstantial evidence

The Graves then moved the Circuit Court to reconsider its April 8th Order, pursuant to Rule 59(e), South Carolina Rules of Civil Procedure, asking it not only to reverse its Rule 702, SCRE ruling excluding the testimony of their expert witnesses but also to address their contention that they could prove their case solely with circumstantial evidence, *i e* , even if the court refused to overturn its Rule 702 ruling

By Order dated April 23, 2010, the Circuit Court denied the Graves' Rule 59(e) motion Of particular importance, the Circuit Court held (1) "Plaintiffs have not shown that a product defect can be proved by circumstantial evidence in South Carolina," April 23rd Order at 1, (2) "[a]llowing these Plaintiffs to proceed only on untested, circumstantial evidence would leave the question of defect to mere 'surmise, conjecture, or speculation,'" *id* at 2 (citations omitted), and (3) the "Plaintiffs' approach also conflicts with our Supreme Court's recent rulings on expert testimony, including *Watson v Ford Motor Co* , Op No 26786 (March 15, 2010),"[3] which stated that "expert testimony is required 'where a factual issue must be resolved on scientific, technical or other specialized knowledge,'" which the Circuit Court regarded was "required" here because "[t]he factual issues presented in this case concerning the writing, testing, and operation of computer software are clearly beyond the experience of the typical juror " *Id* at

[3] On September 13, the Supreme Court replaced its March 15 slip opinion with a revised opinion *See Watson v Ford Motor Co* 389 S C 434, 699 S E 2d 169 (2010)

2 Lastly, the lower court held that the plaintiffs' circumstantial evidence "argument is essentially one of *res ipsa* " which simply "is not the law in this state " *Id* at 3

The Plaintiffs' appeal followed

STATEMENT OF THE FACTS

India Graves died in the early morning hours of April 11, 2004 She was 16 weeks old She had been born, prematurely, on December 30, 2003, along with her triplet sisters, Asia and Paris Premature infants are smaller, weaker, and more vulnerable than full-term babies They are especially susceptible to apnea of prematurity, *i e* , breathing stoppages associated with premature, not fully developed brains Because of the high risk that premature infants like India might stop breathing without anyone noticing and thus might die before medical personnel could provide simple but effective stimulation to restart their breathing or hearts, India and her sisters were not sent home within days of her birth (like most newborns are nowadays) but instead were placed in a hospital Neonatal Intensive Care Unit ("NICU") until February 17, 2004, when India and her sisters were released to their parents, who drove them to their Orangeburg home

Because the risk of apnea in premature infants is so commonplace and because the dangers of undetected apnea are so grave, NICU physicians ordered that India and her sisters be electronically monitored while in the hospital by a complex medical device that could detect respiratory or cardiac distress and, if distress was detected, summon timely help for the patient by simultaneously illuminating bright Light Emitting Diode ("LED") lights and sounding ear-piercing audible alarms These lights and alarms were intended to alert caregivers and summon aid by shining and blaring continuously until turned off

NICU staff selected CAS AMI Plus Apnea/Heart Rate Monitors (Model 9700) for each child, which were attached to the infants throughout their stay in the NICU The triplets'

physicians also ordered that the Model 9700 Monitors be sent home with India and her sisters and that their parents receive simple but completely adequate training on how to use the Monitors and how to quickly stimulate and revive an infant if its breathing or cardiac rates fell below acceptable limits and thus was in danger of dying

Tara and Kareem Graves testified that they properly attached the CAS Monitor to their children each night before they went to bed, and that they had done so throughout the period from February 17 to April 11, 2004 Mrs Graves testified that on April 11, at approximately 2 00 a m , she placed the Model 9700 Monitor around India's chest, checked to see if the cables linking her child to the Monitor were securely plugged in and attached, and that the Monitor was fully powered and working properly Mrs Graves lay India in her bassinet and then went to sleep in her own bed, just a few feet away from the bassinets of her three babies The Graves had placed all three bassinets in their own bedroom to ensure they could hear any alarm and thereby assure that they could quickly stimulate a baby or call for backup emergency aid if necessary NICU physicians had advised the Graves to expect breathing or heart rate problems, to rely on the Monitors to warn them if a baby's life was endangered, and, if necessary, to trust the training they had received to stimulate the baby and save its life

Mrs Graves testified that she awoke less than an hour later and got up to see if the fragile infants responded to her touch Paris and Asia immediately "jumped" when Mrs Graves touched them India did not move at all and was completely non-responsive Mrs Graves screamed, rousing Mr Graves from his sleep in their bed, and shouted for him to call 911 while she tried to stimulate her baby and then to administer CPR

Neither of the Graves heard the Monitor sound an alarm This was unprecedented to each of them because they were within easy earshot of the alarm, because the alarm was sharp, high-

pitched, and extremely loud (at 85 decibels it was designed to shock babies into breathing and to awaken slumbering caregivers), and because each parent had heard the alarm sound several times over the preceding two months The Monitor's silence also seemed very abnormal to them because the Monitor's LED alert lights, the visual counterpart to the Monitor's audible alarm, were shining bright red

April Simmons (Mrs Graves's sister, who had been sleeping in an adjacent bedroom and was startled awake by Mrs Graves' screams) testified that she, too, did not hear the Monitor's alarm, either before or after Mrs Graves' cries split the night This seemed very odd to her as well because she had heard the alarm several times in the past two months and because she was well positioned to hear the alarm if it had sounded

Finally, Paramedic Kelly, who arrived at the Graves' home at 4 01 a m , testified that although she saw that one of the Monitor's LED alert lights was illuminated and remained red, she never heard the Monitor sound an alarm Paramedic Kelly testified that she found India in her bassinet in the Graves' bedroom, that India was not breathing and had no heart rate, that she tried and failed to resuscitate the child, and that she then carried India's body outside to the EMS truck, where a summoned coroner pronounced her dead An autopsy concluded that India had died of Sudden Infant Death Syndrome ("SIDS")

The Graves' theory of the case is that India died because the Model 9700 Monitor failed to sound the alarm and wake them up and that if they had awoken they would have stimulated India and kept her alive until they had a chance to summon emergency aid and have her rushed to a hospital The Graves' offered several types of evidence to support their claims First, their own direct, eyewitness testimony, combined with the eyewitness testimony of Ms Simmons and Ms Kelly, established that the Monitor had detected India's problems (as demonstrated by the

Monitor's glowing red LED alert lights) but had completely failed to emit any audible sound, as it was designed and marketed to do

This direct testimony was confirmed by the testimony of the Graves' three computer software and biomedical experts, who found evidence of previous failures in the Monitor's internal computer "event log" The experts read the event log as showing the Monitor had detected problems in India's respiration and cardiac rates at least fifteen times in the two months prior to her death but had failed to sound an alarm each time They opined the Model 9700 Monitor had failed these times and during the early morning hours of April 11 (and they inferred that this model generally was prone to failure) because of "bugs" and "structure" failures in the Monitor's internal computer software, specifically electronic wiring and schematic "lines" of instruction that were overly complex, poorly written, and poorly made and "maintained"

These experts also noted that identical Model 9700 CAS Monitors had failed under similar circumstances in other cases, as further evidenced by a federal Food and Drug Administration ("FDA") report that CAS had "voluntar[ily]" recalled all of the Model 9700 Monitors, *i e*, the same model India had used, that had been manufactured during the five-year period between 1997 and 2001, all because (as discussed below) the Model 9700 "infant apnea monitor might shut down and the audible alarm might fail to sound" Finally, the Graves' experts eliminated alternative reasons why the Monitor could have failed, and then concluded it was unreasonably dangerous and that its flaws were the proximate cause of India's death

CAS's theory of the case is straightforward there simply were no problems with their Model 9700 Monitors, in general, or with the Model 9700 Monitor that had been attached to India Graves, in particular Citing the testimony of two lay witnesses—"Scott Lambert, one of the creators of the AMI" Monitor, CAS Brief, at 5-6, and Steve Elliott, a salesman for "Ashby

Medical, the company that leased the monitors to the Graves," *id* at 7—CAS asserts "Simply put, the machine's own record indicates it was functioning properly at the time of India's death " *Id* at 3 (emphasis added), "[t]he monitor worked properly before and after India's death " *Id*, "[t]he monitor records or 'logs' patient events, equipment events, and alarm activity " *Id* at 5, "[t]he log of India's decline does not reflect" any failures, "only that the alarm soundly properly " *Id* at 6, "Elliot's company had approximately 100 AMI monitors He has had no other complaint of an alarm not sounding " *Id* at 8 Thus, CAS's evidence confirms that the Monitor detected a pulmonary problem At bottom, the factual dispute at the heart of this case concerns who saw and heard what, specifically whether the Monitor's alarm sounded The plaintiffs rely on the direct testimony of four eyewitnesses, who swore the Monitor did not sound an alarm, while CAS offers testimony from the Monitor's computer record that it did A jury should have resolved this classic factual dispute

To substantiate Elliot's testimony that "[h]e has had no other complaint of an alarm not sounding," *id*—and, impliedly, that no one else ever had heard a "complaint of an alarm not sounding"—CAS boasted that the Model 9700 was a well-designed, well-tested, and government-sanctioned machine inasmuch as it had been "approved for marketing by the [FDA], after a review of extensive documentation, including documentation of the AMI software development and testing *See* Model 9700 Summary Verification Test Plan (listing the extensive number and the variety of tests of the software) " *Id* at 3 (emphases added, citation omitted)

> Although CAS's brief does not mention it, the FDA later reported that CAS
>
> > voluntarily recalled three models of Infant Apnea Monitors The firm initiated the recall on December 17, 2001, because the infant apnea monitor might shut down and the audible alarm might fail to sound Monitors effected (sic) in the recall were AMI 9700 Apnea Monitor, AMI 9700A Apnea Monitor, and AMI Plus 9700B Infant Central Apnea/Heart Rate Monitor The devices were manufactured between 1997 and 2001

FDA, *Recall of Infant Apnea Monitor Possible Failure of Infant Monitoring Device Results in Class I Recall* http //www fda gov/ICECI/EnforcementActions/EnforcementStory/ EnforcementStoryArchive/ucm103360 htm ("Last Updated 01/13/2010") (website last visited May 8, 2011) (emphasis added)) [4] A Class I recall is the most serious kind, and is reserved for "situation[s] in which there is a reasonable probability that the use of a violative product will cause serious adverse health consequences or death " 21 C F R § 7 41(1) (2009) *See In re Medtronic Inc Sprint Fidelis Leads Prods Liab Litig* 623 F 3d 1200, 1204 (8th Cir 2010)

CAS also retained its own expert in computer software, who testified the Graves' experts were wrong in concluding the Model 9700 Monitor was defectively designed He did not, however, testify regarding his interpretation of the event log of the Monitor that India's parents used or his reaction to the FDA recall of the Model 9700 Monitor

Regarding India's own Monitor, "CAS does not dispute the monitor was set up properly and that it had power " CAS Def Br at 47 Nor does CAS attribute any problems or failures to that Monitor's age, contend that the Monitor had been subject to excessive use, maintain that the Graves had altered their product, or assert that anyone had misused or abused the Monitor in any fashion

CAS's lay and expert witnesses asserted that, in general, Model 9700 Monitors were not designed or manufactured to fail and that none ever had failed, they also asserted, in particular, that India's Monitor did not fail in this case, either before, during, or after her death According to CAS, the most telling testimony was provided by the Monitor's computerized event log

[4] Although the FDA's recall report is not part of the record, this Court is empowered to take judicial notice of official reports of the federal and state governments *See Meier v Meier*, 208 S C 520, 528, 38 S E 2d 762, 767 (1946) (judicial notice of orders published in the Federal Register), *State v Life Ins Co of Ga* , 254 S C 286, 297, 175 S E 2d 203, 208 (1970) ("official reports of [the State] Comptroller General ")

"Simply put, the machine's own record indicates it was functioning properly at the time of India's death " CAS Brief at 3 In other words, the machine not only spoke for itself (or *machina ipsa loquitur*) but spoke more accurately, more infallibly than any human witness did or could

In sum, in CAS's view, there was nothing wrong with the Monitor It could not fail and it did not fail (perhaps leaving the implication that something must have been wrong not only with the Graves and with Ms Simmons, but also with Paramedic Kelly, and that that each of them should have heard—perhaps must have heard—the Monitor's alarm)

THE APPROPRIATE STANDARDS OF REVIEW

A THE STANDARD OF REVIEW FOR QUESTIONS OF FIRST IMPRESSION

This Court reviews trial court decisions regarding legal issues of first impression *de novo* "In a case that raises a novel question of law, [appellate courts] are free to decide the question with no particular deference to the Circuit Court " *Camp v Camp*, 386 S C 571, 574, 689 S E 2d 634, 636 (2010)

B THE STANDARD OF REVIEW FOR GRANTS OF SUMMARY JUDGMENT

This Court also reviews grants of summary judgment *de novo* "'apply[ing] the "same standard that governs the trial court under Rule 56(c), SCRCP,'" and "'review[ing] all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below '" *USAA Property & Casualty Insurance Co v Clegg*, 377 S C 643, 653, 661 S E 2d 791, 796 (2008)

ARGUMENT

The Circuit Court's predicate decision that circumstantial evidence is and should be inadmissible in causes of action for products liability in South Carolina, and the court's ultimate grant of summary judgment for CAS, were erroneous as those rulings were based on that court's

misreading of *Watson v Ford Motor Co* 389 S C 434, 699 S E 2d 169, 180 (2010), the Circuit Court's misunderstanding of the nature and relative value of direct and circumstantial evidence, and that court's failure to appreciate the status of circumstantial evidence in South Carolina, in particular, and in products liability cases throughout the nation, in general

First, although the Circuit Court regarded *Watson* as dispositive on all matters, *see* April 23rd Order at 2, and although CAS likewise contends that *Watson* is controlling, *see e g* CAS Br at 16 ("our Supreme Court held recently in *Watson* a defect must be proven, and cannot be shown by circumstantial evidence"), *id* at 45-46 (*Watson* "rejected the circumstantial evidence argument"), *Watson* never mentioned "circumstantial evidence" at all Instead, all *Watson* said was "the mere occurrence of an accident or existence of an alleged product malfunction does not establish the liability of a product manufacturer " *Watson v Ford Motor Co* , 389 S C at 455, 699 S E 2d at 180 [5] That constitutes a "reject[ion]" of a *res ipsa* argument, not a circumstantial evidence one Most important, *Watson* actually considered the circumstantial evidence the plaintiffs had presented in that case—noting that "[e]vidence of similar accidents, transactions, or happenings is admissible where there is some special relation between the accidents tending to prove or disprove some fact in dispute"—but ultimately decided that the

[5] Neither of the other two cases CAS relies on actually supports its argument *Shelton v LS & K Inc* , 374 S C 294, 648 S E 2d 307 (Ct App 2007), never mentions, much less "reject[s]," as CAS claims, the proposition that plaintiffs may use circumstantial evidence to prove a product defect in a strict liability case *Sunvillas Homeowners Ass n, Inc v Square D Co* , 301 S C 330, 391 S E 2d 868 (Ct App 1990), is even less helpful There, in a negligence case, this Court said the plaintiff "[wa]s correct in its assertion [that] negligence may be proved by circumstantial evidence," and merely upheld a directed verdict for a defendant manufacturer because the circumstantial evidence in that case did not prove that defendant had been negligent *Id* 301 S C at 334, 391 S E 2d at 870

Watson plaintiffs' circumstantial evidence should have been excluded because they had "failed to show that the incidents were substantially similar " *Id* 699 at 179 [6]

Second, contrary to the Circuit Court's assumptions, direct evidence is not better, more reliable, or more probative than circumstantial evidence and circumstantial evidence is not the same thing as or equivalent to *res ipsa loquitur* Indeed, the *res ipsa* doctrine is invoked in cases in which there is no concrete, case-specific circumstantial evidence as to defect or causation but where the overall probabilities associated with the event suggests likely defectiveness and causation That presumption, by itself, is enough to establish a *prima facie* case under the *res ipsa loquitur* doctrine Of course, when circumstantial evidence exists, the *res ipsa loquitur* doctrine is unnecessary *See* 2 Stephen A Saltzburg, Michael M Martin, and Daniel J Capra, FEDERAL RULES OF EVIDENCE MANUAL § 301 02[2] at 301-6 (9th ed 2006) [7]

Third, contrary to the Circuit Court s evident belief, circumstantial evidence is used in every type of case in South Carolina and circumstantial evidence is used in products liability actions in 47 States, *i e* in 100 percent of the States whose courts have had a chance to decide if such evidence should be admissible in products liability actions

Finally, because the Circuit Court should have admitted and considered circumstantial evidence in this case, it should not have granted summary judgment against the Graves, as that

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[6] As the Pennsylvania Supreme Court recently noted in a strict products liability case, "similar accidents involving the same product" are among the classic "types of circumstantial evidence " *Barnish v KWI Bldg Co* , 980 A 2d 535, 542 (Pa 2009) *See DeWitt v Eveready Battery Co Inc* , 565 S E 2d 140, 149-50 (N C 2002), *Dorn v BMW of North America LLC*, --- F Supp 2d ---, 2010 WL 3913226, *9 (D Kan 2010), *Smith v Central Admixture Pharmacy Services Inc* 2010 WL 1137507, *5 (D Md 2010) *See* 2 Saltzburg, Martin & Capra, FED RULES OF EVID MANUAL, § 403 03[78][g]

[7] *See also* Richard W Wright, *Liability for Possible Wrongs Causation, Statistical Probability and the Burden of Proof*, 41 LOY L A L REV 1295, 1334-42 (2008), 1 Dan B Dobbs, LAW OF TORTS § 154, at 372 (2001) & 102 (2010 Supp)

evidence undermines CAS's claim that there is no genuine issue as to any material fact and that CAS thus was entitled to judgment as a matter of law

I THE CIRCUIT COURT ERRED IN REFUSING TO CONSIDER THE PLAINTIFFS' CIRCUMSTANTIAL EVIDENCE BECAUSE THE COURT MISUNDERSTOOD THE DIFFERENCES BETWEEN DIRECT AND CIRCUMSTANTIAL EVIDENCE AND BETWEEN CIRCUMSTANTIAL EVIDENCE AND *RES IPSA LOQUITUR*

A CIRCUMSTANTIAL EVIDENCE IS "JUST AS GOOD" AS DIRECT EVIDENCE

Direct evidence and circumstantial evidence certainly are quite different in form—"'[d]irect evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness,'" while "'[c]ircumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact,'" *Moriarty v Garden Sanctuary Church of God*, 341 S C 320, 337, 534 S E 2d 672, 680 (2000) (citations omitted), but these differences in form are immaterial in substance because "[t]he law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence " *Id* Nor is there any reason to regard circumstantial evidence as less trustworthy than direct evidence, or has having less probative value

> It is simply untenable to assume that circumstantial evidence is less reliable than is direct evidence In short, whether direct evidence or circumstantial evidence is more trustworthy and probative depends upon the particular facts of the case and no generalizations realistically can be made that one class of evidence is per se more reliable than is the other class of evidence [Both] inherently possess the same probative value

State v Cherry, 361 S C 588, 600, 606 S E 2d 475, 481 (2004) (emphases added, citations and internal quotation marks omitted) [8]

[8] *See State v Wright*, 140 S C 363, 138 S E 828, 830 (1927) ("'there is no practical difference between circumstantial and direct evidence'" and "'nothing in the nature of circumstantial evidence renders it any less reliable than other classes of evidence'") (citations

Circumstantial evidence involves, in addition to witnesses' testimony regarding what they saw or heard (or did not see or hear), a process of reasoning, or inference by which a conclusion is drawn Like all other evidence, it may be strong or weak, it may be so unconvincing as to be quite worthless, or it may be irresistible and overwhelming

> While generally direct evidence is to be preferred, *e g* , the witness sees A stab B, yet in some situations circumstantial evidence seems to be no less trustworthy if not superior, *e g* , "There is still no man who would not accept dog tracks in the mud against the sworn testimony of a hundred eye-witnesses that no dog has passed "

William Lloyd Prosser, LAW OF TORTS, 212 (4th ed 1971) The gist of circumstantial evidence, and the key to it, is the inference, or process of reasoning by which the conclusion is reached This must be based on the evidence given, together with a sufficient background of human experience to justify the conclusion *Id*

Accordingly, "[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 " *St Paul Fire & Marine Ins Co v American Ins Co* , 251 S C 56, 59-60, 159 S E 2d 921, 923 (1968) (emphasis added) *See Donahue v Donahue*, 299 S C 353, 357, 384 S E 2d 741, 744 (1989) As the U S Supreme Court unanimously explained, "[t]he reason for treating circumstantial and direct evidence alike is deep rooted 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence '" *Desert Palace Inc v Costa*, 539 U S 90, 100 (2003) (emphasis added, citation omitted) [9]

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omitted), *Desert Palace Inc v Costa*, 539 U S 90, 100 (2003) ("juries are routinely instructed that '[t]he law makes no distinction between the weight or value to be given to either direct or circumstantial evidence '") (citations omitted)

[9] *See Rogers v Mo Pac R Co* , 352 U S 500, 508, n 17 (1957), *The Wenona*, 86 U S 41, 58 (1873) Scholars agree that direct evidence is not superior to circumstantial evidence *See* 1A John Henry Wigmore, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS

B CIRCUMSTANTIAL EVIDENCE IS DIFFERENT THAN *RES IPSA LOQUITUR*

It is beyond dispute that "South Carolina does not follow the doctrine of *res ipsa loquitur*" in tort cases, *Watson* 699 S E 2d at 179, and, indeed, *res ipsa* "is not applicable" in any kind of case in this State *Merchant v Columbia Coca-Cola Bottling Co* 214 S C 206, 207, 51 S E 2d 749, 750 (1949) (citing *Eickhoff v Beard-Laney Inc*, 199 S C 500, 20 S E 2d 153 (1942)) Significantly, though, as *Merchant* took pains to explain in the next sentence "[r]ejection of this [*res ipsa*] rule of evidence does not mean, however, as is pointed out in the *Eickhoff* case, and many others, that negligence may not be established by circumstantial evidence as well as by direct evidence" 214 S C at 207, 51 S E 2d at 750 (Emphasis added)

Eickhoff provides the definitive exposition of how circumstantial evidence differs from *res ipsa loquitur*, and why South Carolina courts bar *res ipsa loquitur* in every case but do not preclude the use of circumstantial evidence in any case There, writing for unanimous Court, then-Justice (and later Chief Justice) Taylor Hudnall Stukes explicated

> It is important in considering the *res ipsa loquitur* doctrine and its application and effect in given cases, to distinguish that doctrine from the principle that negligence may be established by circumstantial evidence Failure to observe this distinction has led to some uncertainty
>
> In other words, in the situation to which *res ipsa loquitur* as a distinctive rule applies, there is **no** evidence, circumstantial or otherwise, at least none of sufficient probative value, to show negligence, apart from the postulate, which rests on common experience and not on specific circumstances of the instant case, that physical causes of the kind which produced the accident in question do not ordinarily exist in the absence of negligence, that is, in the absence of a breach of

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AT COMMON LAW §26 (P Tillers rev ed 1983) (the idea that "circumstantial evidence may be as persuasive and as compelling as testimonial evidence, and sometimes more so, is now generally accepted "), 2 Saltzburg, Martin & Capra, FED RULES OF EVID MANUAL, § 401 02[3] at 401-7 ("in some cases, circumstantial evidence may indeed have more weight than direct evidence") (citing cases), Charles T McCormick, HANDBOOK OF THE LAW OF EVIDENCE 317 (1954) An 1850 decision by Lemuel Shaw, the Chief Justice of the Massachusetts Supreme Judicial Court and one of the nineteenth century's most eminent jurists, is especially illuminating, as reflected in the fact that Wigmore quoted it at great length *See Commonwealth v Webster*, 59 Mass 295, 311-12 (Mass 1850) (Shaw, C J), cited in 1A Wigmore, EVIDENCE § 26, at 959-60

> duty such as defendant owed to plaintiff Rejection of the doctrine of *res ipsa loquitur* does not mean that negligence may not be established by circumstantial evidence as well as by direct evidence

Eickhoff, 20 S E 2d at 155 (citation omitted, emphasis added)[10]

The Supreme Court of South Carolina always has appreciated the distinction between liability based on *res ipsa—i e* liability based solely on "common experience and not on specific circumstances of the instant case," *id* —and liability based on concrete particularized, case-specific circumstantial evidence Thus, on the one hand

> [e]xperience shows that ordinary machines and appliances often fail or break, when reasonable care, and sometimes when even extreme care, has been exercised in selecting or constructing and maintaining them, and hence the negligence of the master cannot with safety be assumed from the mere fact that they failed or broke in the use

Edgens v Gaffney Mfg Co , 69 S C 529, 48 S E 538, 538 (1904) (emphasis added)

On the other hand, however—indeed, in the same case—the *Edgens* Court noted the flaw in the plaintiff's case was not one of doctrine but of fact Thus, in affirming a nonsuit for the defendant, *Edgens* stressed that "[n]o evidence, either direct or circumstantial, was offered from which the jury might find the defendant liable for operating defective and unsafe machinery " *Id* (emphasis added) The implication was clear if the plaintiff had offered some relevant and credible 'evidence, either direct or circumstantial," dismissal would have been unwarranted

For these reasons, the Supreme Court repeatedly has stressed "'While our decisions uniformly state that the so called doctrine of *res ipsa loquitur* does not apply in this State, they

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[10] *Byrne v Boadle*, 159 Eng Rep 299 (Exch Div 1863), provides the original and still classic exposition of the *res ipsa* doctrine There a barrel of flour fell out of a shopowner's second-story window and struck a passing pedestrian The court allowed the plaintiff to recover despite the fact that he had not proffered even a "scintilla" of evidence regarding the shopowner's fault, *e g* , that the shopowner had stored the flour barrel inappropriately or had been moving it in an unsafe manner, or any other allegation that might indicate specific negligent conduct *Id* at 301 Yet, the court explained the accident "spoke for itself" and thus held the defendant must have been negligent (in some unknown, unspecified, and perhaps unspecifiable manner) *Id*

have with equal uniformity recognized that negligence may be proved by circumstantial evidence as well as direct evidence '" *McQuillen v Dobbs*, 262 S C 386, 392, 204 S E 2d 732, 735 (1974) (quoting *Chaney v Burgess*, 246 S C 261, 266, 143 S E 2d 521, 523 (1965)) Indeed, the Supreme Court often has held, since at least 1876, that negligence may be established entirely on circumstantial evidence [11]

Echoing *Eickhoff Edgens*, and *McQuillen*, modern scholars have clarified the crucial distinction between *res ipsa* and circumstantial evidence cases with *res ipsa*, a plaintiff no longer need satisfy the traditional requirement of proving every element of his cause of action with particularized, case-specific evidence, that is, of proving that the defendant's tortious conduct caused the plaintiff's injuries Rather, *res ipsa* allows "[a]n inference of negligence on the particular occasion based merely on abstract aggregate statistics" regarding what occurs in an "ordinary" case Richard W Wright, *Liability for Possible Wrongs Causation Statistical Probability and the Burden of Proof*, 41 LOY L A L REV 1295, 1337 (2008) (citations omitted) Indeed, as *Watson* explained, *res ipsa* "is a rebuttable presumption that the defendant was negligent where an accident is one which ordinarily does not occur in the absence of negligence " *Watson* 699 S E 2d at 179 n 7 (emphasis added) [12] That probabilistic presumption

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[11] *See Hicklin v Jeff Hunt Mach Co* , 226 S C 484, 492, 85 S E 2d 739, 742 (1955) ("It is well settled that negligence may be established by circumstantial evidence as well as direct evidence, and that the law does not require proof to a certainty We think the circumstances reasonably warrant the inference either that the cotter pin was not in place when the machine left the shop or was in a defective condition and should not have been used Negligence in causing the fall of the sheave could be based on either fact ") *See also Caldwell v Pullman Co* , 132 S C 321, 128 S E 504, 505 (1925), *Steele v Atl C L R Co* , 103 S C 102, 87 S E 639, 642 (1916), *Green v Southern R Co* , 72 S C 398, 52 S E 45, 47 (1905), *Rowe v Greenville & C R Co* , 7 S C 167, 179 (1876)

[12] "Some courts have tended in the past, and some few still tend, to give *res ipsa loquitur* the effect of a presumption, which requires a directed verdict for the plaintiff if the defendant offers no evidence to rebut it " RESTATEMENT (SECOND) OF TORTS, § 328D, Comment m (1965) *See* W Page Keeton, PROSSER & KEETON ON TORTS 258 (5th ed 1984 & Supp 1988) Thus, some

regarding what "ordinarily does not occur in the absence of negligence," *id* may be enough, by itself, to establish a *prima facie* case in jurisdictions that accept the *res ipsa* doctrine *See* Wright, *Liability* 41 LOY L A L REV at 1337 n 146 (citing Dan B Dobbs, LAW OF TORTS § 154, at 372 (2001), for "noting, correctly, that *res ipsa loquitur* cases differ 'overwhelmingly' from ordinary circumstantial evidence cases by allowing an inference of negligence without any particularistic evidence of negligence on the particular occasion ")

Circumstantial evidence is very different, as it consists of "concrete evidence specific to the particular occasion about the network of causal relationships leading to and flowing from the particular factual issue being litigated " Wright, *Liability* 41 LOY L A L REV at 1337 (emphasis added) Significantly, although South Carolina courts reject *res ipsa* they recognize that concrete, case-specific circumstantial evidence may be appropriate, admissible, and probative in a civil proceeding, such as in a car accident case in which the particularistic testimony of an independent witness "'contained circumstantial evidence that support[ed] P[laintiff]'s testimony that an unknown driver contributed to her accident,'" the witness'

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jurisdictions may allow cases to be submitted to juries under an extreme form of *res ipsa*, *i e* , with "no evidence" at all *See Brown v Racquet Club of Bricktown*, 471 A 2d 25, 36 (N J 1984) (Clifford, J dissenting) (protesting decision that submission of a negligence case to the jury on a theory of *res ipsa loquitur* appropriate despite the fact that "plaintiff introduced no evidence of any specific acts," noting that "[t]his is the kind of case that could give *res ipsa loquitur* a bad name ") *See also Judson v Camelot Food Inc* , 756 P 2d 1198, 1201 n 4 (Nev 1988) Nevertheless, "the great majority of the courts treat *res ipsa loquitur* as creating nothing more than a permissible inference, which the jury may draw or refuse to draw," depending on the evidence in its entirety REST (SECOND), § 328D, Comment m Thus, "the great majority" implicitly embrace (even if they do not formally adopt) the RESTATEMENT (SECOND)'s *res ipsa* formulation—which requires a plaintiff to adduce at least some evidence supporting his claim—as it provides "(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence, (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence, and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff " *Id* , Comment l *See* Marshall S Shapo, PRINCIPLES OF TORT LAW ¶ 45 01 at 248-51 (2d ed 2003), 1 Dobbs, TORTS, § 154

"'testimony that she saw the lights of an unknown car that was turning around and fleeing the scene of the accident sufficiently corroborates [the plaintiff]'s testimony creating a question of fact as to causation for the jury'" *Shealy v Doe*, 370 S C 194, 204, 634 S E 2d 45, 50 (Ct App 2006) (quoting *Gilliland v Doe*, 357 S C 197, 202, 592 S E 2d 626, 629 (2004)) Numerous examples abound of admissible circumstantial evidence [13]

In these kinds of cases, where direct evidence may be nonexistent, weak, or nearly impossible to obtain, a plaintiff or prosecutor utilizes specific circumstantial evidence to prove that the defendant engaged in particular acts 1 Dobbs, TORTS, § 154, Fowler V Harper, Fleming James, Jr & Oscar S Gray, LAW OF TORTS § 19 3, at 7 (2d ed 1986) [14]

II ALLOWING PARTIES TO USE CIRCUMSTANTIAL EVIDENCE IN PRODUCTS LIABILITY CASES IS CONSISTENT WITH SOUTH CAROLINA PRECEDENT IN EVERY OTHER AREA OF THE LAW CIVIL, ADMINISTRATIVE, AND CRIMINAL

It is precisely because "'[t]he law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence,'" *Moriarty*, 341 S C at 337, 534 S E 2d at 680 (citations omitted), that the Supreme Court never has "distinguished between the two types of evidence in numerous cases," *id* and invariably has allowed litigants to use circumstantial evidence in every kind of case, be it civil, administrative, or criminal Put

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[13] *See e g Coleman v Shaw*, 281 S C 107, 113 n 3, 314 S E 2d 154, 157 n 3 (Ct App 1984) (quoting Prosser, TORTS § 41 at 242-43) In the criminal context, a defendant's "apparent attempt to conceal the body and his flight from the scene constitute substantial circumstantial evidence," *State v Al-Amin*, 353 S C 405, 413, 578 S E 2d 32, 37 (Ct App 2003), as does a defendant's possession of the weapon which fired the shot that killed the victim, *State v Freiburger*, 366 S C 125, 136-37, 620 S E 2d 737, 743 (2005), or finding a defendant's blood on the victim's body *State v Cooper* 334 S C 540, 552, 514 S E 2d 584, 590 (1999) These pieces of evidence properly would be considered "circumstantial evidence" insofar as each of them, if taken as true, would still require an inference to be drawn in order to resolve the ultimate issue *See* MCCORMICK ON EVIDENCE §185, at 308 (K Broun ed , 6th ed 2006) *See also* 2 Saltzburg, Martin, & Capra, FED RULES OF EVID MANUAL, § 401 02[3]

[14] In the same vein, "[s]trict liability does not eliminate the necessity to prove a products case," either directly or "circumstantially " Marshall S Shapo, PRODUCTS LIABILITY 114 (1993)

differently, neither this Court nor the Supreme Court ever has held that circumstantial evidence is unsuitable for a particular type of case (The U S Supreme Court has honored the same principle in all types of cases)[15]

On the civil side, "it is axiomatic in this State that issues of negligence and proximate cause may be resolved by direct or circumstantial evidence " *Mahaffey v Ahl*, 264 S C 241, 247, 214 S E 2d 119, 122 (1975) (emphasis added) [16] Thus, South Carolina courts follow this principle in a variety of common law tort actions, such as for

- medical malpractice, *see e g Green v Lilliewood*, 272 S C 186, 190, 249 S E 2d 910, 912 (1978), *Cox v Lund*, 286 S C 410, 417-18, 334 S E 2d 116, 120 (1985),

- toxic/environmental torts, *see e g Henderson v Allied Signal Inc* , 373 S C 179, 185, 644 S E 2d 724, 727 (2007),

- libel, *see e g Holtzscheiter v Thomson Newspapers Inc* , 332 S C 502, 513, 506 S E 2d 497, 503 (1998),

- civil conspiracy, *see e g Pye v Estate of Fox* 39 S C 555, 567, 633 S E 2d 505, 511 (2006), *First Union Nat l Bank of South Carolina v Soden*, 333 S C 554, 575, 511 S E 2d 372, 383 (Ct App 1998),

- civil fraud, *see e g Thompson v Bass*, 167 S C 345, 166 S E 346, 350 (1932), and

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[15] *See e g U S Postal Serv Bd of Governors v Aikens*, 460 U S 711, 714 n 3 (1983) ("in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence "), *Desert Palace*, 539 U S at 100 ("The adequacy of circumstantial evidence also extends beyond civil cases, we have never questioned the [use or] sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required" to obtain a conviction), *Holland v United States*, 348 U S 121, 140 (1954) (noting that, in criminal cases, circumstantial evidence is "intrinsically no different from testimonial evidence"), *Allentown Mack Sales & Service Inc v N L R B* 522 U S 359, 369-72 (1998) (agency cannot bar circumstantial evidence)

[16] *See Madison ex rel Bryant v Babcock Center Inc* , 371 S C 123, 147, 638 S E 2d 650, 662 (2006) (in a negligence case "[t]he question of proximate cause ordinarily is one of fact for the jury, and it may be resolved either by direct or circumstantial evidence "), *Baggerly v CSX Trans Co Inc* , 370 S C 362, 368-69, 635 S E 2d 97, 101 (2006) (same) *See also Mack v West*, 275 S C 453, 455, 272 S E 2d 631, 631 (1980), *Merchant supra Eichkoff, supra Edgens supra McQuillen, supra*

• civil suits for sexual abuse and assault, *see Moriarty* 341 S C at 337-38, 534 S E 2d at 680-81

Circumstantial evidence also is employed in tort causes of action created by statute, such as actions for

• workers' compensation, *see e g Tiller v National Health Care Center of Sumter*, 334 S C 333, 341, 513 S E 2d 843, 846 (1999), or

• wrongful death, *see e g , Legette v Smith*, 265 S C 573, 577, 220 S E 2d 429, 430 (1975), as well as in

• quasi-tort, quasi-contract actions, such as lawsuits for breach of the implied warrant of merchantability, *see e g Doty v Parkway Homes Co* , 295 S C 368, 369, 368 S E 2d 670, 671 (1988)

South Carolina courts routinely permit parties to use circumstantial evidence in non-tort civil actions, such as in

• contract disputes, *see e g Ex parte Bland*, 380 S C 1, 12, 667 S E 2d 540, 546 (2008), *Brown v Allstate Ins Co* , 344 S C 21, 25, 542 S E 2d 723, 725 (2001), *Ellie Inc v Miccichi*, 358 S C 78, 108, 594 S E 2d 485, 492 (Ct App 2004),

• divorce and alimony proceedings, *see, e g Brown v Brown*, 379 S C 271, 280, 665 S E 2d 174, 179 (Ct App 2008), *Anders v Anders*, 285 S C 512, 515, 331 S E 2d 340, 342 (1985),

• disputes regarding the disposition of estates, *see e g In re Last Will and Testament of Smoak*, 286 S C 419, 428, 334 S E 2d 806, 811 (1985), *Mock v Dowling*, 266 S C 274, 276, 222 S E 2d 773, 774 (1976),

• to establish the value of disputed property, *see e g Hughes v Palatine Ins Co* , 130 S C 383, 126 S E 125, 125 (1924), *Beasley v Swinton*, 46 S C 426, 24 S E 313, 323-24 (1896), and

• to appraise the value of corporate stock, *see e g Santee Oil Co Inc v Cox*, 265 S C 270, 277, 217 S E 2d 789, 793 (1975)

Moreover, State administrative agencies frequently rely on circumstantial evidence *See Waters v South Carolina Land Resources Conservation Comm n*, 321 S C 219, 226, 467 S E 2d 913, 917 (1996) (holding circumstantial evidence may be relied on by administrative agencies in decision-making and by reviewing courts in upholding agency findings of fact) *See also Bilton*

v Best Western Royal Motor Lodge, 282 S C 634, 642, 321 S E 2d 63, 68 (Ct App 1984), *Bursey v Dept of Health and Environmental Control* 360 S C 135, 142, 600 S E 2d 80, 84 (Ct App 2004)

Finally, and perhaps most importantly, it is equally well-established that in criminal cases "[i]f there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury " *State v Freiburger*, 366 S C 125, 136, 620 S E 2d 737, 743 (2005) (upholding conviction for murder) (emphasis added, citations omitted) Consequently, South Carolina courts have upheld convictions in a variety of prosecutions solely on the basis of circumstantial evidence *See State v Frazier*, 386 S C 526, 533, 689 S E 2d 610, 614 (2010) (upholding a conviction for murder and armed robbery because "[t]he totality of the evidence, viewed as a whole, establishes substantial circumstantial evidence of the elements of armed robbery ") [17] Indeed, the Supreme Court frequently has "held that a conviction and sentence of death based upon circumstantial evidence is not improper " *State v Williams*, 321 S C 327, 338, 468 S E 2d 626, 632 (1996) (emphasis added) *See State v Winkler*, 388 S C 574, 588-89, 698 S E 2d 596, 603-04 (2010)

Ten years ago, the *Moriarity* Court surveyed a much smaller list of civil, administrative, and criminal cases, determined that circumstantial evidence had been appropriately used in all of them, and ultimately "f[ou]nd no reason to draw a distinction between the use of direct or circumstantial evidence in a repressed memory" sexual abuse/sexual assault case *Moriarty*, 341 S C at 337-38, 534 S E 2d at 680-81 This Court should apply the same standard and methodology and reach the same result in this case

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[17] *See also State v Odems*, 385 S C 399, 406, 684 S E 2d 573, 576 (Ct App 2009) (burglary), *State v Bennett*, 328 S C 251, 264, 493 S E 2d 845, 851 (1997) (kidnapping), *State v Huggins*, 325 S C 103, 110, 481 S E 2d 114, 118 (1997) (criminal conspiracy), *State v Harry*, 321 S C 273, 279-80, 468 S E 2d 76, 80 (Ct App 1996) (arson)

III ALLOWING CIRCUMSTANTIAL EVIDENCE TO BE USED IN PRODUCTS LIABILITY CASES IS CONSISTENT WITH THE PRACTICE "EMPLOYED BY AN OVERWHELMING MAJORITY OF THE JURISDICTIONS IN THIS COUNTRY "

A THE SUPREME COURT CLOSELY FOLLOWS TRENDS IN OTHER STATES

Earlier this year the Supreme Court decided to adopt the "risk-utility test" in strict products liability design-defect cases after finding that thirty-five (35) States "utilize some form of risk-utility analysis in their approach to determine whether a product is defectively designed," *Branham v Ford Motor Co* , 701 S E 2d 5, 14 n 11 (S C 2010), a number which constituted "an overwhelming majority of the jurisdictions in this country " *Id* at *8 *Branham* also noted the risk-utility test has been embraced in and recommended by § 2(b) of the American Law Institute's ("ALI"), RESTATEMENT (THIRD) OF TORTS PRODUCTS LIABILITY (1998) (the "PRODUCTS RESTATEMENT"), finding the ALI's "guidance in this area is instructive " *Id* [18]

Although South Carolina courts certainly are not required to follow the decisions of courts in other States (or to follow the ALI's "guidance"), the Supreme Court pays very close attention to decisions of other courts and almost invariably is "persuaded by the reasoning of those courts" whose careful analyses persuade a majority of States to agree *Boan v State*, 388 S C 272, 276, 695 S E 2d 850, 852 (2010) Indeed, the Supreme Court has elected to follow the majority rule seventeen (17) times in the last five years alone, including in *Boan* and *Branham* [19]

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[18] For an extensive discussion of both the history of products liability and the development of the ALI's Restatements regarding products liability, *see* Richard W Wright, *The Principles of Product Liability*, 26 REV LITIG 1067 (2007), Marshall S Shapo, THE LAW OF PRODUCTS LIABILITY (3d ed 1994 & Supp 1999)

[19] *See also Mathis v Brown & Brown of S C Inc* , 389 S C 299, 698 S E 2d 773, 783 (2010), *Fowler v Hunter* 388 S C 355, 362, 697 S E 2d 531, 535 (2010), *Todd v Joyner*, 385 S C 421, 425, 685 S E 2d 595, 597 (2009), *State v Edwards*, 383 S C 66, 72, 678 S E 2d 405, 408 (2009), *Blackburn v Daufuskie Is Fire Dist* , 382 S C 626, 632, 677 S E 2d 606, 609 (2009), *State v White*, 382 S C 265, 272, 676 S E 2d 684, 687, (2009), *Gissel v Hart*, 382 S C 235, 243, 676 S E 2d 320, 324 (2009), *Kiriakides v School Dist of Greenville Cty* , 382 S C 8,

More telling still, the Supreme Court never has departed from the majority path during this period

B COURTS IN FORTY-SEVEN (47) STATES ALLOW LITIGANTS TO USE CIRCUMSTANTIAL EVIDENCE IN PRODUCTS LIABILITY CASES, *I E*, COURTS IN EVERY STATE THAT HAS CONSIDERED THE QUESTION

Applying the majority-approach yardstick to the question of whether this Court should allow circumstantial evidence to be used in products liability cases leads to the inexorable conclusion that this Court ought to do so because an examination of the law in other jurisdictions demonstrates (as detailed in accompanying Appendix B) that courts in 47 of the other 49 States that recognize products liability claims as a separately cognizable cause of action expressly have held that plaintiffs may use circumstantial evidence to prove defects The list includes all of South Carolina's neighbors [20] (Courts in Alaska and Maine have not ruled on the issue, at least

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18, 675 S E 2d 439, 444 (2009), *Davie v State*, 381 S C 601, 609, 675 S E 2d 416, 420 (2009), *ATC South Inc v Charleston Cty*, 380 S C 191, 197-98, 669 S E 2d 337, 340 (2008), *Sloan v Dept of Transp*, 379 S C 160, 170, 666 S E 2d 236, 241 (2008), *Spoone v State*, 379 S C 138, 143, 665 S E 2d 605, 607 (2008), *McKnight v State*, 378 S C 33, 49, 661 S E 2d 354, 362 (2008), *Hurst v East Coast Hockey League Inc*, 371 S C 33, 38, 637 S E 2d 560, 562 (2006), *Russell v Wachovia Bank N A*, 370 S C 5, 12, 633 S E 2d 722, 726 (2006)

[20] *See e g DeWitt v Eveready Battery Co Inc*, 565 S E 2d 140, 151 (N C 2002) ("the burden sufficient to raise a genuine issue of material fact in case may be met if the plaintiff produces adequate circumstantial evidence of a defect") (strict products liability/breach of warranty case), *Rose v Figgie Intern Inc*, 495 S E 2d 77, 81 (Ga App 1997) ("circumstantial evidence is particularly appropriate in product liability cases"), *Miller v Allstate Ins Co*, 650 So 2d 671, 672 (Fla App 1995) ("a products liability plaintiff may establish a prima facie case on circumstantial evidence"), *Perkins v Trailco Mfg & Sales Co*, 613 S W 2d 855, 857 (Ky 1981) ("the existence of a defect in the product itself may be established by a sufficient quantum of circumstantial evidence"), *Meadows v Coca-Cola Bottling Inc*, 392 So 2d 825, 827 (Ala 1981) ("circumstantial evidence of similar defects in other units of the product in litigation is competent to show that a product is defective"), *Browder v Pettigrew*, 541 S W 2d 402, 405 (Tenn 1976) ("a defect in a product, as well as any other material fact, may be proven by direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence") For additional representative cases, *see* Appendix B

not decisively, although multiple appellate decisions in each State strongly suggest that these States would join every other one if a suitable case presented the opportunity to do so) [21]

Strikingly, the 47 States that allow circumstantial evidence in products liability actions do so despite the fact that "the vast majority of courts have held that [*res ipsa*] is not applicable in strict liability cases" Terrence F Kiely & Bruce L Ottley, UNDERSTANDING PRODUCTS LIABILITY LAW § 8 02 at 227 (2006) [22]

The Reporters for the PRODUCTS RESTATEMENT, Professors James A Henderson, Jr , of Cornell Law School and Aaron D Twerski of Brooklyn Law School, found that "[a] huge body of case law supports th[e] proposition" that circumstantial evidence is very often used—and

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[21] For example, as highlighted in Appendix B, although Alaska courts have not expressly held that circumstantial evidence may be used in products liability cases, those courts often have quoted with approval California Supreme Court decisions that have so held *See e g , Clary v Fifth Ave Chrysler Center Inc* , 454 P 2d 244, 246-47 (Alaska 1969) ("The facts before us are similar in many respects to those considered by the Supreme Court of California in *Vandermark v Ford Motor Co* ," 391 P 2d 168, 170 (Cal 1964), where California's high "court held that products liability plaintiffs 'were entitled to establish the existence of a defect by circumstantial evidence '")

[22] *See* J Gregory Marks, *Determining the Indeterminate Defect*, 36 ST MARY'S L J 237, 245 & n 55 (2005) (citing *Welge v Planters Lifesavers Co* , 17 F 3d 209, 211 (7th Cir 1994), *Brooks v Colonial Chevrolet-Buick Inc* , 579 So 2d 1328, 1333 (Ala 1991), *Tresham v Ford Motor Co* , 275 Cal App 2d 403, 407 (Cal App 1969), *Ford Motor Co v Reed*, 689 N E 2d 751, 754 (Ind App 1997), *Brothers v Gen l Motors Corp* , 658 P 2d 1108, 1110 (Mont 1983), *Myrlak v Port Auth of N Y & N J* , 723 A 2d 45, 54 (N J 1999), *Fulton v Pfizer Hospital Products Group Inc* , 872 S W 2d 908, 912 (Tenn App 1994)) *See also Rutledge v Harley-Davidson Motor Co* , 364 Fed Appx 103, 107, 2010 WL 445498, *4 (5th Cir 2010) ("'The doctrine of *res ipsa loquitur* is inapplicable in any action predicated upon the theory of strict liability '") (citations omitted) *Cf Hughes v Stryker Sales Corp* , --- F Supp 2d ---, 2010 WL 1961051, *4 (S D Ala 2010), *Show v Ford Motor Co* , 697 F Supp 2d 975, 984 (N D Ill 2010), *Freeman Family Ranch Ltd v Maupin Truck Sales Inc* , 2010 WL 908665, *8 (W D Okla 2010), *Mohammad v Toyota Motor Sales U S A Inc* 947 A 2d 598, 608 (Md App 2008), *Park v Bay Crane Inc* , 854 N Y S 2d 154, 155 (N Y App 2008), *Miller v Ford Motor Co* , 653 S E 2d 82, 84 (Ga App 2007)

should be used—in products liability cases PRODUCTS RESTATEMENT, § 3, Reporters' Note, Comment b (Emphasis added) [23]

The ALI synthesized this "huge body of case law" into § 3 of the PRODUCTS RESTATEMENT, which provides, in full

> It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff (a) was of a kind that ordinarily occurs as a result of product defect, and (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution

Although this may seem similar to the inference of negligent causation under the *res ipsa* doctrine, the ALI intended a much narrower interpretation Section 3, Comment b states that such an inference is permissible if, and only if, the harm is caused by the product's failure "to perform its manifestly intended function" in a specific situation in which there must have been a

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[23] Like the official texts of the RESTATEMENTS themselves, which often are regarded as "authoritative guides," Hon Shirley S Abrahamson, *Refreshing Institutional Memories Wisconsin and the American Law Institute*, 1995 WIS L REV 1, 3 (1995), *see* Hon Herbert P Wilkins, *Process Partisanship and the Restatements of Law*, 26 HOFSTRA L REV 567, 567 (1998), the official Comments and Reporters' Notes frequently are cited as persuasive authorities in their own right, *see e g Branham* at 390 S C at 220, 701 S E 2d at 14 & n 10, *Samantar v Yousuf* --- U S ----, 130 S Ct 2278, 2285, n 6 (2010), perhaps not least because of the caliber of ALI members and the lengthy collaborative process that informs the drafting and adoption of each Restatement As Professors Henderson and Twerski explain "Altogether, at least a dozen formal drafts, widely circulated among ALI members, were discussed, debated, criticized, and revised over the five-year life of the project The Reporters met with one group or another in formal sessions at least six times each year and presented drafts at Annual Meetings in 1994, 1995, 1996, and 1997 Thousands of written suggestions were received and considered by the Reporters, and countless hours were spent discussing every conceivable aspect of the project Reported appellate court decisions and statutes spanning a thirty-year period were examined, classified, and relied on as the basis for the black letter rules and supporting comments All of this research is included in the finished form of extensive Reporters' Notes " Henderson & Twerski, *What Europe Japan and Other Countries Can Learn from the New American Restatement of Products Liability*, 34 TEX INT'L L J 1, 6 (1999)

In 1997, "[f]or their contributions to this RESTATEMENT, Henderson and Twerski were jointly appointed to the [ALI's] Cutter Reporter's Chair, an honor reserved for Reporters whose work is [considered] especially outstanding " ALI, PRODUCTS RESTATEMENT, http //www ali org/ali_old/promo6081 htm (last visited May 8, 2011)

defect in the product This clearly applies here, where (per the plaintiffs' evidence) the Monitor failed to sound its alarm, which is its sole purpose

Other highly regarded scholars have echoed the PRODUCTS RESTATEMENT's now twelve-year old finding that circumstantial evidence was, even then, almost universally accepted in American courts to adequately establish that a product is defective For example, a decade ago, Professor David G Owen[24] wrote that "[a] substantial and growing majority of American jurisdictions now accept this principle of circumstantial evidence for proving defectiveness in strict products liability" David G Owen, *Manufacturing Defects*, 53 S C L REV 851, 882 (2002) (emphasis added, footnotes omitted)[25] As evidenced by the nearly 200 cases (from 47 States) listed in Appendix B, the "substantial majority" has indeed "grow[n]" since that time

C LEADING TORT COMMENTATORS COMMEND PLAINTIFFS' USE OF CIRCUMSTANTIAL EVIDENCE IN PRODUCTS LIABILITY CASES AS "LOGICAL" AND "FAIR," AS WELL AS "WELL-ESTABLISHED"

There are good reasons why courts in 47 States unambiguously allow litigants to use circumstantial evidence in products liability cases and why the ALI has "endorse[d]" and

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[24] Owen is the Carolina Distinguished Professor of Law and Director of the Office of Tort Law Studies at the University of South Carolina He also is the author of the leading casebook on the subject, PRODUCTS LIABILITY AND SAFETY (6th ed 2010), the preeminent hornbook/treatise on the topic, PRODUCTS LIABILITY LAW (2d ed 2008), and the most widely used "nutshell" in the field, PRODUCTS LIABILITY IN A NUTSHELL (8th ed 2008), as well as the co-author of the most frequently cited multi-volume treatise on the subject MADDEN & OWEN ON PRODUCTS LIABILITY (3d ed 2000) Finally, Professor Owen is the editor of PHILOSOPHICAL FOUNDATIONS OF TORT LAW (1995), a co-author of PROSSER AND KEETON ON TORTS (5th ed 1984 and 1988 Supp), an Adviser to the American Law Institute on the RESTATEMENT (THIRD) OF TORTS, and an Editorial Adviser for the ALI's RESTATEMENT OF PRODUCTS LIABILITY

[25] *See* David G Owen, *Design Defect Ghosts*, 74 BROOK L REV 927, 944 (2009), Dominick Vetri, *Order Out of Chaos Products Liability Design-Defect Law*, 43 U RICH L REV 1373, 1427-32 (2009), Owen, PRODUCTS LIABILITY LAW, § 7 4 at 473 ("[h]aving spread across the nation , the malfunction doctrine has become a well-established precept of modern products liability law") *See also* Chad E Wallace, *Skimming the Trout from the Milk Using Circumstantial Evidence to Prove Product Defects under the Restatement (Third) of Torts*, 68 TENN L REV 647, 665, 677-81, 691 (2001)

"certified" the use of circumstantial evidence in such cases [26] As Professor Owen, who extols the views of the "growing majority," explains

> it is difficult to see how any jurisdiction could reject some properly formulated version of such a well-established, fair, and logical principle of proof In short, the manifest merits of this simple canon of circumstantial evidence suggests that its acceptance should soon be universal

Owen, *Manufacturing Defects*, 53 S C L REV at 883 (emphasis added, footnotes omitted) [27] Other students of the issue agree Indeed, "'[f]ew would question the use of circumstantial evidence to prove products liability in appropriate cases '" J Gregory Marks, *Determining the Indeterminate Defect*, 36 ST MARY'S L J 237, 239 (2005) (quoting *Ford Motor Co v Ridgway*, 135 S W 2d 598, 603 (Tex 2004) (Hecht, J)) [28] As evidenced above, no State has "'question[ed] the use of circumstantial evidence to prove products liability'" in the proper case and under appropriate conditions *Id*

In the final analysis, South Carolina courts have every right to stand alone and to "question the use of circumstantial evidence to prove products liability " After all, the majority is often wrong and "a foolish consistency is the hobgoblin of little minds " Ralph Waldo Emerson, *Self-Reliance*, in Emerson, ESSAYS FIRST SERIES 53 (1895 ed) Nevertheless, *amici* respectfully submit there are no jurisprudentially sound reasons for South Carolina courts to

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[26] In Professor Owen's view, the ALI's decision "to endorse[] the principle in the Products Liability Restatement § 3," did not advocate substantial changes in existing law but merely restated and "[c]ertif[ied] the propriety of the doctrine's widespread acceptance " *Manufacturing Defects*, 53 S C L REV at 883 (footnotes omitted)

[27] *See* Owen, *Design Defect Ghosts*, 74 BROOK L REV at 944 (balanced, "fair and simple") *Cf* Owen, PRODUCTS LIABILITY LAW, § 6 5 at 430 ("logic and fairness" support the use of "circumstantial proof of defect[s]"), and *id*, § 7 4 at 473 ("[h]aving spread across the nation , the malfunction doctrine has become a well-established precept of modern products liability law " (footnote omitted)

[28] *See* James A Henderson, Jr and Aaron D Twerski, *The Products Liability Restatement in the Courts*, 27 WM MITCHELL L REV 7, 21-24 (2000), Vicki L MacDougall, *The Impact of the Restatement (Third) Torts Products Liability* 62 CONSUMER FIN L Q REP 105, 110-11 (2008), Victor M Schwartz, *New Products Old Products Evolving Law Retroactive Law* 58 N Y U L REV 796, 828-36 (1983)

disregard their own long-standing precedents, and to ignore the decisions of 47 other States, by denying the plaintiffs the opportunity to use circumstantial evidence to make their case that the CAS Monitor that failed to warn them of their baby's life-threatening condition was defective

D SOUTH CAROLINA COURTS ALSO SHOULD FOLLOW THE ALI RESTATEMENT'S GUIDANCE REGARDING THE USE OF CIRCUMSTANTIAL EVIDENCE IN LIEU OF "PROOF OF A SPECIFIC DEFECT," IN LIEU OF PROOF OF A "REASONABLE ALTERNATIVE DESIGN," IN LIEU OF THE NEED FOR EXPERT TESTIMONY IN EVERY CASE, AND REGARDLESS OF WHETHER THE PRODUCT IN QUESTION FAILED BECAUSE OF A DESIGN DEFECT OR A MANUFACTURING DEFECT

Amici respectfully suggest that South Carolina courts not only should adopt the ALI's general position allowing circumstantial evidence in products cases, but also the ALI's particular guidance regarding the need for expert testimony, alternative designs, and identification of which component of a product is defective and in what respect

The text of the first paragraph of the PRODUCTS RESTATEMENT § 3 explicitly states that the existence of a product defect "may be inferred without proof of a specific defect " (This contrasts with the Circuit Court's opinion that the Graves are required to "identify the specific defect" in the CAS Monitor, April 8th Order at 9) Official Comment c to PRODUCTS RESTATEMENT § 3 elaborates on this rule

> **c 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 Furthermore, quite apart from the question of what type of defect was involved, the plaintiff need not explain specifically what constituent part of the product failed For example, if an inference of defect can be appropriately drawn in connection with the catastrophic failure of an airplane, the plaintiff need not establish whether the failure is attributable to fuel-tank explosion or engine malfunction

(Emphasis added) As detailed in both the following footnote and accompanying Appendix C, the views set forth in § 3, Comment (c) are completely consistent with case law from around the country, which hold that a plaintiff is not required to identify the alleged defect with

particularity, or describe which individual "constituent part" or sub-component of a product was flawed, or explain precisely how and why a component was defectively designed, or how and why a sub-component was defectively manufactured, or how and why the entire product malfunctioned [29]

As a further consequence, products liability plaintiffs relying on circumstantial evidence "need not prove that the product departed from its intended design or that a reasonable alternative design could have been adopted " Section 3, Reporters' Note 1 (emphasis added) [30] *See* Michael D Green, *The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects*, 74 BROOK L REV 807, 835 (2009)

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[29] *See e g Ramos v Howard Indus Inc* , 885 N E 2d 176, 178 (N Y 2008) ("It is well settled that a products liability cause of action may be proven by circumstantial evidence, and thus, a plaintiff need not identify a specific product defect"), *Bennett v Asco Services Inc* , 621 S E 2d 710, 717 (W Va 2005) ("A plaintiff is not required to establish a strict products liability cause of action by identifying the specific defect that caused the loss, but instead may permit a jury to infer the existence of a defect by circumstantial evidence ") For additional representative cases, *see* Appendix C

As Professor Owen explains "Since normal products liability doctrine requires a plaintiff to establish that a product was defective and that the defect caused his harm, requiring a plaintiff to prove that a specific defect caused the accident might appear to make good sense But the very purpose of the malfunction doctrine is to allow a plaintiff to prove a case by circumstantial evidence when there simply is no direct evidence of precisely how or why the product failed Sometimes the specific cause of a malfunction disappears in the accident when the product blows up, burns up, is otherwise severely damaged, or is thereafter lost Not infrequently, however, products simply malfunction, and mysteriously so, leaving no tangible trace of how or why they failed In all such situations, where direct evidence is unavailable, the courts have properly refused to require the plaintiff to prove what specific defect caused the product to malfunction " Owen, *Manufacturing Defects*, 53 S C L REV at 874 (footnotes omitted) *See* Owen, PRODUCTS LIABILITY LAW, § 7 4 at 472, 2 Dobbs, TORTS, §§ 360, 362

[30] A "tentative draft" of the PRODUCTS RESTATEMENT, which lacked this disclaimer, was heavily criticized for nullifying plaintiffs' ability to use circumstantial evidence to prove their case without expert testimony or proof of feasible alternative designs *See* Wright, *Principles of Products Liability*, 26 REV LITIG at 1087 (the "'feasible alternative design requirement imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration Such a rule would require plaintiffs to retain an expert witness even in cases in which lay jurors can infer a design defect from circumstantial evidence '") (quoting *Potter v Chicago Pneumatic Tool Co* , 694 A 2d 1319, 1332 (Conn 1997) (internal citations omitted))

Moreover, PRODUCTS RESTATEMENT § 3, together with the cases cited in the accompanying official Comments and Reporters' Notes, establishes that a plaintiff is not required to adduce expert testimony to prove a product defect in every case, regardless of whether the alleged defect is one of design or manufacture, rather, the need for such testimony depends on the facts and circumstances of each case [31] (Indeed, as a general rule, "[i]t is well settled that expert testimony is unnecessary in cases where 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 '" *Wills v Amerada Hess Corp*, 379 F 3d 32, 46 (2d Cir 2004) (citations omitted)) [32]

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[31] *See e g Newell Rubbermaid Inc v Raymond Corp* 2010 WL 2643417, *11 (N D Ohio 2010) (applying Ohio law) ("expert testimony is not always required to prove the material elements of a design defect claim " (citations omitted)), *Hughes v Stryker Sales Corp*, 2010 WL 1961051, *2 (S D Ala 2010) ("under Alabama law, but [a]s also consistent with precedents from other jurisdictions," "'expert testimony is not always necessary to establish the existence of a manufacturing defect'" and the issue of "'[w]hether expert testimony is required [in a products liability case] ultimately depends on whether it is a fact issue upon which the jury needs assistance to reach an intelligent or correct decision '" (citations omitted, brackets in the original), *Driskill v Ford Motor Co*, 269 S W 3d 199, 204 (Tex App 2008) (expert testimony is "'generally encouraged'" but definitely is "'not required to establish a products liability claim '

Whether expert testimony is required depends on whether the issue involves matters beyond 'the general experience and common understanding of laypersons '") (citations omitted), *Cansler v Mills*, 765 N E 2d 698, 706 (Ind App 2002) ("Expert testimony is not always required if there is sufficient circumstantial evidence "), *Arnold v Krause Inc*, 233 F R D 126, 132 (W D N Y 2005) (applying New York law) ("a claim of strict products liability may be established based upon circumstantial evidence" and "[e]xpert testimony as to the specific design defect is not required "), *Krause Inc v Little* 34 P 3d 566, 571 (Nev 2001) ("expert testimony is not always necessary to establish the existence of a manufacturing defect ") For additional representative cases, *see* Appendix F

[32] *See* Wright, *Principles of Products Liability* 26 REV LITIG at 1087 (discussing *Potter* 694 A 2d at 1332), Frank J Vandall, *The Restatement (Third) Products Liability Section 2(b) The Reasonable Alternative Design Requirement*, 61 TENN L REV 1407, 1426 & n 118 (1994) (citing cases), Frank J Vandall, *Design Defect in Products Liability Rethinking Negligence and Strict Liability*, 43 OHIO ST L J 61, 76 (1982)

This fully comports with South Carolina practice in both products liability and complex negligence cases, such as ones for medical malpractice [33] Thus, as the Supreme Court recently stressed "[i]n discussing the issue of proof in a defective design case, Professors Hubbard and Felix say, 'As with other matters in varying degrees beyond the knowledge and experience of ordinary persons, expert testimony will often be useful and may be necessary,'" *Watson* 699 S E 2d at 174 (emphasis added, quoting F Patrick Hubbard & Robert L Felix, THE SOUTH CAROLINA LAW OF TORTS 313 (3d ed 2004)) By negative implication, expert testimony is neither indispensable nor required in every case

Finally, as detailed in Appendices D and E, many of the cases that informed the RESTATEMENT, or have been guided by it, pointedly emphasize that circumstantial evidence may be used to prove a product defect in both design defect cases[34] and/or manufacturing defect cases [35] One reason why, at least for circumstantial evidence purposes, it is immaterial to specify whether the product was defectively designed or manufactured is that the two types of defects

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[33] For example, *Green v Lilliewood*, 272 S C 186, 192, 249 S E 2d 910, 913 (1978), reversed the grant of a directed verdict for a defendant physician where plaintiff relied on circumstantial evidence that showed his medical problems began soon after insertion of a medical device, holding that in "considering the sufficiency of circumstantial evidence, the facts and circumstances should be assessed in light of ordinary experience and common sense This general proposition of tort law has been applied in malpractice cases as an exception to the general rule requiring expert testimony " (Internal citations omitted) *See Cox v Lund* 286 S C 410, 416, 334 S E 2d 116, 120 (1985)

[34] *See e g Atkins v Gen l Motors Corp* 132 Ohio App 3d 556, 564, 725 N E 2d 727, 733 (Ohio App 2009) (circumstantial evidence may "suffice to document the existence of a design defect "), *Webber v Hilborn*, 2009 WL 5150082 (Mich App 2009) ("defective design claim may be based on either direct or circumstantial evidence") (citations omitted)) For additional representative cases on the same point, *see* Appendix D

[35] *See e g Turpin v Stanley Schulze & Co Inc* , 2009 WL 875218, * 5-6 (Ky App 2009) ("manufacturing defect" may be established by "circumstantial evidence") (citations omitted), *Shaun T Mian Corp v Hewlett-Packard Co* , 237 S W 3d 851, 854 (Tex App 2007) ("circumstantial evidence was sufficient to raise an issue of material fact as to each contested element of their manufacturing defect claim ") For additional representative cases on the same point, *see* Appendix E

may "overlap[] and operate simultaneously" Jerry J Phillips, *Products Liability Beyond Warnings*, 26 N KY L REV 595, 623 (1999)) *See* Owen, *Manufacturing Defects*, 53 S C L REV at 874 [36]

In sum, this Court should reverse the decision below and allow circumstantial evidence to be used in products liability cases because such evidence is admissible in each of the other States whose courts have considered the question and because the ALI and leading scholars endorse the approach taken by the vast majority of the States

IV BARRING THE USE OF CIRCUMSTANTIAL EVIDENCE TO PROVE A PRODUCTS LIABILITY CAUSE OF ACTION WILL CONFUSE JURIES AND BURDEN ALREADY OVERTAXED COURTS

Prohibiting plaintiffs from using circumstantial evidence to prove a strict products liability **cause of action** will not prevent plaintiffs from introducing circumstantial evidence in a products liability **case** This is so because South Carolina allows plaintiffs to plead multiple claims in a single case and because products liability plaintiffs often join negligence and breach of implied warranty claims to strict liability claims, just as the plaintiffs did in this case [37]

Because, as detailed above, products liability plaintiffs may use circumstantial evidence in support of their negligence and warranty claims, juries will be confused by contradictory

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[36] *See Bryan v John Bean Div of FMC Corp*, 566 F 2d 541, 547-48 (5th Cir 1978) (inadequate specifications, a design defect, led to manufacturing defects), *Colt Indus Op Corp v Frank W Murphy Mfr Inc*, 822 P 2d 925, 930 (Alaska 1991) (same)

[37] *See Melton v Medtronic Inc*, 389 S C 641, 650 n 3, 698 S E 2d 886, 890 n 3 (Ct App 2010) (plaintiff "alleged ten causes of action [including] (1) products liability, negligence (against Medtronic), (2) products liability, strict liability (against Medtronic), (3) breach of warranty, merchantability (against Medtronic), (4) breach of warranty, fitness for a particular purpose (against all defendants), (5) breach of warranty, express (against all defendants), (6) medical malpractice and negligence (against all defendants)") *See also Holst v KCI Konecranes Int l Corp*, 390 S C 29, 699 S E 2d 715, 717 (Ct App 2010) (manufacturer sued for negligence, breach of warranty, and defective design), *Rife v Hitachi Const Mach Co Ltd*, 363 S C 209, 609 S E 2d 565 (Ct App 2005) (same)

instructions [38] Thus, on the one hand, juries will be instructed (for negligence and warranty purposes) to regard "circumstantial evidence is just as good as direct evidence," *St Paul Fire* 251 S C at 59-60, 159 S E 2d at 923, and that both types "inherently possess the same probative value " *Cherry*, 361 S C at 600, 606 S E 2d at 481 On the other hand, though, for strict liability purposes, jurors will be told to ignore circumstantial evidence as worthless and unreliable The possibilities of confused juries, inconsistent verdicts, complex post-trial motions, and multiple appeals seem high

Such results would be unwelcome in any court system and would seem to be especially undesirable to South Carolina's courts, which are twice as busy as the average court in the country As Chief Justice Toal explained in her *2010 State of the Judiciary Address*, the South Carolina Judiciary Department ("SCJD") has been in the midst of, or threatened with, a financial crisis for more than a decade, a crisis which has compelled the SCJD to put into effect a "hiring freeze," "[r]reduce[] judges' travel, [e]liminate[] travel for law clerks, [r]estrict[] travel for court reporters, [a]uthorize[] county Clerks of Court to operate with skeleton staffs on local furlough days ," and "[c]ut the reimbursement of the monthly office allowance to judges " Chief Justice Jean Hoefer Toal, *2010 State of the Judiciary Presentation to the South Carolina Legislature* 5 (Feb 24, 2010) (http //www sccourts org/whatsnew/2010StateOfJudiciary pdf, last

[38] "In a products liability action, regardless of the theory of recovery pursued, a plaintiff must establish three elements (1) he was injured by the product, (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user, and (3) the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant " *Jackson v Bermuda Sands Inc*, 383 S C 11, 15, 677 S E 2d 612, 614 (Ct App 2009) (citations omitted) "In addition, liability for negligence also requires proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design " *Id* 383 S C at 15, 677 S E 2d at 614-15 (citations omitted) "[A] plaintiff must prove the product defect was the proximate cause of the injury sustained," which requires proof of causation in fact and legal cause 'Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence,' while 'Legal cause is proved by establishing foreseeability '" *Id* 383 S C at 16, 677 S E 2d at 615 (citations omitted)

visited Feb 29, 2010) As a result, South Carolina judges remain among the busiest in the nation, and "South Carolina continues to have more than twice the national average of filings per judge " *Id* at 8 [39] And additional and more stringent cuts might be in the offing [40]

Barring circumstantial evidence and mandating that plaintiffs retain experts to prove a specific defect in every strict products liability cause of action (which is the Circuit Court's preferred alternative to the use of circumstantial evidence) not only would increase the litigation costs for plaintiffs who pursue this option (and increase defense costs as well), discourage other plaintiffs from filing suit because the costs are prohibitive (and thereby effectively deny such plaintiffs access to the courts), and increase jury confusion, but also would increase the burdens on the courts to determine the reliability and admissibility of expert testimony and to assess the sufficiency of that testimony

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[39] According to a "joint study by the Conference of State Court Administrators, the Bureau of Justice Statistics [of the U S Department of Justice], and the National Center for State Courts," all of the "States averaged 1,761 filings per judge and 3 74 judges per 100,000 population in 2006 (most current year for which statistics are available) " *2010 State of the Judiciary* at 8 By contrast, South Carolina averaged 4,374 filings per judge–more than twice as much as the average in the other States–and only 1 1 judges per 100,000 population–less than a third of the average in the other States–in 2006 *Id*

[40] Thus, Chief Justice Toal further warned that, as a result of the budget crisis "Lay-offs for the Circuit Court law clerks may occur this Spring 2010, Court of Appeals staff may be reduced from 3 to 2 staff personnel per judge, New law clerks may not be hired next year, Reduction of court reporters being considered, Judicial Department may be forced to run a deficit in the upcoming fiscal year, Consideration being given to not filling some upcoming judicial vacancies and associated non-judicial positions for further costs savings, Current funding levels jeopardize the Court's ability to adequately fulfill constitutional functions, Furloughs and reductions in force (RIF) may be required " *Id* at 6 (emphasis added) As the Chief Justice advised a State Bar convention in January "'We are in as difficult a time as has ever faced the court since its colonial foundation,'" she said "'We are in the biggest crisis for maintaining an open court system in South Carolina that we have ever experienced '" Fred Horlbeck, *Chief Justice Jean H Toal Judiciary Faces Most Dire Budget Crisis Ever* SOUTH CAROLINA LAWYERS WEEKLY (Feb 1, 2010) (http //www allbusiness com/government/government-bodies-offices-regional-local/13891413-1 html) (last visited Feb 16, 2010) (emphasis added)

As one experienced federal judge noted, heightened admissibility requirements make it "more important than ever for the trial court to take an active role in the presentation of expert testimony," which may "greatly lengthen and complicate assessment of [such] testimony " Hon Charles R Richey, *Rule 16 Revised and Related Rules*, 233 ALI-ABA 363, 376 (1994) "[G]iven the complex factual inquiry required by *Daubert* [*v Merrell Dow Pharmaceuticals Inc* 509 U S 579 (1993)], courts will be hard-pressed in all but the most clear-cut cases to gauge the reliability of expert proof on a truncated record " *Cortes-Irizarry v Corporacion Insular De Seguros*, 111 F 3d 184,188 (1st Cir 1997) *Accord Padillas v Stork-Gamco Inc* , 186 F 3d 412, 417 (3d Cir 1999), *Kemp ex rel Wright v State*, 809 A 2d 77, 86 (N J 2002) Federal courts, and state courts that apply *Daubert*, have found that in order to develop something more than a "truncated record," they need to hold time-consuming "*Daubert* hearings "[41]

For all these reasons, allowing circumstantial evidence for most claims and in most cases, but barring such evidence regarding strict liability products claims will confuse juries and burden South Carolina's already overtaxed courts

[41] These "*Daubert* hearings" consume vast amounts of judicial resources, Peter J Goss, *Clearing Away The Junk* 56 FOOD & DRUG L J 227, 230 (2001), impose "immense burdens" on both trial and appellate judges, Katherine M Atikian, *Nasty Medicine Daubert v Merrell Dow Pharm Inc Applied to a Hypothetical Medical Malpractice Case*, 27 LOY L A L REV 1513,1514 (1994), and have left many judges "reeling " Michael C Mason, *The Scientific Evidence Problem a Philosophical Approach*, 33 ARIZ ST L J 887, 892 (2001) As one prominent Texas state judge has explained, reliability/admissibility "hearings consume too much time and judicial resources and limit a trial court's time for the actual trial, while increasing the number and duration of hearings", such "hearings can last many days, in addition to the time spent by a judge reviewing memoranda, publications, and data in fields for which they may have little or no training " Hon Harvey Brown, *Procedural Issues Under Daubert*, 36 HOUS L REV 1133, 1150 (1999) *See also* Ralph D Gants, *Daubert/Lamigan Making the Gate Swing Smoothly*, 47 BOSTON BAR J 8, 9 (MARCH/APRIL 2003) (reliability-admissibility hearings often "evolve into mini-trials that greatly burden the time of the court ")

V PRECLUDING PLAINTIFFS FROM USING CIRCUMSTANTIAL EVIDENCE IN PRODUCTS LIABILITY CASES VIOLATES FEDERAL AND STATE CONSTITUTIONAL GUARANTEES OF ACCESS TO THE COURTS AND EQUAL PROTECTION OF THE LAWS

It is well-established that "[i]n many strict liability cases, the product involved will be damaged or destroyed, making proof of the lack of a defect virtually impossible" *Jenkins v Whittaker Corp*, 785 F 2d 720, 733 (9th Cir 1986) For example

> a new automobile's steering or brakes suddenly [may] fail to work, causing the car to crash into a tree, Christmas tree lights inexplicably [may] catch fire, causing them to be consumed, or a person [may be] suddenly and severely sickened while eating food, but all evidence of contamination disappears in the victim's stomach and thence elsewhere

David G Owen, *The Graying of Products Liability Law Paths Taken and Untaken in the New Restatement*, 61 TENN L REV 1241, 1248 (1994)

In situations "in which a product suddenly and catastrophically fails, destroying all direct evidence of product defectiveness , it is sometimes clear as a matter of circumstantial evidence that such a malfunctioning product was quite probably defective in one way or another" *Id* Obviously, there are other cases in which the product is not destroyed and in which "proof of design defectiveness may often be available in such cases from an examination of similar units of the product" *Id*

> Yet sometimes the precise mechanisms that caused a particular product to fail are not readily discoverable by examining or even testing similar products that have not yet failed Moreover, the cost of expert testing and proof in such instances may put all but the most serious cases of this sort outside the practical realm of the justice system There thus appears to be no good reason to attempt to undercut the ability of accident victims to obtain relief in cases involving probable design defects—or, more commonly perhaps, in cases involving the probability of some kind defect, but only speculation as to the particular form of defect

Id (emphasis added)

The ALI was "persuaded by the logic and fairness of arguments such as these," to allow, through RESTATEMENT § 3, for circumstantial evidence to be used to prove defects in products "cases that involve the probability of any form of defect " *Id* at 1249

Moreover, as a general principle, depriving plaintiffs of the chance to use circumstantial evidence to prove product defects in cases in which direct evidence is physically impossible to obtain (because it has been destroyed) or practicably infeasible or prohibitively uneconomic to acquire (because "the cost of expert testing and proof" may be so high, *id* at 1248) not only would be an affront to "logic and fairness" of PRODUCTS RESTATEMENT § 3, *id* at 1249, but also would violate state and federal constitutional guarantees of meaningful access to the courts for redress of grievances [42]

Thus, the United States Supreme Court and the high courts of many States have admonished, in various contexts, that States may not impose conditions that are "so gravely difficult and inconvenient that [a litigant] will for all practical purposes be deprived of his day in court " *M/S Bremen v Zapata Off-Shore Co* , 407 U S 1, 18 (1972) (discussing state court enforcement of extremely onerous forum-selection clauses) [43]

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[42] Reflecting the importance of this right, "[d]ecisions of th[e United States Supreme] Court have grounded the [federal] right of access to courts" in no less than five overlapping constitutional provisions "the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection, and Due Process Clauses " *Christopher v Harbury*, 536 U S 403, 415 n 12 (2002) (citations omitted) The same right is secured by S C Const art I, § 22 *See Central RR & Banking Co v Ga Constr & Investment Co* , 32 S C 319, 11 S E 192, 203 (1890) ("it is very manifest that the object of that section was simply to secure to the inhabitants of the state, for which the constitution was made, access to the courts for redress of any injury which they may have received ")

[43] *See e g Christy v Horn*, 115 F 3d 201, 206-07 (3d Cir 1997) (exhaustion of state remedies may not be required when "state remedies are futile, inadequate, or incapable of providing a full and fair adjudication of federal claims"), *Piselli v 75th Street Medical*, 808 A 2d 508, 524 (Md 2002) (a rule that mandates that statutes of limitations periods that run against a minor during its infancy "is an unreasonable restriction upon a child's remedy and the child's

A decision to uphold the Circuit Court's rulings and to deny products liability plaintiffs the right to use the same kind of evidence litigants are permitted to use in every other kind of case in this State—civil, administrative, and criminal—would effectively and unconstitutionally deny them access to the courts

By like token, denying products liability plaintiffs the right to use the same kind of circumstantial evidence that litigants are permitted to use in every other kind of tort case, indeed, in every criminal, administrative, and civil case in South Carolina, also would deprive them of the equal protection secured by the Fourteenth Amendment and S C Const art I, § 22, while providing products liability defendants with the kind of "special law" proscribed by S C Const art III, § 34 (IX)

The perversity of allowing the State to convict criminal suspects solely on the basis of circumstantial evidence—and, indeed, to impose a "sentence of death based upon circumstantial evidence," *State v Williams*, 321 S C 327, 338, 468 S E 2d 626, 632 (1996)—but prohibiting plaintiffs from using the same kind of evidence to impose civil liability, is particularly plain in light of the Supreme Court's longstanding recognition that if different evidentiary rules and standards ever are warranted, they should be much more stringent in criminal cases–where a

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access to the courts "), *Martin v Richey*, 711 N E 2d 1273, 1282-84 (Ind 1999) (same), *Strahler v St Luke s Hosp* , 706 S W 2d 7, 11-12 (Mo 1986) (same), *Thurnwald v A E* , 163 P 3d 623, 635 (Utah 2007) (strictly enforcing requirement that unwed fathers file paternity claims under impossible time conditions would violate Due Process), *Calif Teachers Ass n v State of California*, 975 P 2d 622, 648 (Cal 1999) ("prohibitive financial penalties on the exercise of a procedural right are impermissible because they effectively deny the process that is due ") These courts have so held despite the facts that the right to have one's day in court "'is neither absolute nor unconditional '" *Butler v Dept of Justice*, 492 F 3d 440, 445 (D C Cir 2007) (citations omitted), and that courts "may impose conditions upon a litigant so long as they are taken together, not so burdensome as to deny the litigant meaningful access to the courts " *In re Green*, 669 F 2d 779, 786 (D C Cir 1981) *See Carter v United States*, 733 F 2d 735, 737 (10th Cir 1984), *cert denied*, 469 U S 1161 (1985), *Farmer v Monsanto Corp* 353 S C 553, 558, 579 S E 2d 325, 328 (2003)

defendant's liberty and life are at stake, and where the State enjoys vastly superior resources–than in civil cases where the odds are even and monetary damages are the only thing at risk

For these reasons, courts always have held that "'[a] higher degree of proof is required in criminal than in civil cases '" *State Bd of Dental Examiners v Breeland*, 208 S C 469, 474, 38 S E 2d 644, 646 (1946) [44] The United States Supreme Court has honored the same principle since 1798 *See Calder v Bull*, 3 U S (3 Dall) 386, 399 (1798), *Mitchell v United States*, 526 U S 314, 328 (1999) Indeed, the need for more rigorous standards of proof in criminal cases "has crystallized into rules of evidence consistent with [these higher] standard[s]," *In re Winship*, 397 U S 358, 362 (1970), because "it is far worse to convict an innocent man than to let a guilty man go free" *Id*, 397 U S at 372 (Harlan, J , concurring) *See* 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1769) chap 27, at 352 ("it is better that ten guilty persons escape, than that one innocent suffer ") In this spirit

> the degree of proof required of circumstantial evidence is not and should not be as great in civil cases as in criminal cases In criminal cases the presumption of innocence arises in favor of the defendant, and the circumstances must be of such force and character as to convince the jury beyond a reasonable doubt of the guilt of the accused In civil cases where there is no presumption and where the proof merely has to be by the preponderance or greater weight of the evidence, it would be harsh and unjust to hold that the criminal circumstantial rule should be invoked

Powe v Atlantic Coast Line R Co , 161 S C 122, 159 S E 473, 479 (1930), reversed on other grounds, 283 U S 401 (1931) (emphasis added)

The Circuit Court's decision flouts this venerable common law wisdom and turns these State and federal constitutional principles on their head

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[44] Thus, to the extent that a double standard exists in this State, it always has favored criminal, not civil, defendants *See State v Symmes*, 40 S C 383, 19 S E 16, 20 (1894), overruled on other grounds by *State v Belcher*, 385 S C 597, 685 S E 2d 802 (2009)

VI THIS COURT SHOULD REVERSE THE SUMMARY JUDGMENT GRANT BECAUSE GENUINE DISPUTES OF MATERIAL FACT REMAIN

If, as *amici* recommend, this Court chooses to follow every other State in the country, *i e* to follow the 47 States that have considered the issue, each of which has expressly held that circumstantial evidence is admissible in products liability actions, then this Court should reverse the Circuit Court's grant of summary judgment because material facts remain in genuine dispute

"Summary judgment is a drastic remedy and should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues " *Hoard ex rel Hoard v Roper Hosp Inc* , 387 S C 539, 545, 694 S E 2d 1, 4 (2010) (citations omitted) Thus, "'summary judgment should be granted'"—and upheld—only if "'plain, palpable, and indisputable facts exist on which reasonable minds cannot differ '" *USAA Property & Casualty Insurance Co v Clegg*, 377 S C at 653-54, 661 S E 2d at 796 Such a disposition is inappropriate "'where further inquiry into the facts of the case is desirable to clarify the application of the law " *Id* 377 S C at 653, 661 S E 2d at 796 (citations omitted) Finally, "'[e]ven when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied '"*Id* (citations omitted)

As a factual matter, *amici* do not know for a certainty if India's Monitor failed and, if so, why The evidence is clearly in conflict, however, and there appears to be a very genuine dispute regarding the material facts in this case The weighing of such evidence and the resolution of that dispute is constitutionally entrusted to juries, not courts *See Erickson v Jones Street Publishers L L C* 368 S C 444, 480, 629 S E 2d 653, 672 (2006), *Ex parte Keller*, 189 S C 26, 199 S E 909, 914 (1938) *Cf Tellabs Inc v Makor Issues & Rights Ltd* , 551 U S 308, 328 (2007)

The Graves presented the testimony of four eyewitnesses (Mr and Mrs Graves, Ms Simmons, and Paramedic Kelly) all of whom swore that they were well positioned to hear the

Monitor's audible alarm but did not hear it, and three of whom (the plaintiffs and the paramedic) swore that they were in a position to see and did see the Monitor's LED warning lights blazing This is consistent testimony that the Monitor failed to work adequately while India lay dying—and fairly powerful testimony at that, considering that Paramedic Kelly was a trained professional and a disinterested witness

CAS presented no contrary direct testimony on this point Nor did CAS argue that if the Monitor failed such failure was due to forces beyond its control, *e g* , that the Monitor had not been plugged in or had been altered, misused or abused Indeed, CAS conceded this was not so "CAS does not dispute the monitor was set up properly and that it had power " CAS Br at 47

Instead, and quite ironically, CAS relied on a variant of *res ipsa loquitur* the machine spoke for itself "Simply put, the machine's own record indicates it was functioning properly at the time of India's death " CAS Br at 3 (emphasis added) In other words, CAS contends that this Court should infer the Monitor "was functioning properly at the time of India's death," because "the machine's own record"—which was introduced by and interpreted by CAS's lay witnesses—says so, or more exactly, "indicates" so *Id* This is circumstantial evidence Moreover, it is circumstantial evidence that is contradicted by the log's failure to consistently record activations of the alarm and hearing of the alarm's sounding on other occasions, as well as by the complaints regarding failure of the alarm that led to its FDA recall Whether it is credible and probative circumstantial evidence and whether it is outweighed by the plaintiffs' circumstantial evidence are questions for the jury [45]

[45] CAS's faith in the infallibility of technology is understandable but is undermined by its own actions CAS implicitly concedes that electronic and computer equipment may fail, which is why CAS furnished the Model 9700 Monitor with a front alarm and rear, back-up alarm, why the Model 9700 has microphones to listen for the first alarm to sound and why, if the microphones hear nothing, the Model 9700's software is rigged to ring the back-up alarm But CAS appears to

The Plaintiffs' circumstantial evidence comes in four forms First, Mr and Mrs Graves and Ms Simmons each testified that, although they were well positioned to hear the alarms' purposefully deafening sound, they heard nothing at all, and the Graves and Paramedic Kelly each testified that although the Monitor's alarm was silent, the Monitor's alert lights were on, from which a jury could reasonably infer the Monitor was functioning but not well it detected India's respiratory distress and sent visual warnings but stood mute when shouting was needed

Second, Mr and Mrs Graves, together with Ms Simmons, testified that the Monitor's silence was unusual, as each remembered numerous previous times in which India's distress had triggered both glowing lights and screaming alarms, from which the trier of fact reasonably could infer that the Monitor was functioning differently and worse than it had in the past, and that such malfunctioning was due to an inherent defect This testimony was corroborated by the Graves' experts, who read the Monitor's record log as showing several past instances in which the alarm properly sounded when it should have, *i e* when India was in distress, but also as showing at least fifteen other "patient events" when the alarm should have sounded but did not

CAS's lay witnesses said the Graves' experts misread the record log and that "[t]he monitor worked properly before and after India's death " CAS Br at 3 [46] One of those lay witnesses also testified that his "company had approximately 100 AMI monitors" and "has had no other complaint of an alarm not sounding " *Id* at 8

As a general rule, the "relevant history of the product" may constitute "adequate circumstantial evidence of a defect " *DeWitt v Eveready Battery Co Inc* , 565 S E 2d 140, 151

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believe that "the machine's own record" is infallible and what "the machine record[ed]" must have occurred Everything can fail except the "record log " The wish is father to the thought

[46] Although the Circuit Court ruled that the experts' testimony regarding the Monitor's software code was unreliable and inadmissible, there was no basis for that court to discount their reading of the Monitor's record log, given that the court allowed and apparently credited the testimony of CAS's lay witnesses on this point

(N C 2002) The history of India's Monitor seems to provide "circumstantial evidence of a defect" that is "adequate" enough to submit this case to a jury *See Snider v Bob Thibodeau Ford Inc*, 202 N W 2d 727, 732 (Mich App 1972) ("circumstantial evidence in the truck's service history" shows "an inherent defect in the braking system"), *Hamilton Mut Ins Co v Ford Motor Co*, 702 N E 2d 491, 494 (Ohio App 1997)

Third, the Graves' experts testified that they had eliminated alternative causes, *e g*, alteration or misuse, for the Monitor's failure As noted above, CAS not only did not dispute this point, it conceded the Monitor had not be altered or abused This is important because "elimination of other possible causes" is widely accepted as "circumstantial evidence of a defect" *DeWitt* 565 S E 2d at 151 [47]

Lastly, CAS's "voluntary" recall of five years' worth of the same Model 9700 Monitors for exactly the same problems the Graves have alleged in this case—"because the infant apnea monitor might shut down and the audible alarm might fail to sound," FDA, *Recall of Infant Apnea Monitor, supra*—constitutes compelling circumstantial evidence that the particular Model 9700 Monitor that "fail[ed] to sound" in this case may have failed for the same reason [48] This is

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[47] *See Harrison v Bill Cairns Pontiac Inc*, 549 A 2d 385, 390 (Md App 1988) ("[a]n inference of a defect may be drawn from the happening of an accident, where circumstantial evidence tends to eliminate other causes, such as product misuse or alteration "), *Yanovich v Zimmer Austin Inc*, 255 Fed Appx 957, 966, 2007 WL 4163860, *9 (6th Cir 2007) (applying Ohio law), *Allstate Ins Co v Hamilton Beach/Proctor Silex Inc*, 473 F 3d 450, 459 (2d Cir 2007) (applying Vermont law), *Hickerson v Pride Mobility Prod Corp*, 470 F 3d 1252, 1258 (8th Cir 2006) (applying Missouri law) *Cf* PRODUCTS REST, § 3 ("It may be inferred that the harm was caused by a product defect when the incident that harmed the plaintiff was not, in the particular case, solely the result of causes other than product defect ")

[48] CAS contends the FDA recall is irrelevant because that recall was ostensibly prompted by a problem, electrostatic interference, which may not have been present in this case, even though that ostensibly different sort of problem with all Model 9700 Monitors manufactured between 1997 and 2001, albeit a problem that produced the exact same failure—"audible alarm might fail to sound," FDA Recall, *supra*--alleged here in the exact same model monitor, the Model 9700 This kind of dispute is one for the jury

critical because "a product recall can serve as circumstantial evidence sufficient to establish the defect" *Denton v DaimlerChrysler Corp*, 645 F Supp 2d 1215, 1226 (N D Ga 2009) [49]

In the final analysis and on this record, it is not possible to conclude that there was no genuine dispute about material facts and about the inferences that reasonably could to be drawn from the circumstantial evidence presented by the Graves' witnesses and CAS's witnesses In this light, summary judgment was not just a "drastic remedy" but an unwarranted one, one that "improperly deprived" the Graves of their right to "trial on disputed factual issues" *Hoard*, 387 S C at 545, 694 S E 2d at 4

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[49] *See Louisiana Citizens Prop Ins Corp v Gen l Elec Co*, 2010 WL 1561176, *4 (M D La 2010) (a safety "recall stands as more circumstantial evidence that GE manufactured a range with an unreasonably dangerous characteristic and that the range had that dangerous characteristic when it left GE's control") *See Fitting v Dell Inc*, 2008 WL 2152233, *8 (D Idaho 2008), *Hendrix v Evenflo Co Inc*, 2008 WL 2025840, *5 (N D Fla 2008), *Bombard v Gen l Motors Corp*, 238 F Supp 2d 464, 468 (N D N Y 2002), *Snodgrass v Ford Motor Co*, 2002 WL 485688, *5 (D N J 2002)

Allowing product recalls that predate a product-related incident to be used as circumstantial evidence to establish the defective nature of a product does not contradict the "considerable authority that product recalls occurring after the injury or harm, are not admissible to prove a product defect" *Kucik v Yamaha Motor Corp* 2010 WL 2694962, *6 n 3 (N D Ind 2010) (emphasis added, citations omitted), because such "authority" is based on the sound policy against discouraging subsequent remedial measures *See Rutledge v Harley-Davidson Motor Co* 2010 WL 445498, *3 (5th Cir 2010), *Hughes v Stryker Sales Corp*, 2010 WL 1961051, at *4 n 9

CONCLUSION

For the reasons set forth above, *amici* respectfully urge this Court to reverse the Circuit Court's determination that circumstantial evidence may not be used to prove a product defect in a strict products liability cause of action The Court should accordingly reverse the Circuit Court's grant of summary judgment and remand this case for trial

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May 16, 2011

APPENDIX A

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APPENDIX B

FORTY-SEVEN (47) STATES THAT ALLOW PLAINTIFFS TO PROVE PRODUCT DEFECT BY CIRCUMSTANTIAL EVIDENCE [1]

ALABAMA

Brooks v Colonial Chevrolet-Buick Inc , 579 So 2d 1328, 1332 (Ala 1991) ("If, however, under all the attendant circumstances, absent expert testimony, the jury could reasonably infer from the product's failure of performance that a defective condition caused the injury, a prima facie case has nonetheless been established ") (citing *Sears Roebuck & Co Inc v Haven Hills Farm Inc* , 395 So 2d 991, 995 (Ala 1981)) *See Meadows v Coca-Cola Bottling Inc* 392 So 2d 825, 827 (Ala 1981) ("circumstantial evidence of similar defects in other units of the product in litigation is competent to show that a product is defective") (citations omitted) *See Goree v Winnebago Industries Inc* 958 F 2d 1537, 1541 (11th Cir 1992) (construing Alabama law), *Rudd v General Motors Corp* , 127 F Supp 2d 1330, 1333 (M D Ala 2001) (construing Alabama law)

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[1] The two States that have not approved the use of circumstantial evidence to prove defect in products liability cases–Alaska and Maine (and which are denoted in the text of this Appendix by double-asterisks **)–have not rejected such use, rather they have not been presented with (or at least have not ruled on) the question (perhaps because their combined population of 2 3 million is less than one percent of the total for the nation, with the result that proportionally few products liability cases litigated in their courts) Furthermore, as highlighted in the text of this Appendix, case law in Alaska and Maine strongly suggests that each State would join the other 47 States if presented with the chance to do so in the appropriate case Thus, for example, although Alaska courts have not held that circumstantial evidence may be used in products liability cases, those courts often have quoted with approval California Supreme Court decisions that have so held *See e g , Clary v Fifth Ave Chrysler Center Inc* , 454 P 2d 244, 246-47 (Alaska 1969) ("The facts before us are similar in many respects to those considered by the Supreme Court of California in *Vandermark v Ford Motor Co* ," 391 P 2d 168, 170 (Cal 1964), where the California "supreme court held that products liability plaintiffs "were entitled to establish the existence of a defect and of appellee's responsibility for the defect by circumstantial evidence ")

ALASKA **

General Motors Corp v Farnsworth, 965 P 2d 1209, 1221 (Alaska,1998) ("We agree with the California Supreme Court that '[i]n particular circumstances, a product's design may perform so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers '") (quoting *Soule v General Motors Corp* , 882 P 2d 298, 305 (Cal 1994), which also similarly said "'an injured plaintiff will frequently be able to demonstrate the defectiveness of the product by resort to circumstantial evidence, even when the accident itself precludes identification of the specific defect at fault '" (quoting, in turn, *Barker v Lull Engineering Co* 573 P 2d 443, 454 (Cal 1978)), *Clary v Fifth Ave Chrysler Center Inc* , 454 P 2d 244, 246-47 (Alaska 1969) ("The facts before us are similar in many respects to those considered by the Supreme Court of California in *Vandermark v Ford Motor Co* , " 391 P 2d 168, 170 (Cal 1964), where the California "supreme court held that products liability plaintiffs "were entitled to establish the existence of a defect and of appellee's responsibility for the defect by circumstantial evidence ") *See Universal Motors Inc v Waldock*, 719 P 2d 254, 258 (Alaska 1986) (circumstantial evidence is enough to support the consumer's burden of proof in an action for breach of implied warranty that the damage was caused by a defect in factory materials or workmanship) *See also Wyller v Fairchild Hiller Corp* 503 F 2d 506, 508 (9th Cir 1974) (construing Alaska law)

ARIZONA

Dietz v Waller, 685 P 2d 744, 747 (Ariz 1984) ("Plaintiffs must be permitted to rely upon circumstantial evidence alone in strict liability cases, because it is unrealistic

to expect them to otherwise be able to prove that a particular product was sold in a defective condition") (citations omitted) *See Cox v May Dept Store Co* 903 P 2d 1119, 1122 n 2 (Ariz App 1995) ("A plaintiff may also use a *res ipsa loquitur* type of inference to prove the existence of a defect in a strict liability case") *Reader v General Motors Corp* 483 P 2d 1388, 1394 (Ariz 1971), *Metropolitan Property and Casualty Insurance Co v Del Webb's Coventry Homes Inc*, 2007 WL 5448133, *5-6) (Ariz App 2007) *See also Allstate Ins Co v Ford Motor Co* 2010 WL 1654145, *15-17 (D Ariz 2010) (applying Arizona law)

ARKANSAS

Yielding v Chrysler Motor Co Inc, 783 S W 2d 353, 355 (Ark 1990) ("Under our product liability statute, a plaintiff must prove that the product as supplied was defective so as to render it unreasonably dangerous and that such defect was the proximate cause of the accident It must be shown that the product was in a defective condition at the time it left the hands of the particular seller It is not necessary to establish these elements by direct proof, circumstantial evidence will suffice") *See Harrell Motors Inc v Flanery* 612 S W 2d 727, 729, (Ark 1981) ("proof of specific defect is not required when common experience tells us that the accident would not have occurred in the absence of a defect") *See also Williams v Smart Chevrolet Co*, 730 S W 2d 479, 482 (Ark 1987), *Ruminer v General Motors Corp*, 483 F 3d 561, 564-65 (8th Cir 2007) (applying Arkansas law)

CALIFORNIA

Soule v General Motors Corp, 882 P 2d 298, 305 (Cal 1994) ("'an injured plaintiff will frequently be able to demonstrate the defectiveness of the product by resort to circumstantial evidence, even when the accident itself precludes identification of the specific defect at fault'" (quoting *Barker v Lull Engineering Co*, 573 P 2d 443, 454 (Cal 1978)), *Campbell v General Motors Corp* 649 P 2d 224, 230 (Cal 1982) ("'the law recognizes that in a products liability case proof of [defect and proximate cause] by direct evidence is frequently impossible, a plaintiff may, therefore, satisfy his burden of proving defect and causation by circumstantial evidence'") (citations omitted), *Cardinal Health 301 Inc v Tyco Electronics Corp* 169 Cal App 4th 116, 147, 87 Cal Rptr 3d 5, 30 (Cal App 2008) (in a products liability case, "[c]ausation need not be proved with absolute certainty, and can be shown by circumstantial evidence") *See Aetna Casualty & Sur Co v Farmers Bros Co* 65 Cal App 4th 574, 578-79, 76 Cal Rptr 2d 587, 589 (Cal App 1998), *Elmore v American Motors Corp* 451 P 2d 84, 87 (Cal 1969) ("a plaintiff is entitled to establish the existence of the defect and the defendants' responsibility for it by circumstantial evidence "), *Vandermark v Ford Motor Co*, 391 P 2d 168, 170 (Cal 1964) ("plaintiffs were entitled to establish the existence of a defect and defendants' responsibility therefore by circumstantial evidence") *See also Notmeyer v Stryker Corp*, 502 F Supp 2d 1051, 1059-60 (N D Cal 2007) (applying California law)

COLORADO

Branco Eastern Co v Leffler, 482 P 2d 364, 366 (Colo 1971)("Circumstantial evidence is therefore an acknowledged basis for showing causation" in a products

liability case), *Union Insurance Co v RCA Corp*, 724 P 2d 80, 83 (Colo App 1986) (allowing a products liability plaintiff to proceed against manufacturer of an allegedly defective product using circumstantial evidence) *See Manzi by Manzi v Montgomery Elevator Co* 865 P 2d 902, 904 (Colo App 1993) (permitting products liability plaintiff to proceed against manufacturer of an allegedly defective product under the theory of *res ipsa loquitur*) *See also Truck Ins Exchange v MagneTek Inc*, 360 F 3d 1206, 1215 (10th Cir 2004) (applying Colorado law) ("circumstantial evidence may be used to prove causation ")

CONNECTICUT

Potter v Chicago Pneumatic Tool Co, 241 Conn 199, 218, 694 A 2d 1319, 1332 (1997) ("the feasible alternative design requirement imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration Such a rule would require plaintiffs to retain an expert witness even in cases in which lay jurors can infer a design defect from circumstantial evidence Connecticut courts, however, have consistently stated that a jury may, under appropriate circumstances, infer a [design] defect from the evidence without the necessity of expert testimony") (citations omitted), *Paranto v Piotrkowski*, 2010 WL 4226765, *4 (Conn Super Sept 22, 2010) (a design or manufacturing "'defect may be inferred by circumstantial evidence that (1) the product malfunctioned, (2) the malfunction occurred during proper use, and (3) the product had not been altered or misused in a manner that probably caused the malfunction '") (citations omitted) See *Standard Structural Steel Co v Bethlehem Steel Corp* 597 F Supp 164, 183-84 (D Conn 1984) (recognizing Connecticut law permits fact finder to

draw inference of product defect from circumstantial evidence), *Living & Learning Centre Inc v Griese Custom Signs, Inc* 491 A 2d 433, 435 (Conn App 1985) ("It is not necessary that the plaintiff in a strict tort action establish a specific defect as long as there is evidence of some unspecified dangerous condition In the absence of other identifiable causes, evidence of malfunction is sufficient evidence of a defect under § 402A of the SECOND RESTATEMENT OF TORTS ")

DELAWARE

Reybold Group Inc v Chemprobe Technologies Inc 721 A 2d 1267, 1270 (Del 1998) (in a products liability case, "a plaintiff may submit circumstantial evidence to a jury" to show that a defendant's product "was either defective or the proximate cause of its injury"), *Brown v Dollar Tree Stores Inc* 2009 WL 5177162, *4 (Del Super 2009) ("In the present case [for negligence], Plaintiff has presented sufficient circumstantial and direct evidence to permit a jury to find that the product was defective even without the aid of expert testimony ") See *Fatovic v Chrysler Corp* , 2003 WL 21481012, *2-3 (Del Super 2003)

FLORIDA

Parke v Scotty's Inc 584 So 2d 621, 623 (Fla App 1991) ("'proof of defect can be established by reasonable inferences from the circumstances '") (quoting, *Cassisi v Maytag Co* 396 So 2d 1140, 1150 (Fla App 1981), and citing *McCarthy v Florida Ladder Co* , 295 So 2d 707, 709-710 (Fla App 1974)) See *Miller v Allstate Insurance Co* 650 So 2d 671, 672 (Fla App 1995) ("a products liability plaintiff may establish a

prima facie case for jury consideration on circumstantial evidence")(citations omitted) *See also Ainsworth v KLI Inc*, 967 So 2d 296, 302 (Fla App 2007) *See Cassini* 396 So 2d at 1153 (it is "immaterial that the plaintiffs failed to identify the specific cause of the malfunction since it is inferred that the malfunction itself, under such circumstances, is evidence of the product's defective condition at both the time of the injury and at the time of sale") *See generally McCorvey v Baxter Healthcare Corp* 298 F 3d 1253,1259 (11th Cir 2002) (construing Florida law)

GEORGIA

Rose v Figgie Intern, Inc, 495 S E 2d 77, 81 (Ga App 1997) ("circumstantial evidence is particularly appropriate in product liability cases to show the manufacturing defect "), *Folsom v Sears Roebuck & Co Inc*, 329 S E 2d 217, 218 (Ga App 1985) ("Circumstantial evidence may be used to establish the existence of a manufacturing defect at the time a product left the manufacturer ") (citations omitted), *Firestone Tire & Rubber Co v King*, 244 S E 2d 905, 908-09 (Ga App 1978) ("We do not agree that it was necessary for the [plaintiff]/appellee to specify the nature of the defect in order to meet her burden of proof It has often been held that the existence of a manufacturing defect in a products liability case may be inferred from circumstantial evidence ") *Graff v Baja Marine Corp* 310 Fed Appx 298, 305, 2009 WL 226308, *6 (11th Cir 2009) (applying Georgia law)

HAWAI'I

Acoba v General Tire Inc 986 P 2d 288, 303-04 (Hawai'i,1999) (in a "claim for strict product liability, [p]roof of defect and causation may be provided by expert

testimony or by circumstantial evidence ") (citations omitted), *Wagatsuma v Patch*, 879 P 2d 572, 576 (Hawai'i App 1994) ("circumstantial evidence is sufficient to prove causation in an action based on negligence and/or strict liability ") (citations omitted) *See Stewart v Budget Rent-A-Car Corp*, 470 P 2d 240, 242 (Hawai'i, 1970) ("user's testimony on what happened is another method of proving that the product was defective") *See also Rodriguez v General Dynamics Armament & Tech Products Inc*, 696 F Supp 2d 1163, 1279 (D Hawai'I 2010) (applying Hawai'i law) ("Plaintiffs may rely on circumstantial evidence to prove the existence of a defect that caused them injury "), *Jenkins v Whittaker Corp* 785 F 2d 720, 732 (9th Cir 1986) (applying Hawai'i law)

IDAHO

Stanley v Lennox Industries Inc 102 P 3d 1104, 1107 (Idaho,2004) ("'A prima facie case may be proved by direct or circumstantial evidence of a malfunction of the product and the absence of evidence of abnormal use and the absence of evidence of reasonable secondary causes which would eliminate liability of the defendant '") (quoting *Farmer v International Harvester Co*, 553 P 2d 1306, 1311 (Idaho 1976)) *See Glanzman v Uniroyal Inc*, 892 F 2d 58, 60 (9th Cir 1989) ("A plaintiff need not prove a specific defect to carry his burden of proof He may prove a prima facie case by direct or circumstantial evidence of a malfunction of the product and the absence of evidence of abnormal use and the absence of evidence of reasonable secondary causes which would eliminate liability of the defendant ") (applying Idaho law and citing *Farmer*)

ILLINOIS

Boyd v Travelers Insurance Co 652 N E 2d 267, 273 (Ill 1995))("plaintiffs may be able to prove their products liability action against [a defendant] through circumstantial evidence "), *Davis v Material Handling Associates Inc* 929 N E 2d 1229, 1234, 1237 (Ill App 2010) ("a prima facie case of product liability can be established exclusively from circumstantial evidence", "Illinois law clearly states a products liability case can be established based on circumstantial evidence"), *Sorce v Naperville Jeep Eagle Inc* , 722 N E 2d 227, 237 (Ill App 1999)(proof of the elements of a strict products liability claim "may be made inferentially, by either direct or circumstantial evidence ") (citations omitted), *Bollmeier v Ford Motor Company*, 265 N E 2d 212, 217 (Ill App 1970) *See Rizzo v Corning Inc* 105 F 3d 338, 343 (11th Cir 1997) (applying Illinois law)

INDIANA

Cansler v Mills, 765 N E 2d 698, 706 (Ind App 2002) ("Expert testimony is not always required to establish an element of a products liability action if there is sufficient circumstantial evidence within a lay person's understanding that would constitute a basis for a legal inference and not mere speculation ") (citations omitted), disapproved on other grounds by *Schultz v Ford Motor Co* , 857 N E 2d 977 (Ind 2006) *See U-Haul Intern Inc v Nulls Machine and Mfg Shop* 736 N E 2d 271, 285 n 3 (Ind App 2000), *Montgomery Ward & Co v Gregg*, 554 N E 2d 1145, 1157 (Ind App 1990) *See also Whitted v General Motors Corp* , 58 F 3d 1200, 1207 (7th Cir 1995) (Posner, J)

(construing Indiana law), *Gaskin v Sharp Electronics Corp*, 2007 WL 2819660, *5-6 (N D Ind 2007) (applying Indiana law)

IOWA

Weyerhaeuser Co v Thermogas Co, 620 N W 2d 819, 827 (Iowa 2000) ("'[p]roof that a product was sold in a defective, unreasonably dangerous condition can be made by circumstantial evidence '") (citations omitted), *Mercer v Pittway Corp* 616 N W 2d 602, 620 (Iowa 2000) ("Proof that a product is unreasonably dangerous may be proven by circumstantial evidence "), *Aller v Rodgers Machinery Mfg Co*, 268 N W 2d 830, 834 (Iowa 1978) ("A plaintiff may, and usually does, establish that a product is unreasonably dangerous by circumstantial evidence ")

KANSAS

Dieker v Case Corp 73 P 3d 133, 145-46 (Kan 2003) ("the elements of a product liability action 'may be proved by circumstantial evidence'" and "'[p]roximate causation in a proper case may be shown by circumstantial evidence '") (citations omitted) See *Farmers Insurance Co Inc v Smith* 549 P 2d 1026, 1033 (Kan 1976), *Mays v Ciba-Geigy Corp*, 661 P 2d 348, 360 (Kan 1983) *See Dorn v BMW of North America LLC*, --- F Supp 2d ---, 2010 WL 3913226, *6 (D Kan 2010) (applying Kansas law) ("A product liability claim may be proven by either direct or circumstantial evidence ") (citing *Mays v Ciba-Geigy*), *Pritchett v Cottrell Inc*, 512 F 3d 1057, 1065 (8th Cir 2008) ("in Kansas, the elements of a products liability action may be proven by

circumstantial evidence") *See also Orth v Emerson Elec Co White-Rodgers Div* 980 F 2d 632, 637 (10th Cir 1992) (construing Kansas law)

KENTUCKY

Turpin v Stanley Schulze and Co Inc , 2009 WL 875218, *5 (Ky App April 3, 2009) (a "manufacturing defect" may be established by "circumstantial evidence") (citations omitted), *Perkins v Trailco Mfg and Sales Co* , 613 S W 2d 855, 857 (Ky 1981) ("the existence of a defect in the product itself may be established by a sufficient quantum of circumstantial evidence"), quoting *Holbrook v Rose Ky* 458 S W 2d 155, 157 (1970) *See Holbrook*, 458 S W 2d at 157 ("Proof of legal causation is required in cases involving liability for products including drugs, again in this instance, legal causation may be established by a quantum of circumstantial evidence from which a jury may reasonably infer that the product was a legal cause of the harm ") *See also Calhoun v Honda Motor Co* 738 F 2d 126, 130 (6th Cir 1984) (Under Kentucky law, once a plaintiff demonstrates that a product was defective, the plaintiff must establish causation, which may be proved by either direct or circumstantial evidence)

LOUISIANA

Lawson v Mitsubishi Motor Sales of America Inc , 938 So 2d 35, 47 (La 2006) ("the existence of a defect in the product itself may be established by a sufficient quantum of circumstantial evidence "), *Brown v Sears Roebuck and Co* , 514 So 2d 439, 444 (La 1987) ("[a] defect may be inferred from the circumstances of the accident "), *Jurls v Ford Motor Co* 752 So 2d 260, 265 (La App 2000) (although a

court cannot permissibly "infer the existence of a defect solely from the fact that an accident occurred, a manufacturing defect may be established by circumstantial evidence "), *id* at 266 (observing that expert testimony of a specific defect is not required to make out a prima facie case of manufacturing defect)

MAINE **

Simon v Town of Kennebunkport, 417 A 2d 982, 984-85 (Me 1980) (noting that in many types of actions (primarily sounding in negligence but also including in "products liability" actions), "evidence of other similar accidents or occurrences may be relevant circumstantially to show a defective or dangerous condition, notice thereof or causation on the occasion in question ") *See Suminski v Maine Appliance Warehouse Inc* , 602 A 2d 1173, 1175 (Me 1992) ("In some circumstances a breach of the implied warranty of merchantability under the [Uniform Commercial Code] may be established by circumstantial evidence ") (citations omitted), *Ginn v Penobscot Co* 334 A 2d 874, 879 (Me 1975) (circumstantial evidence may be used to establish negligent defect in a product) *See also Moores v Sunbeam Products Inc* 425 F Supp 2d 151, 158 & n 10 (D Me 2006) (applying Maine law) ("circumstantial evidence may establish a theory of strict liability" in a products liability case (citing *Ginn v Penobscot Co* , 334 A 2d 874 (Me 1975), and *Poulin v Aquaboggan Waterslide*, 567 A 2d 925 (Me 1989)), *Canning v Broan-Nutone LLC*, 480 F Supp 2d 392, 404 (D Me 2007) (applying Maine law) (plaintiffs may use circumstantial evidence to prove a product defect, citing, *inter alia, Moores v Sunbeam* and RESTATEMENT OF PRODUCTS LIABILITY § 3), *Canning v Broan-Nutone*, LLC, 2007 WL 1112355, *10-17 (D Me 2007) (same), TNT Road Co v

Sterling Truck Corp , 2004 WL 1626254, *6-7 (D Me 2004), *Ricci v Alternative Energy Inc* 211 F 3d 157, 162-63 (1st Cir 2000) (construing Maine law), *Moulton v Rival Co* 116 F 3d 22, 26-27 (1st Cir 1997) (construing Maine law)

MARYLAND

Mohammad v Toyota Motor Sales U S A Inc , 947 A 2d 598, 613 (Md App 2008) ("circumstantial evidence has been held sufficient to establish a prima facie case in a products liability action") *See Crickenberger v Hyundai Motor America*, 944 A 2d 1136, 1143 (Md 2008), *Laing v Volkswagen of America Inc* , 949 A 2d 26, 40 (Md App 2008), *Harrison v Bill Cairns Pontiac*, 549 A 2d 385, 390 (Md App 1988) *See also Assurance Co of America v York Intern Inc* , 305 Fed Appx 916, 921, 2008 WL 5455704, *4-5 (4th Cir 2008) (applying Maryland law), *Shreve v Sears Roebuck & Co* , 166 F Supp 2d 378, 407-08 (D Md 2001) (applying Maryland law)

MASSACHUSETTS

Calvanese v W W Babcock Co Inc , 412 N E 2d 895, 898 (Mass App 1980) ("It is now common in product liability cases to see circumstantial proof for the purpose of proving or disproving the cause of an accident ") (citations omitted) See *Cotter v McDonald's Restaurant of Mass Inc* 2006 WL 2382735, *2-3 (Mass App 2006), *Benavides v Stop & Shop Inc* 190 N E 2d 894, 896 (Mass 1963) *See also McKinnon v Skil Corp* , 638 F 2d 270, 277 (1st Cir 1981) (applying Massachusetts law) *Makuc v American Honda Motor Co Inc* , 835 F 2d 389, 392-93 (1st Cir 1987) (applying Massachusetts law to breach of warranty claim for defective product), White v

W W Grainger Co Inc , 1988 WL 290663, *1 (applying Massachusetts law to breach of warranty claim for defective product)

MICHIGAN

Webber v Hilborn, 2009 WL 5150082 (Mich App Dec 29, 2009) ("defective design or manufacture claim may be based on either direct or circumstantial evidence") (citations omitted), *Skinner v Square D Co* , 516 N W 2d 475, 480 (Mich 1994) ("This Court has repeatedly recognized that plaintiffs may utilize circumstantial proof to show the requisite causal link between a defect and an injury in products liability cases ") *See Lubanski v NLC Inc* 2010 WL 2836328, *3 (Mich App 2010), *Fox v Sherwin Williams Co* , 2010 WL 46905, *7 (Mich App 2010), *Kenkel v Stanley Works*, 665 N W 2d 490, 498 (Mich App 2003), *Holloway v General Motors Corp* 403 Mich 614, 271 N W 2d 777, 780 (Mich 1978) *See also Croskey v BMW of North America Inc* 532 F 3d 511, 516 (6th Cir 2008) (construing Michigan law)

MINNESOTA

Schafer v JLC Food Systems Inc , 695 N W 2d 570, 576 (Minn 2005) ("where the claimed defect is such that there is circumstantial evidence from which it can be inferred that it is more probable than not that the product was defective when it left defendant's hands, absent plaintiff's own want of care or misuse of the product, there is an evidentiary basis for submitting the issue of liability to the jury") (citing RESTATEMENT (THIRD) OF TORTS PRODUCTS Liability § 3 (1998)) *See International Financial Services Inc v Franz*, 534 N W 2d 261, 266 (Minn 1995) ("circumstantial evidence may be

sufficient to show the causal relationship between the product and the injury which followed its use ") (citations omitted) *See also Western Sur & Casualty Co v General Electric Co* 433 N W 2d 444, 447 (Minn App 1988) (holding that "in a strict products liability action, a plaintiff may use circumstantial evidence to prove the existence of a defect" and noting that the use of circumstantial evidence to prove the existence of a defect in a strict liability action is in essence a strict liability version of *res ipsa loquitur*)

MISSISSIPPI

Daniels v GNB Inc 629 So 2d 595, 602 (Miss 1993) ("circumstantial evidence will suffice on the element of showing that the product was defective when it left the hands of the defendants, and that it was in such defective condition at the time of the explosion ") (citations omitted) See *Coca Cola Bottling Co Inc of Vicksburg v Reeves by Reeves*, 486 So 2d 374, 382-83, 386 (Miss 1986) *See also Hammond v Coleman Co Inc* , 61 F Supp 2d 533, 541-42 (S D Miss 1999) (construing Mississippi law and citing *Daniels v GNB Inc* 629 So 2d 595, 602 (Miss 1993)), Thornton v Ford Motor Co , 2007 WL 2580337, *5 (S D Miss 2007) (construing Mississippi law and citing *Daniels v GNB Inc* 629 So 2d 595, 602 (Miss 1993))

MISSOURI

Martin v Survivair Respirators Inc , 298 S W 3d 23, 30 (Mo App 2009) ("Circumstantial evidence may be sufficiently relied on to support a verdict in a products liability case ") (citations omitted), *Strong v American Cyanamid Co* 261 S W 3d 493, 511 n 4 (Mo App 2007) ("Missouri precedent clearly permits the use of circumstantial

evidence to show that a product is defective"), *Peters v General Motors Corp*, 200 S W 3d 1, 18 (Mo App 2006) ("Sufficient circumstantial evidence will support a jury verdict in a products liability case ", "[Plaintiff] met his burden of proof and could submit to the jury the issue of strict liability-defective design, if the facts and circumstances in evidence fairly warrant the conclusion that the [product] was defectively designed and dangerous and caused the accident and the resulting injuries "), *Klein v General Elec Co* 714 S W 2d 896, 900 (Mo App 1986) ("[t]he existence of a defect may be inferred from circumstantial evidence with or without the aid of an expert witness") *See Sappington v Skyjack Inc* 512 F 3d 440, 447 (8th Cir 2008) (construing Missouri law)

MONTANA

Wood v Old Trapper Taxi, 952 P 2d 1375, 1384 (Mont 1997) ("a claim of product defect may be proven by circumstantial evidence and inferences therefrom") See *Eisenmenger by Eisenmenger v Ethicon Inc* 871 P 2d 1313, 1318 (Mont), cert denied, 513 U S 919 (1994), *Hagen v Dow Chem Corp*, 863 P 2d 413, 417 (1993) ("it is well established that in actions dealing with product liability, sufficient evidence to make a prima facie case may consist of establishing the circumstances of the incident, similar occurrences under similar circumstances, and elimination of alternative causes "), *Brandenburger v Toyota Motor Sales U S A Inc* 513 P 2d 268, 274 (Mont 1973) *See Brown v North American Manufacturing Co*, 576 P 2d 711, 720 (Mont 1978) ("defendant, in a given [products liability] case, may effectively discharge his burden [of proof regarding an assumption of risk defense] through proof of the subjective elements by circumstantial evidence ")

NEBRASKA

Genetti v Caterpillar Inc 621 N W 2d 529, 542 (Neb 2001) ("Although expert testimony pointing to a specific defect would be the best means of proving the existence of a defect in some cases, proof that the warranted product is defective may be circumstantial in nature and may be inferred from the evidence "), *Con Urbach v Industrial Chemical Laboratories Inc* 1997 WL 576595, *7 (Neb App 1997) ("a plaintiff may rely upon circumstantial evidence alone in a strict products liability case, since it is unrealistic to expect a plaintiff to otherwise be able to prove that a particular product was sold in a defective condition ")

NEVADA

Allison v Merck and Co Inc , 878 P 2d 948, 952 n 5 (Nev 1994) ("plaintiffs may rely on circumstantial evidence to establish a product defect ") (citations omitted), *Stackiewicz v Nissan Motor Corp in U S A* 686 P 2d 925, 929 (Nev 1984) ("evidence of a steering malfunction which resulted in the driver losing control of the vehicle might properly be accepted by the trier of fact as sufficient circumstantial proof of a defect, or an unreasonably dangerous condition, without direct proof of the mechanical cause of the malfunction ") *See Krause Inc v Little*, 34 P 3d 566, 571 (Nev 2001) ("expert testimony is not always necessary to establish the existence of a manufacturing defect"),

NEW HAMPSHIRE

Elliott v Lachance, 256 A 2d 153, 156 (N H 1969) (because "'[t]he cornerstone rule in products liability is that proof of mere injury furnishes no rational basis for inferring that the product was defective for its intended use,'" a products liability a plaintiff must, and therefore may adduce "sufficient circumstantial evidence to establish such unfitness or causal defect") Notably, in discussing the propriety of using circumstantial evidence, the New Hampshire Supreme Court cited both *Vandermark v Ford Motor Co* 391 P 2d 168 (Cal 1964) (Traynor, J), which held that "plaintiffs were entitled to establish the existence of a defect and defendants' responsibility therefore by circumstantial evidence," *id* 391 P 2d at 170, and *Elmore v American Motors Corp* , 451 P 2d 84 (Cal 1969), which noted that *Vandermark* "recognized that a plaintiff is entitled to establish the existence of the defect and the defendants' responsibility for it by circumstantial evidence," *id* at 87, and then held "[n]o reason appears why the same rule should not apply where the plaintiff is seeking to prove that the defect caused his injuries" *Id See McConchie v Samsung Electronics America Inc* 2000 WL 1513777, *3 (D N H 2000) (applying Maine law) ("[w]hile 'mere injury' is insufficient to prove liability, when a plaintiff cannot identify the specific defect, product defect may be proven through circumstantial evidence of malfunction and a lack of evidence of other causes") (citing *Elliott v Lachance*)

NEW JERSEY

Tluczek v Prestige BMW of Ramsey, 2009 WL 2601625, *2 (N J App Aug 26, 2009) ("a manufacturing defect" can be proven by "(1) direct evidence, (2) circumstantial

evidence that justifies such an inference, or (3) negating all other possible reasons for the occurrence to make it reasonable to assume that the defect existed prior to the sale ") (citations omitted), *Lauder v Teaneck Volunteer Ambulance Corps*, 845 A 2d 1271, 1277 (N J App 2004) (in a products liability action, "[t]o prove the existence of a defect, a plaintiff may rely on the testimony of an expert who has examined the product or offers an opinion on the product's design Alternatively, a plaintiff may produce circumstantial evidence of a defect ") *See Myrlak v Port Authority of New York and New Jersey*, 723 A 2d 45, 55, 56-57 (N J 1999) (stating "the requirements that the defect occurred before the product left the control of the manufacturer, can be satisfied through direct and circumstantial evidence," expressly adopting the approach taken by the RESTATEMENT (THIRD) OF TORTS PRODUCTS LIABILITY § 3 (1998), noting "the historical antecedent to Section 3 of the RESTATEMENT is traceable to the negligence doctrine of *res ipsa loquitur*" and that "Section 3 of the RESTATEMENT in a products liability case does precisely what *res ipsa loquitur* does in a negligence context"), *id* at 56 ("A plaintiff can satisfy the requirements of Section 3 of the RESTATEMENT by direct and circumstantial evidence as well as evidence that negates causes other than product defect ") *See State Farm Fire & Casualty Co v Kaz*, Inc , 2008 WL 2122639, *3-4 (N J App 2008), *Jerista v Murray*, 883 A 2d 350, 364 (N J 2005), *Scanlon v General Motors Corp* 326 A 2d 673, 678-79 (N J 1974)

NEW MEXICO

Salinas v John Deere Co Inc , 707 P 2d 27, 32 (N M App 1984) ("The plaintiff may rely on circumstantial evidence" to prove that a product is defective in an action for

strict products liability), *Richards v Upjohn Co* 625 P 2d 1192, 1195 (N M App 1980) (in an action for products liability, "[c]ausation may be established by circumstantial evidence ") *See Springer Corp v Dallas & Mavis Forwarding Co Inc* 559 P 2d 846, 848 (N M App 1976)

NEW YORK

Bueno v Chase Manhattan Bank, 23 Misc 3d 1106(A), 2009 WL 960719, *7 (N Y Sup April 9, 2009) ("Plaintiff may rely on circumstantial evidence to prove a manufacturing defect ") (citations omitted), *Ramos v Howard Industries Inc* , 885 N E 2d 176, 178 (N Y 2008) ("It is well settled that a products liability cause of action may be proven by circumstantial evidence, and thus, a plaintiff need not identify a specific product defect") (citing *Speller v Sears Roebuck & Co* 790 N E 2d 252 (N Y 2003), *Halloran v Virginia Chems* 361 N E 2d 991 (N Y 1977), *Codling v Paglia*, 298 N E 2d 622 (N Y 1973)), *Speller ex rel Miller v Sears Roebuck and Co* , 790 N E 2d 252, 254-55 (N Y 2003) ("New York has long recognized the viability of this circumstantial approach in products liability cases In this regard, New York law is consistent with the RESTATEMENT [THIRD] OF TORTS PRODUCTS LIABILITY § 3 [1998]) "), *Landahl v Chrysler Corp* , 534 N Y S 2d 245, 246 (N Y App 1988) ("plaintiff in a products liability action need not establish the precise nature of the defect in order to make out a prima facie case")

NORTH CAROLINA

DeWitt v Eveready Battery Co Inc, 565 S E 2d 140, 151 (N C 2002) ("the burden sufficient to raise a genuine issue of material fact in such a case may be met if the plaintiff produces adequate circumstantial evidence of a defect This evidence may include such factors as (1) the malfunction of the product, (2) expert testimony as to a possible cause or causes, (3) how soon the malfunction occurred after the plaintiff first obtained product and other relevant history of the product, such as its age and prior usage by plaintiff and others, including evidence of misuse, abuse, or similar relevant treatment before it reached the defendant, (4) similar incidents, "'when[ ] accompanied by proof of substantially similar circumstances and reasonable proximity in time,"' (5) elimination of other possible causes of the accident, and (6) proof tending to establish that such an accident would not occur absent a manufacturing defect The plaintiff does not have to satisfy all these factors to create a circumstantial case, and if the trial court determines that the case may be submitted to the jury, "'[i]n most cases, the weighing of these factors should be left to the finder of fact[ ]'"" (citations omitted)), *Red Hill Hosiery Mill Inc v MagneTek Inc*, 582 S E 2d 632, 635 (N C App 2003) ("a products liability case can be proven by circumstantial evidence") (citing *DeWitt*)) *See also Walsh v Restoration Hardware Inc*, 122 Fed Appx 28, 30, 2005 WL 327556, 2 (4th Cir 2005) (applying North Carolina law) ("If the plaintiffs do not present any direct evidence of the product's defectiveness at the time of sale, they can still raise an issue of material fact sufficient to survive summary judgment through circumstantial evidence ")

NORTH DAKOTA

Endresen v Scheels Hardware and Sports Shop Inc, 560 N W 2d 225, 232 (N D 1997) ("Circumstantial evidence will also suffice to prove proximate cause in a products liability case ") (citations omitted), *Herman v General Irrigation Co* 247 N W 2d 472, 473 (N D 1976) (in an action for strict products liability "[a] defect in the product need not be conclusively proved, but can be shown by circumstantial evidence " (Syl No 4, by the Court))

OHIO

Atkins v General Motors Corp 564, 725 N E 2d 727, 733 (Ohio App 2009) ("expert testimony is not always required to prove the material elements of a design defect claim In some cases, circumstantial evidence alone, without expert testimony, will suffice to document the existence of a design defect "), *McAuliffe v W States Import Co Inc*, 651 N E 2d 957, 958 n 1 (Ohio,1995) ("' it shall be sufficient for the claimant to present circumstantial or other competent evidence that establishes, by a preponderance of the evidence, that the product in question was defective'"), *Watson v Ford Motor Co* 2007 WL 4216975, *12 (Ohio App 2007) ("Ohio courts have held that the existence of a design defect in a strict products-liability action may be shown by either direct or circumstantial evidence "), *Triplex Co v R L Pomante Contractor*, 2006 WL 3240534, *5 (Ohio App 2006) *See Najib v Meridian Medical Technologies Inc* 179 Fed Appx 257, 260, 2006 WL 1133299, *3 (6th Cir 2006) (applying Ohio law) ("the existence of a product defect can be demonstrated by circumstantial evidence, without the need for expert testimony, even if direct evidence is potentially available ")

OKLAHOMA

Nash v General Motors Corp, 153 P 3d 73, 75 (Okla App 2006) (in a products liability action, "[t]he existence of a defect may be proved by direct or circumstantial evidence, or a combination thereof ") (citing *Kirkland v General Motors Corp*, 521 P 2d 1353, 1364 (Okla 1974) *See Lee v Volkswagen of America Inc*, 688 P 2d 1283, 1285 (Okla 1984) ("circumstantial evidence, coupled with the proper inferences drawn from it, is clearly an acceptable minimal basis" to prove a product is defective), *Tigert v Admiral Corp* 612 P 2d 1381, 1383-84 (Okla App 1979) (same) *See also Henderson v Sunbeam Corp*, 46 F 3d 1151, 1995 WL 39022, *1 (10th Cir 1995) (applying Oklahoma law) (circumstantial evidence has always been considered an acceptable, indeed often necessary, means of proof in product cases ")

OREGON

Krause v American Aerolights Inc, 762 P 2d 1011, 1014 (Or 1988) ("circumstantial evidence of a dangerous defect in a similar product" is admissible because it is "is relevant to prove that the product involved in this accident was defective "), *Roe Roofing Inc v Lumber Products Inc*, 688 P 2d 425, 427 (Or App 1984) ("' a latent defect may be proved circumstantially by evidence that the product was used in a normal manner '") (citations omitted) *See also McCathern v Toyota Motor Corp*, 332 Or 59, 23 P 3d 320, 331 (Or 2001) ("evidence related to risk-utility balancing, which may include proof that a practicable and feasible design alternative was

available, will not always be necessary to prove that a product's design is defective and unreasonably dangerous")

PENNSYLVANIA

Barnish v KWI Bldg Co 980 A 2d 535, 540 (Pa 2009) ("the malfunction theory" of products liability "allows for proof of strict product liability claims through circumstantial evidence "), *Dansak v Cameron Coca-Cola Bottling Co* , 703 A 2d 489, 496 (Pa Super 1997) ("From this circumstantial evidence, a jury may be permitted to infer that the product was defective at the time of sale ") *See Rogers v Johnson & Johnson Prods Inc* 565 A 2d 751, 754 (Pa 1989), *Woodin v J C Penney Co Inc* 629 A 2d 974, 975-76 (Pa Super 1993), *Padillas v Stork-Gamco Inc* 186 F 3d 412, 415 (3d Cir 1999) (construing Pennsylvania law)

RHODE ISLAND

Olshansky v Rehrig Intern , 872 A 2d 282, 287 (R I 2005) (in a strict products liability action, "[a] plaintiff is permitted to draw inferences of fact based on circumstantial evidence"), *Thomas v Amway Corp* , 488 A 2d 716, 722 (R I 1985) ("Introducing probative circumstantial evidence that may create inferences of fact not otherwise subject to direct proof, and which could prove the defect and the causal connection is entirely consonant with the theory of strict liability ") *See Sheehan v The North American Marketing Corp* , 610 F 3d 144, 150 (1st Cir 2010) (applying Rhode Island law)

SOUTH DAKOTA

Kreager v Blomstrom Oil Co , 379 N W 2d 307, 310 (S D 1985) ("To recover under a theory of strict liability, the plaintiff must prove by a preponderance of the evidence that the product was defective when delivered The existence of a defect may, of course, be established by circumstantial evidence ") (citations omitted), *Drier v Perfection Inc* 259 N W 2d 496, 504 (S D 1977) (citations omitted) ("No specific defect need be shown if the evidence, direct or circumstantial, permits the inference that the problem was caused by a defect A defect may be inferred from proof that the product did not perform as intended by the manufacture ") *See also Kendall v Bausch & Lomb Inc* 2009 WL 1740008 *11 (D S D 2009) ("the general rule is that the existence of a defect may be proven by direct or by circumstantial evidence, and a circumstantial case, by itself, is not a bar to a jury determination ") (construing South Dakota law)

TENNESSEE

Browder v Pettigrew, 541 S W 2d 402, 405 (Tenn 1976) ("we adhere to the body of law which holds that a defect in a product, as well as any other material fact, may be proven by direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence ") (citations omitted) *See Whaley v Rheem Mfg Co* , 900 S W 2d 296, 299 (Tenn App 1995) ("defect in a product may be proven by direct evidence, circumstantial evidence, or a combination of both ") (citation omitted) *See also Mohr v DaimlerChrysler Corp* , 2008 WL 4613584, *4 (Tenn App 2008)

TEXAS

Shaun T Mian Corp v Hewlett-Packard Co, 237 S W 3d 851, 854 (Tex App 2007) ("we conclude appellants' circumstantial evidence was sufficient to raise an issue of material fact as to each contested element of their manufacturing defect claim "), *Kindred v Con/Chem Inc* 650 S W 2d 61, 63 (Tex 1983) ("Although no witness could conclusively state that the product was the cause, the jury could have made that determination from circumstantial evidence ") (citations omitted), *Cooper Tire & Rubber Co v Mendez*, 204 S W 3d 797, 807 (Tex 2006) ("circumstantial evidence of a product defect may be offered"") (citations omitted), *Sipes v General Motors Corp*, 946 S W 2d 143, 155 (Tex App 1997) (when "the plaintiff has no evidence of a specific design defect or manufacturing defect, he may offer evidence of the product's malfunction as circumstantial proof of the defect ") *See Ford Motor Co v Ridgway*, 135 S W 3d 598, 603 (Tex 2004) (Hecht and Owen, JJ,, concurring) ("Few would question the use of circumstantial evidence to prove products liability in appropriate cases The hard issue is not whether it can be done, but when and how ") *See also Ayres v Sears Roebuck & Co* 789 F 2d 1173, 1175 (5th Cir 1986) (observing that a Texas design defect is "provable by direct or circumstantial evidence, based on fact or opinion testimony "), abrogated on other grounds, *Torres v Oakland Scavenger Co*, 487 U S 312 (1988)

UTAH

King v Searle Pharmaceuticals Inc, 832 P 2d 858, 862 (Utah 1992) (where circumstances make it impossible "to adduce direct evidence of causation the doctrine of *res ipsa loquitur* is sufficient to create a factual inference of product defect

sufficient to preclude summary judgment" for the products liability defendant Thus, a plaintiff may "establish[ ] a prima facie case of liability based on *res ipsa loquitur* if the circumstances of the case otherwise raise a reasonable inference that [the product manufacturer] was liable under either products liability or negligence law ") See *Alder v Bayer Corp AGFA Div* 61 P 3d 1068, 1089 (Utah 2002) *See also Taylor v Cooper Tire & Rubber Co* 130 F 3d 1395, 1398 (10th Cir 1997) (construing Utah law)

VERMONT

985 Associates Ltd v Daewoo Electronics America Inc , 945 A 2d 381, 386 (Vt 2008) (" Defendant's argument that plaintiffs' experts should be excluded because they were unable to identify a specific defect in the microwave is without merit The central issue here is the admissibility of the proffered expert testimony, not the sufficiency of the evidence in proving plaintiffs' case Again, the fact that Austin was able to arrive at the microwave as the source of the fire only by way of elimination of other sources does not render his methodology unreliable Experts in products liability cases are rarely able to establish causation to a certainty, such cases tend to be more of an exercise in excluding other causes and determining the likely cause based on circumstantial evidence "), *Travelers Insurance Cos v Demarle Inc U S A* , 878 A 2d 267, 272 (Vt 2005) ("causation in a products liability or warranty case can be proved through circumstantial evidence") *See also Allstate Insurance Co v Hamilton Beach/Proctor Silex, Inc* , 473 F 3d 450, 452-56 (2d Cir 2007) (construing Vermont law)

VIRGINIA

Owens-Corning Fiberglas Corp v Watson, 413 S E 2d 630, 639 (Va 1992) (in a product liability action, circumstantial evidence is "sufficient to support the jury's finding that [a plaintiff] was exposed to [a defendant's product] and that such exposure was a proximate cause of his death "), *Southern States Co-op Inc v Doggett*, 292 S E 2d 331, 335 (Va 1982) ("Although the fact-finder is not authorized to indulge in speculation or guesswork, this does not destroy the weight of circumstantial evidence in fixing civil liability," including in a products liability case "'Proof of facts from which it can be reasonably inferred that an act or circumstance sought to be established occurred or existed is sufficient to authorize submission of the issue to the jury But such circumstantial evidence must be sufficient to establish that the result alleged is a probability rather than a mere possibility '") (citations omitted)) *See also Wilder v Toyota Motor Sales U S A Inc* 23 Fed Appx 155, 158 (4th Cir 2001) ("there is no per se rule requiring expert testimony about the specific defect in products liability cases, and in some cases, circumstantial evidence alone may be used to establish product liability in Virginia ") (construing Virginia law)

WASHINGTON

Lockwood v AC & S Inc , 722 P 2d 826, 840-41 (Wash App 1986), aff'd, 744 P 2d 605 (Wash 1987) ("Circumstantial evidence may establish the entire basis for recovery under either negligence or strict products liability ") *See Allen v Asbestos Corp Ltd* 138 Wash App 564, 157 P 3d 406, 409 (Wash App 2007), *Pagnotta v Beall*

Trailers of Oregon Inc 991 P 2d 728, 732 (Wash App 2000) *See also Transue v Aesthetech Corp* 341 F 3d 911, 920 (9th Cir 2003) (applying Washington law)

WEST VIRGINIA

Bennett v Asco Services Inc , 621 S E 2d 710, 717 (W Va 2005) ("A plaintiff is not required to establish a strict products liability cause of action by identifying the specific defect that caused the loss, but instead may permit a jury to infer the existence of a defect by circumstantial evidence "), *Anderson v Chrysler*, 403 S E 2d 189, 193 (W Va 1991) ("Circumstantial evidence may be sufficient to make a prima facie case in a strict liability action, even though the precise nature of the defect cannot be identified, so long as the evidence shows that a malfunction in the product occurred that would not ordinarily happen in the absence of a defect " "In most instances the plaintiff will produce direct evidence of the product's defective condition In some instances, however, the plaintiff may not be able to prove the precise nature of the defect in which case reliance may be had on the "malfunction" theory of product liability This theory encompasses nothing more than circumstantial evidence of product malfunction It permits a plaintiff to prove a defect in a product with evidence of the occurrence of a malfunction and with evidence eliminating abnormal use or reasonable, secondary causes for the malfunction It thereby relieves the plaintiff from demonstrating precisely the defect yet it permits the trier-of-fact to infer one existed from evidence of the malfunction, of the absence of abnormal use and of the absence of reasonable, secondary causes " (citations omitted)), See *Beatty v Ford Motor Co* 574 S E 2d 803, 807 (W Va 2002)

WISCONSIN

Sumnicht v Toyota Motor Sales USA Inc 360 N W 2d 2, 18 (Wis 1984) ("In addition to expert testimony, the presence of a product's defective design that is unreasonably dangerous can be established by the presentation of circumstantial evidence "), *Rennick v Fruehauf Corp* , 264 N W 2d 264, 267 (Wis 1978) ("For the plaintiff to prevail on a products liability claim he must show, among other things, that the product was in a defective condition when it left the possession or control of the seller The existence of the defect may be shown by a *res ipsa* type of inference ") *See also Godoy ex rel Gramling v E I du Pont de Nemours and Co* 768 N W 2d 674, 698-99 (Wis 2009) (Prosser, Ziegler, & Gableman, JJ , concurring) ("under RESTATEMENT (THIRD) [OF PRODUCTS LIABILITY] § 3, circumstantial evidence may be sufficient in some cases to support a conclusion that a product was defectively designed without requiring proof of a reasonable alternative design, if the product fails to perform its intended function ")

WYOMING

Valentine v Ormsbee Exploration Corp , 665 P 2d 452, 462 (Wyo 1983) ("It is not necessary to prove a specific defect, and while proof of the failure or malfunction of an article standing alone is insufficient to prove that a product was defective, it is a strong circumstance to consider along with the remaining facts "), *Shipton Supply Co Inc v Bumbaca*, 505 P 2d 591, 594 (Wyo 1973) ("the defectiveness of a product may be proved by circumstantial evidence")

APPENDIX C

PLAINTIFFS NEED NOT IDENTIFY SPECIFIC PRODUCT DEFECT

See e g Ramos v Howard Industries Inc , 885 N E 2d 176, 178 (N Y 2008) ("It is well settled that a products liability cause of action may be proven by circumstantial evidence, and thus, a plaintiff need not identify a specific product defect")

Bennett v Asco Services Inc , 621 S E 2d 710, 717 (W Va 2005) ("A plaintiff is not required to establish a strict products liability cause of action by identifying the specific defect that caused the loss, but instead may permit a jury to infer the existence of a defect by circumstantial evidence ")

Stanley v Lennox Industries Inc , 102 P 3d 1104, 1107 (Idaho 2004) (circumstantial evidence may be used to determine whether a product is defective "While direct evidence of identifiable defect is the strongest evidence of a product's defective condition, such evidence of a defect in a product which was present when it left the manufacturer's control will be rare and unusual," with the result that "a plaintiff need not prove a specific defect to carry his burden of proof ")

Sanders v Quikstak Inc , 889 F Supp 128, 131 (S D N Y 1995) (applying New York law) ("Under certain circumstances, however, a plaintiff need not prove a specific defect in the product at issue Despite an absence of proof of any specific defect in a product, a jury may infer that an accident occurred because of a defect when the plaintiff has proven that the product did not perform as intended and has excluded all causes of the accident not attributable to the defendant ")

Henderson v Sunbeam Corp , 46 F 3d 1151 (10th Cir 1995) (applying Oklahoma law) (plaintiff may prove case with circumstantial evidence without identifying a particular defective component)

Soule v General Motors Corp , 882 P 2d 298, 305 (Cal 1994) ("'an injured plaintiff will frequently be able to demonstrate the defectiveness of the product by resort to circumstantial evidence, even when the accident itself precludes identification of the specific defect at fault '") (citations omitted)

Anderson v Chrysler Corp , 403 S E 2d 189 (W Va 1991) (plaintiff need not identify the specific defect that caused the harm)

Landahl v Chrysler Corp , 534 N Y S 2d 245, 246 (N Y App 1988) ("plaintiff in a products liability action need not establish the precise nature of the defect in order to make out a prima facie case")

Living & Learning Centre Inc v Griese Custom Signs Inc , 491 A 2d 433, 435 (Conn App 1985) ("It is not necessary that the plaintiff in a strict tort action establish a specific defect as long as there is evidence of some unspecified dangerous condition ")

Dietz v Waller, 685 P 2d 744, 745 (Ariz 1984) ("[N]o specific defect need be shown if the evidence, direct or circumstantial, permits the inference that the accident was caused by a defect")

Valentine v Ormsbee Exploration Corp , 665 P 2d 452, 462 (Wyo 1983) ("It is not necessary to prove a specific defect, and while proof of the failure or malfunction of an article standing alone is insufficient to prove that a product was defective, it is a strong circumstance to consider along with the remaining facts ")

Cassisi v Maytag Co , 396 So 2d 1140, 1153 (Fla App 1981) (it is "immaterial that the plaintiffs failed to identify the specific cause of the malfunction since it is inferred that the malfunction itself, under such circumstances, is evidence of the product's defective condition at both the time of the injury and at the time of sale")

Harrell Motors Inc v Flanery 612 S W 2d 727, 729, (Ark 1981) ("proof of specific defect is not required when common experience tells us that the accident would not have occurred in the absence of a defect")

Garrett v Nobles, 630 P 2d 656, 658 (Idaho 1981) ("plaintiff need not prove a specific defect in order to carry burden of proof")

Knight v Otis Elevator Co , 596 F 2d 84 (3d Cir 1979) (applying Pennsylvania law) (plaintiffs need not prove the existence of a specific defect if they can show that the product malfunctioned in the absence of abnormal use and reasonable secondary causes)

Holloway v General Motors Corp , 271 N W 2d 777 (Mich 1978) (plaintiffs were not required to prove the specific defect in the product)

Drier v Perfection Inc , 259 N W 2d 496, 504 (S D 1977) ("No specific defect need be shown if the evidence, direct or circumstantial, permits the inference that the problem was caused by a defect A defect may be inferred from proof that the product did not perform as intended by the manufacture ")

General Motors Corp v Hopkins, 548 S W 2d 344, 349-50 (Tex 1977) (if a "plaintiff has no evidence of a specific defect in the design or manufacture of the product, he may offer evidence of its malfunction as circumstantial proof of [its] defect")

APPENDIX D

CIRCUMSTANTIAL EVIDENCE IN DESIGN DEFECT CASES

See, e g Davis v Material Handling Associates Inc , 929 N E 2d 1229, 1234 (Ill App 2010) ("a prima facie case of [defective design] product liability can be established exclusively from circumstantial evidence")

Paranto v Piotrkowski, 2010 WL 4226765, *4 (Conn Super Sept 22, 2010) (a design "'defect may be inferred by circumstantial evidence") (citations omitted)

Alza Corp v Thompson, 2010 WL 1254610, *19 (Tex App April 1, 2010) ("when 'the plaintiff has no evidence of a specific design defect , he may offer evidence of the product's malfunction as circumstantial proof of the defect '") (citations omitted)

Atkins v GMC 564, 725 N E 2d 727, 733 (Ohio App 2009) ("In some cases, circumstantial evidence alone will suffice to document the existence of a design defect ")

Webber v Hilborn, 2009 WL 5150082 (Mich App Dec 29, 2009) ("defective design claim may be based on either direct or circumstantial evidence") (citations omitted)

Peters v GMC, 200 S W 3d 1, 18 (Mo App 2006) ("Sufficient circumstantial evidence will support a jury verdict in a products liability case "), "[Plaintiff] met his burden of proof if the facts and circumstances in evidence fairly warrant the conclusion that the [product] was defectively designed and dangerous and caused the accident and the resulting injuries ")

Lauder v Teaneck Volunteer Ambulance Corps, 845 A 2d 1271, 1277 (N J ,App 2004) (in a products liability action, "[t]o prove the existence of a defect, a plaintiff may rely on circumstantial evidence of a defect ")

Potter v Chicago Pneumatic Tool Co , 241 Conn 199, 218, 694 A 2d 1319, 1332 (1997) ("a jury may infer a [design] defect from the evidence without the necessity of expert testimony") (citations omitted)

Sumnicht v Toyota Motor Sales U S A Inc , 360 N W 2d 2, 18 (Wis 1984) ("defective design can be established by the presentation of circumstantial evidence ")

General Motors Corp Hopkins, 548 S W 2d 344, 349-50 (Tex 1977) ("[i]f the plaintiff has no evidence of a specific defect in the design of the product, he may offer evidence of its malfunction as circumstantial proof")