

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 2006-CP-10-4773

5 Star, Inc., Petitioner,

v.

Ford Motor Company, Respondent.

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BRIEF OF RESPONDENT

S.C. Supreme Court

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QUESTIONS PRESENTED

- I. Whether the Court of Appeals correctly concluded 5 Star's experts were not qualified to offer opinions as to whether Ford's conduct was negligent.
- II. Whether the Court of Appeals correctly concluded 5 Star failed to present any evidence that Ford was negligent in the design of the truck and its speed control deactivation switch.
- III. Whether 5 Star failed to prove the truck was in essentially the same condition at the time of the fire as it was when it left Ford's control in 1995.
- IV. Whether the trial court should have dismissed 5 Star's case as a sanction for its spoliation of crucial evidence.

STATEMENT OF THE CASE

5 Star, Inc. ("5 Star") filed this product liability action against Ford Motor Company ("Ford") seeking damages from a fire allegedly caused by a defect in a 1996 Ford pickup truck owned by 5 Star. (App. at 151–52.) The Complaint's sole cause of action was for negligent design of the truck,¹ and 5 Star sought to recover actual and punitive damages. (*Id.*) At trial, Ford asserted, *inter alia*, that it was entitled to judgment because 5 Star (1) failed to present any evidence that Ford was negligent, (2) destroyed the truck and its allegedly defective speed control deactivation switch after the fire, and (3) failed to prove that the vehicle was in the same condition at the time of the fire as it was when it left Ford's control.

¹ There was no claim for strict liability. *See* 5 Star's Complaint (App. 151–52 (stating a single cause of action, found in paragraph 8, for "negligent, careless, willful and wanton" conduct)); *see also* 5 Star, Inc. v. Ford Motor Co., 395 S.C. 392, 394 n.1, 718 S.E.2d 220, 221 n.1 (Ct. App. 2011) ("5 Star made no claim for strict liability or breach of warranty."). Accordingly, at trial, there was no jury charge on strict liability. (*See* App. 830–56.)

Following a trial in September 2008, the jury returned a verdict awarding 5 Star \$41,000 in actual damages. (*Id.* at 143.) Ford timely moved for judgment notwithstanding the verdict, new trial absolute, and new trial *nisi remittitur*. (*Id.* at 201–53.) After hearing argument, the trial court denied Ford’s post-trial motions. (*Id.* at 144.) Ford filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCF. (*Id.* at 277–78). The trial court subsequently entered an order taxing costs against Ford in the amount of \$416.21 and reflecting a \$3,000 stipulated set-off from the verdict. (*Id.* at 145.) The trial court denied the remainder of Ford’s motion to alter or amend the judgment on December 3, 2008. (*Id.* at 146–50).

Ford timely appealed to the Court of Appeals. The Court of Appeals heard oral argument in the case and, on August 10, 2011, reversed the trial court, holding that the trial court erred in denying Ford’s motion for a directed verdict. (*Id.* at 2.)² The Court of Appeals emphasized that the plaintiff in a design defect case must prove negligent conduct by the defendant *at or before* the time of manufacture. (*Id.* at 4.) The Court of Appeals noted 5 Star’s failure to present evidence of Ford’s conduct or testimony from experts in automotive design (*id.* at 4–5), concluding that “[b]ecause 5 Star failed to present any expert testimony on the design of the speed control deactivation switch and whether the design was negligent in 1996, the trial court erred in not directing a verdict in favor of Ford” (*id.* at 7).³

² The Court of Appeals opinion is published at *5 Star, Inc. v. Ford Motor Co.*, 395 S.C. 392, 718 S.E.2d 220 (Ct. App. 2011).

³ The Court of Appeals incorrectly stated in its opinion that Ford “concedes the switch was defective.” (*Id.* at 453; App. at 5.) Ford did not concede this at trial. The switch at issue was subject to a product recall in 2005. The trial court properly excluded

5 Star sought rehearing (*id.* at 9–20) and rehearing *en banc* (*id.* at 21–22). The Court of Appeals denied the petitions. (*Id.* at 8.) On January 12, 2012, 5 Star filed a Petition for a Writ of Certiorari, presenting a single question: “Did the Court of Appeals err in substituting its view of the evidence for the jury’s view of the evidence?” (Pet. for Cert. at 3). This Court granted the petition.

STATEMENT OF THE FACTS

5 Star is a lawn maintenance and pressure washing company owned by Stan Shelby. (App. at 2.) In early 2005, 5 Star purchased a used 1996 Ford F-250 pickup truck for \$1,500. (*Id.*) Ford designed the truck and sold it to a dealership, which sold it to its original owner in November 1995. (*Id.* at 161.) When 5 Star purchased the vehicle in February 2005 the odometer registered over 227,000 miles. (*Id.* at 705:20–706:6.) 5 Star did not have the truck inspected prior to purchasing it and had no knowledge of the truck’s history or prior maintenance. (*Id.* at 706:20–707:11.)

On a Saturday morning in September 2005, Shelby parked the truck in 5 Star’s warehouse in North Charleston for the weekend. (*Id.* at 2.) The warehouse also stored 5 Star’s lawn maintenance equipment, including tractors, trailers, lawn mowers, weed eaters, and pressure washers. (*Id.*) When Shelby returned two days later, he discovered a fire had occurred in the warehouse. (*Id.* at 2, 664:18–665:11.) The City of North Charleston Fire Department responded to Shelby’s call and extinguished the smoldering remains of the fire. (*Id.* at 666:1–4.) The department’s chief fire

evidence of this recall. (App. at 369–70.) Ford did not affirmatively argue the product was free from defect. Rather, Ford defended at trial based on the complete lack of evidence of negligence by Ford regarding the switch in 1995. Ford also defended at trial based upon the destruction of the particular truck and switch at issue.

investigator, Benjamin Norris, performed a 30–45 minute investigation in which he ruled out arson as a potential cause of the fire. (*Id.* at 625:14–21, 643:9–11) Norris did not photograph, measure, or otherwise document the scene. (*Id.* at 629:20–25.)

Norris first advanced the theory that 5 Star later advanced at trial, speculating that the fire was started by an alleged defect in the speed control deactivation switch. (*Id.* at 612:14–20.) During his inspection, Norris saw debris under the truck but did not look for the speed control deactivation switch because it was outside his scope of responsibility. (*Id.* at 633:7–25.) Similarly, Norris did not conduct or order any of the tests that could have conclusively determined whether the switch had caused the fire. (*Id.* at 629:8–12, 630:1–2, 632:22–633:2.) Norris instructed Shelby to secure the scene and the vehicle and to notify the appropriate insurance company so it could hire an investigator. (*Id.* at 643:21–644:11.)

After hiring an attorney to pursue a claim against Ford, 5 Star towed the truck from its property to a steel mill where it was crushed. (*Id.* at 556:23–557:6, 713:15–18, 714:14–20, 934–35.) Neither 5 Star nor its attorney notified Ford of 5 Star’s potential claim or of the availability of the truck for inspection or testing before destroying it. (*Id.* at 713:12–14; *id.* at 935 ¶ 4; *see also id.* at 162 ¶ 10.⁴)

As a result of the truck’s destruction, the entire body of evidence documenting the condition of the truck and the scene of the fire consists of 17 photographs taken by

⁴ 5 Star argued before the Court of Appeals that its counsel wrote two letters to a lawyer in Charleston “who formerly did work for Ford.” (App. at 71.) The record, however, contains no evidence, testimony, or any other indication of whether the local attorney received the letters, replied to the letters, whether he forwarded the information to his former client, or whether Ford had any notice of the pendency of a potential suit. To the contrary, 5 Star admitted in its response to interrogatories that it did not notify Ford prior to the truck being towed and crushed. (*See id.* at 1078 ¶ 4.)

either an insurance adjustor or Shelby a week after the fire. (*See id.* at 1001–11.) Of these photographs, only seven depict the truck, of which only four include a view of the engine compartment. (*See id.*) None of the photographs depict the allegedly defective switch. All experts at trial agreed that these photographs are insufficient to formulate an opinion about the origin or cause of the fire. (*Id.* at 453:12–454:21, 554:13–556:18, 642:21–24.) All experts also agreed that the destruction of the physical evidence severely prejudiced Ford’s ability to investigate and defend this matter. (*Id.* at 456:9–15, 566:11–18, 646:22–647:2.)

At trial, 5 Star sought to recover the value of the truck, the damages to the building and other equipment, the rental cost for equipment to repair the building and to keep the business operating, and the alleged lost profits resulting from business interruption. (*See id.* at 675–86.) Shelby calculated \$18,000 of “lost profits” by dividing 5 Star’s gross revenue from 2004 by the total number of working days in 2004 and then multiplying that daily revenue by 15—the estimated number of days 5 Star’s business was interrupted. (*Id.* at 675:2–676:17.) Shelby could not identify any projects, calls, or jobs lost because of the fire. (*Id.* at 709:10–20.)

ARGUMENT

This Court should affirm the Court of Appeal’s decision and reinstate judgment in Ford’s favor for two reasons. First, 5 Star failed to preserve its argument that its experts were qualified by failing to raise this issue in its petition for writ of certiorari or on rehearing in the court of appeals. And, even if it were properly raised, the Court of Appeals correctly held that neither of 5 Star’s experts was qualified to opine whether Ford’s automotive design was defective or Ford’s conduct was negligent because they

have no automotive design experience. Second, the Court of Appeal's decision also correctly held that 5 Star fell woefully short of the proof required by this Court's decisions in *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010) and *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010) to establish a prima facie case of negligent design. This court has clearly established that proof of negligent design requires, among other things, expert testimony establishing a design defect, proof of a reasonable alternative design, and evidence of the defendant's negligence at the time the vehicle was manufactured. None of those requirements were met here. In fact, 5 Star completely ignores this Court's precedent in its brief.

The record presents two additional sustaining grounds that were argued to, but not relied upon by, the Court of Appeals: (1) 5 Star failed to prove that the truck was in the same condition at the time of the fire as when it left Ford's control and (2) the dismissal of 5 Star's case was an appropriate sanction for 5 Star's spoliation of evidence.

I. The Court of Appeals correctly concluded 5 Star's experts were not qualified to offer opinions as to whether Ford's conduct was negligent.

At trial, 5 Star presented two experts: Benjamin Norris, an expert in fire cause and origin, and Leonard Greene, an expert in fire cause and origin and electrical engineering. (App. at 3; *id.* at 606). The Court of Appeals correctly examined whether 5 Star, through these experts or other evidence, had proven negligent conduct by Ford in the design of the vehicle at or before the time the vehicle was manufactured. (See *id.* at 4 (citing *Branham*, 390 S.C. at 227, 701 S.E.2d at 17).)

The Court of Appeals concluded that 5 Star’s experts were not qualified to testify regarding automobile design, that 5 Star’s experts did not testify regarding Ford’s conduct at or before 1995, and that 5 Star had presented no other evidence regarding Ford’s alleged negligence in 1995 in designing the automobile.⁵ (*Id.* at 5 (noting that “neither witness was qualified as an expert in automotive design,” neither witness “testified to a single fact or event at or before the manufacture of this truck and this switch,” and “5 Star failed to present any expert testimony on the design of the speed control deactivation switch and whether the design was negligent in 1996”); *id.* at 1–2 (“5 Star presented no expert witness to testify that Ford was negligent in designing the switch, nor any other evidence that Ford breached its duty of care at the time the switch was designed and manufactured.”).)

5 Star now argues before this Court that its experts, who were introduced and qualified as experts in *other* subject matters, were nevertheless competent to opine on automobile design. *See* Pet. Brief at 7–12.⁶ This argument fails for several reasons.

A. *5 Star failed to preserve this issue for review by this Court.*

5 Star’s argument regarding the supposed qualifications of its experts is not preserved for review by this Court. A party who appears before this Court pursuant to a grant of certiorari may not argue any issue not raised in its petition for certiorari. Rule 242(i), SCACR (“If the petition is granted, the Clerk shall notify each party or his

⁵ Although the truck was a 1996 model, its design, assembly, and original sale occurred in 1995. *See* Statement of Facts, *supra*.

⁶ 5 Star’s brief speaks of “experts” (plural) but focuses its attention solely on the supposed qualifications of Greene.

attorney, specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s).”); *McCray v. State*, 317 S.C. 557, 559 n.1, 455 S.E.2d 686, 687 n.1 (1995) (“The other issue presented by petitioner in his brief is not preserved for review because it was not raised in his petition for a writ of certiorari.”).

Here, 5 Star’s petition for writ of certiorari did not raise the question of 5 Star’s experts’ qualifications to opine on issues of automotive design. Rather, the petition presents a different question: “Did the Court of Appeals err in substituting its view of the evidence for the jury’s view of the evidence.” *See* Pet. for Cert. at 3.⁷ This Court did not grant certiorari on the question of 5 Star’s experts’ qualifications, because that question was not presented in the petition. Accordingly, the qualification of 5 Star’s experts is not preserved for review by this Court.

Further, a party petitioning this Court for a writ of certiorari may not raise any issue it failed to raise in its petition for rehearing. Rule 242(d)(2), SCACR (“Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”). The petition for rehearing to the Court of Appeals raised no issue or argument regarding 5 Star’s experts’ qualifications to opine on issues of automotive

⁷ Notably, the question presented in 5 Star’s petition for certiorari is identical to the *other* argument in 5 Star’s brief before this Court. In its brief, 5 Star presents two questions, each of which is supported by a single argument heading: whether the Court of Appeals erred (1) when it concluded “plaintiff’s expert witnesses were not qualified to give opinions regarding Ford’s conduct and did not offer evidence of Ford’s conduct” or (2) by “substituting its view of the evidence for the jury’s view of the evidence.” *See* Pet. Brief at 4, 6, 13. Only the latter argument was advanced by 5 Star in its certiorari petition.

design. Rather, the sole argument raised in the petition for rehearing was that the panel opinion overlooked evidence allegedly demonstrating Ford's negligence in designing the speed control deactivation switch. *See* Pet. for Rehearing (App. at 10–11). For this separate reason, this issue is not preserved for review.

B. 5 Star's experts were not qualified to opine whether Ford's design was defective because they had no automotive design experience.

Even if 5 Star *had* preserved the issue of the qualification of its experts as an issue for review, this Court should nevertheless uphold the Court of Appeals' conclusion that 5 Star's experts were not qualified to opine whether Ford's automotive design in 1995 was negligent. The Court of Appeals held that neither of 5 Star's experts "was qualified as an expert in automotive design or any other area of expertise that would enable them to offer opinions as to whether Ford's conduct was negligent." (App. at 5.) This conclusion was correct because it is undisputed that 5 Star's proffered expert had no design experience.

5 Star presented two experts at trial: Benjamin Norris, an expert in fire cause and origin, and Leonard Greene, an expert in fire cause and origin and electrical engineering. (*See id.* at 3; *id.* at 606). In its brief, however, 5 Star focuses exclusively on Greene.⁸ As argued by Ford's trial counsel,⁹ and as explained below, Greene is

⁸ 5 Star's brief before this Court makes no mention of Norris, *see* Pet. Brief at 7–13, apparently conceding he was not qualified to opine whether Ford's conduct in designing the F-250 was negligent.

⁹ Ford's counsel objected to Greene's qualifications. 5 Star's assertion that "Ford's counsel initially accepted his qualifications," *see* Pet. Brief at 7, is flatly contradicted by the record. When Greene was offered as an expert, Ford's counsel immediately renewed its motion in limine (*see* App. at 504:1–11), and expressly stated "I don't think he's qualified as an expert in automotive design" (*id.* at 504:24–25).

neither qualified as an expert in automotive design nor in any other field with sufficient relevance to enable him to opine on issues of automotive design.¹⁰

As a preliminary matter, 5 Star appears to misunderstand both the legal requirement to prove negligence and the concomitant requirement of a qualified expert to prove such negligence in a design defect case. As to the legal requirement, it is not enough for a plaintiff in a design defect case to merely argue that a product was poorly designed. Rather, the plaintiff must analyze the balance between the design's risk and its utility and must show evidence of a feasible alternative design:

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

Branham, 390 S.C. at 225, 701 S.E.2d at 16 ; *see also id.* at 224, 701 S.E.2d at 16 (“[T]his inquiry asks if the increased costs (lost dollars, lost utility, and lost safety) of altering the design—in the particular manner the plaintiff claims was reasonably necessary to the product's safety—would have been worth the resulting safety benefits.”) (quoting David G. Owen, *Toward a Proper Test for Design Defectiveness: “Micro-Balancing” Costs and Benefits*, 75 Tex. L. Rev. 1661, 1687 (1997)); *Claytor*

¹⁰ It is unclear whether 5 Star is arguing that Greene is qualified as an automotive design engineer, *see* Pet. Brief at 11 (referring to Greene as an “automotive engineer”), or simply that he has some other area of expertise that qualifies him to offer opinions about Ford's conduct, *see id.* at 7–8 (discussing Greene's background in electrical engineering and his few and attenuated connections to the automobile industry). The distinction, however, is insignificant because both arguments fail.

v. Gen. Motor Corp., 277 S.C. 259, 265, 286 S.E.2d 129, 132 (recognizing that any product “can be made more safe” and that “numerous factors must be considered, including the usefulness and desirability of the product [and] the cost involved for added safety”).

In order to assess the balance between a design’s risk and its utility, a design defect plaintiff must present evidence and testimony from an expert who is qualified in the specific field in which the plaintiff’s claim arises. *See Watson*, 389 S.C. at 444, 699 S.E.2d at 174 (noting that cases alleging defective cruise control “necessarily involve sophisticated issues of engineering, technical science and other complex concepts that are quintessentially beyond the ken of a lay person”). It is not enough to merely present an electrical engineer who can explain how an electrical circuit works and how a circuit could be altered to work differently. Rather, the expert must be qualified in the particular industry and product at issue—here, for example, the design of automotive cruise control systems. In the absence of this particular, specialized expertise, the supposed expert’s testimony cannot satisfy the legal requirement placed on the plaintiff. *See id.* at 450, 699 S.E.2d at 177 (“We find that the trial court erred in admitting Dr. Anderson’s testimony as to both an alternative feasible design and his EMI theory. . . . He had no experience in the automobile industry, never studied a cruise control system, and never designed any component of a cruise control system.”).

Here, a review of 5 Star’s brief and relevant portions of the trial transcript demonstrates that 5 Star’s expert, Greene, was neither qualified in automotive design nor in any other field that would permit him to opine on automotive design. The summary of Greene’s qualifications in 5 Star’s brief simply indicates that, while he is

knowledgeable about electrical engineering generally, his connections to the automobile industry are few and attenuated. *See* Pet. Brief at 7–8. Indeed, Greene conceded he never worked for an automotive manufacturer (App. at 506:5–7), never designed a component part for use in an automobile (*id.* at 507:2–5), and never taught or published materials pertaining to automotive design (*id.* at 508:17–22). He was not offered as an expert in automotive design, and he had no experience in automotive design generally or in cruise control systems specifically.

Even if Greene were minimally qualified to opine about automotive design, 5 Star failed to adduce any proof that his proposed solution—adding an extra fuse to the brake assembly—was a reliable theory or a reasonable alternative design. When a plaintiff fails to show that its expert’s proposed solution is a reliable, economically feasible theory incorporated by other manufacturers, the testimony is not reliable, and the plaintiff has failed to present the minimum baseline requirement of proving a design defect. *See Watson*, 389 S.C. at 450–51, 699 S.E.2d at 177–78. *See also Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995) (citing *Stanczyk v. Black & Decker, Inc.*, 836 F.Supp. 565 (N.D. Ill. 1993) (“[P]laintiff must introduce evidence that an alternative design is feasible and cannot rely upon mere conceptual design theories.”)). In sum, 5 Star’s experts were not qualified to opine whether Ford’s design and integration of the cruise control deactivation switch was defective and, in any event, failed to establish an economically feasible alternative design the utility of which outweighed any risks or costs.

II. The Court of Appeals correctly concluded 5 Star failed to present any evidence that Ford was negligent in the design of the truck and its speed control deactivation switch.

Even if 5 Star had preserved the issue of its experts' qualifications, and even if 5 Star's experts were qualified to opine on automotive design, this Court should nevertheless affirm the Court of Appeals because 5 Star failed to present any evidence or testimony that Ford was negligent when it designed this F-250 truck and its speed control deactivation switch. In particular, 5 Star failed to present *any evidence* of Ford's conduct *at or before* the time of manufacture. Furthermore, 5 Star failed to present evidence of any reasonable alternative design known in the industry in 1995, used by any other automobile manufacturer in 1995, or feasible under the state of the art in 1995.

A. 5 Star failed to present any evidence that Ford's conduct in 1995 was negligent.

The Court of Appeals correctly held that 5 Star failed to satisfy its burden in a design defect case when it failed to present any evidence regarding Ford's conduct at or before the time the truck was manufactured. A plaintiff in a negligent design case must prove negligent conduct on the part of the defendant in the design of the product at or before the time of manufacture. *See Branham*, 390 S.C. at 227, 701 S.E.2d at 17 (“When assessing liability in a design defect claim against a manufacturer, the judgment and ultimate decision of the manufacturer must be evaluated based on what was known or ‘reasonably attainable’ *at the time of manufacture.*”) (citing Restatement (Third) of Torts: Products Liability § 2, cmt. a. (1998)) (emphasis added); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 548–49, 462 S.E.2d 321, 331 (Ct. App. 1995) (recognizing that the

“product must be ‘measured against a standard existing at the time of sale’” and that “‘hindsight opinions by . . . experts suggesting that more should have been done . . . are insufficient to discredit the conclusion that the manufacturer met the standard of care’”) (quoting *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 337 (4th Cir.1991) and *Doe v. Miles Labs., Inc., Cutter Labs. Div.*, 927 F.2d 187, 193 (4th Cir.1991)).

Here, 5 Star never offered any evidence or opinion regarding what Ford knew or should have known in 1995 at the time Ford designed and assembled 5 Star’s F-250. (See App. at 3 (noting that Norris and Greene “did not testify to any facts or opinions related to Ford’s conduct in the original design of the truck or any of its component parts”); *id.* at 571:21–572:19 (Greene’s testimony that he did not know about Ford’s design process and review in 1995, did not know when the first deactivation switch fire occurred, and did not know whether Ford was aware in 1995 of any danger associated with the switch).)

The only witness at trial with any knowledge of Ford’s conduct in designing and assembling the truck was John Olson, a Ford design analysis engineer since 1994. However, Olson gave no testimony related to Ford’s conduct in 1995, and 5 Star’s counsel asked him no questions relating to what Ford knew or did at or before this truck’s manufacturing. In fact, Olson, who was the only witness with personal knowledge of Ford’s conduct, testified that Ford satisfied its duty to build safe automobiles. (*Id.* at 405:4–8.) Because 5 Star failed to present any evidence or testimony regarding what Ford knew or did at or before the time it designed and manufactured the truck, 5 Star did not satisfy its obligation to prove a design defect claim.

B. 5 Star failed to present any evidence of a reasonable alternative design.

The plaintiff in a design defect case must present evidence of a reasonable alternative design. *See* Part I.B, *supra*. A plaintiff may satisfy this requirement in several ways. For example, 5 Star could have presented testimony or evidence that other car makers used a safer reasonable alternative design at or before 1995. *See, e.g., Jamison v. Ford Motor Co.*, 373 S.C. 248, 273, 644 S.E.2d 755, 768 (Ct. App. 2007) (noting that the plaintiff had presented evidence of a feasible alternative design when he “submitted a 1987 Volkswagen as an example of an effective passive restraint system with a seat pan that could successfully restrain the lower torso in an accident like the one in this case”).

Alternatively, 5 Star could have introduced evidence regarding the “state of the art” at the time the truck was manufactured. *See Anderson v. Green Bull, Inc.*, 322 S.C. 268, 273, 471 S.E.2d 708, 711 (Ct. App. 1996) (Cureton, J., concurring) (“Both industry standards and the state of the art at time of manufacture are relevant to show the reasonableness of the product’s design.”) (citation omitted); *Bragg*, 319 S.C. at 543, 462 S.E.2d at 328 (“The state of the art and industry standards are relevant to show both the reasonableness of the design and that the product is dangerous beyond the expectations of the ordinary consumer.”) (citing *Reed v. Tiffen*, 697 F.2d 1192, 1196 (4th Cir. 1982)); *see also Reed*, 697 F.2d 1192 (predicting that South Carolina, like the majority of courts, would permit testimony on state of the art in a design defect case).¹¹ Similarly, 5 Star could have presented evidence regarding whether the

¹¹ Note that *Anderson*, *Bragg*, and *Reed* all involved claims founded solely upon a theory of strict liability, which is a theory not present in this case. *See* n.1, *supra*.

allegedly defective design complied with applicable laws and regulations.¹² See Restatement (Third) of Torts: Products Liability § 4 (noting that a product's compliance or noncompliance with applicable product safety statutes or regulations is relevant to determine whether the product is defective).

Here, 5 Star did none of the above and cannot do so at this stage of the proceedings. Its only vague effort at showing a supposed reasonable alternative design at trial was the purely speculative testimony of Greene that, if he were to design the electrical circuit at issue, he would include an extra fuse. Greene's testimony, however, fails to prove a reasonable alternative design for several reasons. First, he has no experience in automotive design and has never designed a component part for an automobile. See Part I.B, *supra*. In light of his limited background and conceded lack of knowledge about the switch and its design, the feasibility of his suggestion is, at best, uncertain. (See App. at 569:15–570:15 (admitting he has never held a speed control deactivation switch, has never tested one, and until shortly before trial did not know how it worked); *id.* at 571:15–21 (conceding that the question of whether his proposed design was “better” than Ford's switch was a difficult question that he could not answer).) Second, Greene formed his opinion based primarily on advances in industry knowledge that occurred *after* the design of the vehicle. (See App. at 517:9–518:19 (stating that his opinion was premised on industry publications such as one

¹² Here, for example, an automobile's braking system is governed by extensive federal regulations. See, e.g., 49 C.F.R. §§ 571.105, 571.135.

published in 2006);¹³ *id.* at 572:9–19 (noting that at the time this truck was manufactured, the danger of deactivation switch fires was unknown and that these fires became prevalent later on).) Thus, Greene’s opinion was not based technology or information that was available during the relevant time period.

Furthermore, neither Greene nor any other witness made even a passing attempt to comply with this Court’s mandate that the “presentation of an alternative design must include consideration of the costs, safety and functionality associated with the alternative design.” *Branham*, 390 S.C. at 225, 701 S.E.2d at 16. Even assuming for the sake of argument that Greene’s proposed design is feasible, 5 Star failed to offer evidence analyzing and balancing the costs, benefits, and risks of the alternative design. *See id.* at 224, 701 S.E.2d at 16 (“[T]his inquiry asks if the increased costs (lost dollars, lost utility, and lost safety) of altering the design—in the particular manner the

¹³ The publication in question—Jeffery T. Morrill, *Analysis of a Ford Speed Control Deactivation Switch*, Fire and Arson Investigator, July 2006, at 22–27—was excluded by the trial judge and does not appear in the record. (App. at 518:20–519:9.) Its identity, however, can be discerned from the record. (*See id.* at 517:15–17 (identifying publication) and *id.* at 141 (identifying title).) Ironically, the article Greene purportedly relied on notes the importance of preserving and inspecting the vehicle—two steps not followed here.

Of particular importance in these investigations is that if at all possible, the vehicle should be inspected in place. Often, crucial evidence is lost as it falls from the vehicle to the ground and is crushed during vehicle recovery or disposed of after the vehicle carcass has been hauled away.

Morrill at 23, available at put.edidomus.it/auto/pdf/news/141009_Incendi_Ford.pdf (last visited July 25, 2013). Greene himself also highlighted the importance of evidence preservation in correspondence to 5 Star’s counsel before Greene was advised everything was destroyed. (App. at 561:15–565:24.)

plaintiff claims was reasonably necessary to the product's safety—would have been worth the resulting safety benefits.’”) (citation omitted).

In the absence of proof of a reasonable alternative design, 5 Star failed to prove Ford's negligence.

C. *Even if simple foreseeability were the standard, 5 Star has failed to prove that in 1995 Ford could or should have foreseen the alleged defect.*

In its brief, 5 Star argues that in the absence of a “smoking gun” or damning internal memorandum, it may prove negligent conduct in this design defect case by proving that it was foreseeable to Ford that its switch design would lead to a fire. *See* Pet. Brief at 14. As noted above, this Court has established a more rigorous test than simple “foreseeability.” However, even if a showing of simple foreseeability *were* the standard in a design defect case, 5 Star failed to show that Ford could or should have foreseen the alleged defect in its deactivation switch in 1995.

Here, the record is devoid of any testimony or evidence indicating the alleged design defect was foreseeable to Ford in 1995. Indeed, 5 Star's own expert, Greene, admitted that at the time this truck was manufactured, the danger of deactivation switch fires was unknown and that these fires became prevalent later on. (App. at 572:9–19.) Olson, the only expert with any direct or personal knowledge of Ford's conduct or knowledge in 1995 testified that Ford did *not* have any knowledge or indication in 1995 of any risk posed by the deactivation switch design. (*Id.* at 497:16–24.) Other than Greene's bare assertion that he would have known to design the switch differently—an assertion made with the benefit of hindsight and based on data that became available after 1995—5 Star introduced no evidence or testimony tending to prove that any danger of fire from the switch was or should have been foreseeable at the time of

design and manufacture. (*See id.* at 5 (“The only mention in the entire trial of what Ford knew or did not know about the switch before 1996 was Greene’s admission that he knew nothing on the subject.”).) In the absence of any evidence that the danger should have been or was foreseeable *at that time*, 5 Star has failed to show foreseeability. The mere fact that there was a fire is insufficient to establish that Ford was negligent. *See Sunvillas Homeowners’ Ass’n v. Square D Co.*, 301 S.C. 330, 333–34, 391 S.E.2d 868, 870 (Ct. App. 1985) (“[T]he mere fact that a product malfunctions does not demonstrate the manufacturer’s negligence or the product’s defectiveness.”). Further, South Carolina does not recognize the doctrine of *res ipsa loquitur*. *Watson*, 389 S.C. 434, 453, 699 S.E.2d 169, 179. In *Branham* and *Watson* this Court established protections to keep out speculation or junk science. 5 Star should not be permitted to circumvent or erode those protections here.

III. 5 Star failed to prove the truck was in essentially the same condition at the time of the fire as it was when it left Ford’s control in 1995.

The record presents an additional sustaining ground, namely 5 Star’s failure to prove the truck was in the same condition at the time of the fire as when it left Ford’s control. This issue was argued to, but not relied upon, by the Court of Appeals. (*See App.* at 2 n.2; *id.* at 50–51.) In a product liability action, the plaintiff must establish that “the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant.” *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 462–63, 494 S.E.2d 835, 842 (Ct. App. 1997); *see also Bragg*, 319 S.C. at 539, 462 S.E.2d at 326. Here, 5 Star did not and cannot satisfy this requirement.

Ford initially sold the truck on November 15, 1995. (App. at 161.) Nearly ten years and 227,000 miles later, when 5 Star purchased the truck, Shelby neither had the vehicle inspected nor knew of the vehicle's service or maintenance history. (*Id.* at 706:20-22; 707:8-11.) Likewise, none of the experts knew the vehicle's maintenance or service history, and none of the former vehicle owners testified to it. (*See id.* at 459:6-12, 546:4-8, 630:7-25.) The experts expected, however, that numerous items would have been replaced in the decade preceding the fire, including but not limited to spark plugs, cables, lights, wiring, belts, fans, hoses, and batteries. (*Id.* at 458:16-459:5, 631:18-632:21.)

Because 5 Star presented no evidence regarding the service or maintenance history of the vehicle, the jury was left to speculate whether the vehicle was in essentially the same condition at the time of the fire as when it left Ford's control in 1995—after ten years of use by third parties who did not testify. Further, no one actually saw the deactivation switch after the fire. There is no evidence or testimony regarding its presence or absence, its configuration or condition, or whether it was even the original factory component. Moreover, because 5 Star had the truck towed and crushed before any testing could be done, it is now impossible to determine which parts, including the switch or the master brake cylinder, may have been replaced after Ford initially sold the vehicle. *See Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 946 (11th Cir. 2005) (applying Georgia law) (“[W]ithout examining the vehicle, defendant could not determine whether it remained in its ‘condition when sold’ at the time of the accident.”). Hence, this Court should affirm the Court of Appeals on this additional sustaining ground.

IV. The trial court should have dismissed 5 Star's case as a sanction for its spoliation of crucial evidence.

The record presents an additional sustaining ground in that the trial court erred when it failed to dismiss 5 Star's case based on its spoliation of evidence. This issue was also argued to, but not relied upon by, the Court of Appeals. (*See App.* at 2 n.2; *id.* at 34–47.) It is undisputed that 5 Star, after hiring an attorney to pursue a claim against Ford and prior to notifying Ford of its potential claim or that this important evidence would be destroyed, directed that the truck and all of its component parts be towed from its property, taken to a steel mill, and crushed. (*See App.* at 448:25–449:25, 556:23–557:6, 558:9–559:16, 713:4–18, 714:17–20, 719:7–10, 1078 ¶ 4.) 5 Star breached its duty to preserve material evidence for litigation and thereby deprived Ford of the fundamental fairness to which every litigant is entitled. The only question is whether the trial court's chosen sanction, an adverse inference jury charge, was an abuse of discretion.

A. *5 Star's spoliation of the evidence.*

Spoliation of evidence refers to the willful destruction or material alteration of vital evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *See Austin v. Beaufort Cnty. Sheriff's Office*, 377 S.C. 31, 35, 659 S.E.2d 122, 124 (citing *Hannah v. Heeter*, 584 S.E.2d 560, 573 (W. Va. 2003)); *see also Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). The duty to preserve material evidence arises not only during litigation, but also extends to that period *before* litigation when a party reasonably should know the evidence may be relevant to anticipated litigation. *Austin*, 377 S.C. at

35, 659 S.E.2d at 124 (noting that spoliation of evidence requires “a pending *or potential* civil action”) (citing *Hannah*, 584 S.E.2d at 573) (emphasis added); *see also Silvestri*, 271 F.3d at 591 (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2nd Cir. 1998)). At the very least, a party has “an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.” *Silvestri*, 271 F.3d at 591.

After the fire department secured and investigated the scene, investigator Norris immediately advised Shelby of a potential claim related to the switch. Norris further instructed Shelby to secure both the scene and the truck. (App. 643:21–644:11.) Shelby did neither. He also did not document the post-fire condition of the scene or the truck. Later, 5 Star hired an attorney, indicating it planned, or at least anticipated, litigation. At that point, both 5 Star and its lawyer owed a duty to preserve all evidence related to the claim, especially the vehicle and the switch. *Austin*, 377 S.C. at 35, 659 S.E.2d at 124. While Shelby did not personally destroy the truck, he contacted a salvage company to remove the truck from his property, knowing it was not going to be preserved and not expecting to see it again. (*Id.* at 712:3–13, 713:4–18, 714:10–20, 719:4–10, 723:12–14.) 5 Star was obligated to notify Ford both of its claim and the possible destruction of the evidence before it happened. 5 Star failed to do so. The conclusion is inescapable that 5 Star, represented by counsel and intending to pursue product litigation related to the truck, spoliated the most important piece of evidence in this case.

B. Dismissal is the only adequate remedy to 5 Star's spoliation of evidence.

This Court has held that trial courts have discretion to issue sanctions under Rule 37, SCRPC, for spoliation of evidence. *Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). The right to impose sanctions arises from a court's inherent power to control the judicial process and litigation, but the power is limited to that which is necessary to redress conduct "which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-46 (1991) (recognizing the inherent power of the courts to fashion appropriate sanctions for conduct that disrupts the judicial process); *see also United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462 (4th Cir. 1993) ("[W]hen a party deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process, the court has the inherent power to dismiss the action."); *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987) ("[W]hatever sanction is imposed should serve to protect the rights of discovery provided by the Rules."). "[B]ecause no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition." *Shaffer Equip.*, 11 F.3d at 457. The courts must protect the integrity of the judicial process because "[a]s soon as the process falters . . . the people are then justified in abandoning support for the system." *Id.*

The sanctions available for spoliation of evidence include outright dismissal of the spoliating party's claim or defense, exclusion of the spoliated evidence at trial, or

an instruction allowing the jury to infer that the missing evidence would be adverse to the spoliating party's case. See *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 152, 714 S.E.2d 537, 541 (2011); *Stokes v. Spartanburg Regional Medical Center*, 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006) (reversing trial court for not giving a jury charge on spoliation of evidence). In this case, dismissal is the only appropriate sanction for Respondent's spoliation of the scene, the vehicle, and the switch. Merely instructing the jury that it may draw an adverse inference fails to redress the extreme prejudice to Ford. Courts focus not only on the conduct of the spoliator, but also separately on the prejudice resulting from the destruction of the evidence.

At bottom, to justify the harsh sanction of dismissal, district courts must consider both the spoliator's conduct and the prejudice caused and be able to conclude either (1) that the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.

Silvestri, 271 F.3d at 593 (emphasis added). The Fourth Circuit also recognized that dismissal is severe and constitutes the ultimate sanction for spoliation. "It is usually justified only in circumstances of bad faith or other like action." *Id.* (citing *Cole v. Keller Indus., Inc.*, 132 F.3d 1044, 1047 (4th Cir. 1998)). However, "even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case." *Id.* As one commentator recently noted:

It is easy to imagine circumstances where bad faith or malicious behavior has occurred, but the defendant is unable to present any evidence regarding the plaintiff's state of mind or the circumstances surrounding the destruction of the evidence. Any cunning plaintiff would

make sure of this. Even if the plaintiff did not destroy the evidence intentionally, the prejudice to the defendant is still the same and must be redressed.

Comment, Christopher B. Major, *Where's The Evidence? Dealing With Spoliation By Plaintiffs in Product Liability Cases*, 53 S.C. L. Rev. 415, 435 (Winter 2002).

Indeed, in *Silvestri*, the Fourth Circuit recognized that sometimes even unintentional spoliation justifies dismissal because of the resulting prejudice:

[T]he inadvertent, albeit negligent, loss of evidence will justify dismissal because of the resulting unfairness: “The expansion of sanctions for the inadvertent loss of evidence recognizes that such physical evidence often is the most eloquent impartial ‘witness’ to what really occurred, and further recognizes the resulting unfairness inherent in allowing a party to destroy evidence and then to benefit from that conduct or omission.”

Silvestri, 271 F.3d at 593 (quoting *Kirkland v. New York City Housing Auth.*, 236 A.D.2d 170, 173 (N.Y. App. Div. 1997)).

Silvestri is factually indistinguishable from the case at bar. In that case, a district court dismissed a product liability claim against an auto manufacturer because of the plaintiff’s spoliation of the vehicle. On appeal, the Fourth Circuit noted that “[i]t is readily apparent, therefore, that [the plaintiff], his attorneys, and his expert witnesses anticipated filing suit against [the defendant] and were fully aware that the vehicle was material evidence in that litigation. Yet, they failed to take any steps to ensure that [the plaintiff] discharged his duty to prevent the spoliation of evidence.” *Silvestri*, 271 F.3d at 591–92. Even though the plaintiff in that case did not own the vehicle, the court ultimately held that the plaintiff “failed to preserve material evidence in anticipation of litigation or to notify [the defendant] of the availability of this evidence, thus breaching his duty not to spoliage evidence.” *Id.* at 592. The court further held that the spoliation

was “highly prejudicial” to the defendant because it “denied [the defendant] access to the only evidence from which it could develop its defenses adequately.” *Id.* Therefore, the court held that dismissal, although severe, was an appropriate sanction. *Id.* at 595.

The Fourth Circuit based its holding, in part, on the fact that the plaintiff’s “level of culpability” was “at least negligent, and may have been deliberate” because the record was clear that his attorney “knew that the vehicle was a central piece of evidence in his case against [the defendant] and that he had been reminded that this piece of evidence should be preserved or that [the defendant] should be notified.” *Id.* at 593–94. However, in addition to evaluating the plaintiff’s conduct, the court focused on the level of prejudice to the defendant: “[t]o require [the defendant] to rely on the evidence collected by [the plaintiff’s] experts in lieu of what it could have collected would result in irreparable prejudice.” *Id.* at 594.

Here, 5 Star actually owned the truck, and the “irreparable prejudice” described in *Silvestri* is just as clear. Ford was unable to investigate the scene, which included multiple potential ignition sources. Before Ford had a chance to investigate, analyze, and test the truck and its parts, 5 Star had the vehicle and the allegedly defective part removed and destroyed. (App. at 1077–78, ¶¶ 1–6.) Thus, 5 Star denied Ford the ability to develop its own conclusions regarding the origin and cause of the fire and fully defend against 5 Star’s defect allegations. Importantly, there are tests that could have been conducted on the switch or its remains to determine conclusively whether the switch failed. (App. at 455:8–465:8, 542:8–12, 559:24–561:21, 568:17–569:14, 575:25–577:14, 634:7–11, 639:2–5.)

Every expert agreed Ford was extremely prejudiced by 5 Star's spoliation of evidence. Ford's design engineer, Jon Olson, testified that Ford was severely disadvantaged by not being able to inspect or test the truck or its component parts. (*See id.* at 456:13–15 (“I believe it’s a severe disadvantage in the sense that we can’t look at it, we can’t feel or touch wires.”).) Similarly, 5 Star's electrical engineering expert, Greene, testified that because of the “significant disadvantage” to Ford, he would never have allowed Respondent to knowingly dispose of the vehicle as it did in this case, because the truck was “crucial evidence” and because it was a violation of “fair rules” to destroy the evidence prior to litigation. (App. at 564:8–24, 566:11–18.) In addition, 5 Star's other expert, Norris, confirmed the extreme disadvantage and prejudice to Ford that resulted from 5 Star's disposal of the critical evidence. (*Id.* at 646:22–647:2 (agreeing that “Ford has been extremely disadvantaged, even prejudiced in its defense of this case by the destruction of this evidence”).) Norris also confirmed that, had he been consulted, he would not have allowed the destruction of such evidence (*id.* at 646:7–21), in part because he would expect the manufacturer to conduct its own investigation (*id.* at 647:12–22). These experts agreed that such an investigation was impossible following 5 Star's disposal of the evidence. (*Id.* at 453:12–22, 554:13–556:10, 642:21–24.)

To defend its spoliation and the resulting prejudice to Ford, 5 Star argued the switch did not survive the fire. (*See App.* at 787:14–788:6; 788:22–25.) Of course, that suggestion is speculation and, because of 5 Star's actions, no one will ever know the condition of the switch following the fire. (*Id.* at 487:8–15, 577:1–14; 591:17–24, 633:19–634:6.) Even if the switch was severely damaged in the fire, the conclusive

tests Greene wanted to perform before learning of the spoliation could have been conducted on the switch remains. (App. at 455:8-456:8, 542:8-12, 559:24-561:21, 568:17-569:14, 575:25-577:14, 634:7-11, 639:2-5.)

Moreover, although the fire did not completely consume the truck or the scene and its other potential ignition sources, 5 Star failed to preserve or document them. In *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66 (Minn. Ct. App. 1998), the court recognized the importance of preserving not only the product at issue, but also the fire scene itself:

All of the experts agreed that the best evidence of the origin and the cause of a fire is the fire scene itself, including the exterior and interior of buildings, the contents of such areas, burn patterns, residuals of combustibles, and fire debris. No expert believed that an adequate investigation could be conducted based solely on photographs taken by others. The experts agreed that an investigator relies on multiple senses in fire inspections as he looks at, smells and touches various areas and items.

Id. at 69. Here, as in *Hoffman*, the “scene was of unquestionable relevancy,” and 5 Star had the duty to document and preserve it in addition to the truck. Because it failed to do so, 5 Star alone created this situation, and 5 Star should bear the consequences.

C. Dismissal of Plaintiff's case was the only appropriate sanction.

Despite the unfair and prejudicial effect of 5 Star's spoliation, the trial court allowed this case to go to the jury with only a spoliation charge permitting the jury to infer that the destroyed truck and switch would have been adverse to 5 Star. The entire instruction given to the jury on this topic consisted of one sentence: “When evidence is lost or destroyed by a party, you may infer that the evidence which was lost or destroyed by that party would have been adverse to that party.” (App. at 836:6-9.)

Such an instruction was insufficient here, in light of the prejudice to Ford, and such instructions have been criticized:

To the jury, the adverse instruction may seem contradictory or even meaningless. The jury has already been presented with testimony from the plaintiff relating to the destroyed evidence which supports the plaintiff's theory of the case. Then, at the conclusion of the trial, the jury is instructed to somehow hold the plaintiff accountable for destroying the evidence. [Under such circumstances,] how does a juror reconcile the expert's testimony that the condition of the [product] supported the plaintiff's case with the instruction that there should be a presumption that the [product's] condition would have been adverse to the plaintiff's case? Even a juror with the best of intentions would find it difficult to effectively counter the impact of such concrete evidence with the abstract notion of a negative inference. Adverse instructions also fail to curtail the temptation for dishonesty "in light of the tremendous benefit a spoliator can obtain by [the] destruction [of evidence]."

Major, 53 S.C. L. Rev. at 424 (internal footnotes omitted). Likewise, this one-sentence jury instruction was not a "meaningful deterrent" to other potential litigants contemplating similar conduct. *See Downey*, 294 S.C. at 45, 362 S.E.2d at 318. Allowing a plaintiff represented by counsel to destroy an allegedly defective product and still recover a verdict carries alarming potential implications for future litigation.

Other courts recognize that merely giving an adverse inference jury instruction regarding spoliation is inadequate to remedy the prejudice to the opposing party under certain circumstances. In *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939 (11th Cir. 2005), the plaintiff failed to preserve an allegedly defective vehicle in a crashworthiness case against the manufacturer. The court noted that the vehicle was "the most crucial and reliable evidence available to the parties at the time plaintiff secured representation." *Id.* at 943. The trial court, rather than imposing a sanction for the

plaintiff's spoliation, merely instructed the jury on the issue of spoliation and on the presumptions which could be raised against a spoliator. *Id.* at 945. Following a verdict for the plaintiff, the *Flury* court reversed, holding that the "resulting prejudice to the defendant was incurable, and dismissal necessary." *Id.* The court reasoned that an adverse inference charge was insufficient:

Moreover, the district court's instruction regarding spoliation was insufficient to cure the resulting prejudice to defendant. The instruction was weak and allowed the jury to balance the conduct of the parties. The record makes evident that only one party was at fault for the vehicle's spoliation—the plaintiff! Defendant could not have prevented spoliation, nor could any such action have been expected, because defendant was never informed of the vehicle's location and plaintiff did not file suit until years after the vehicle's removal.

Id. at 945. The *Flury* court held that "the plaintiff was the only party in a position to preserve the vehicle and failed to do so. Prejudice to the defendant was great, and culpability rested solely upon the plaintiff." *Id.* The court ultimately concluded that "the district court erred in concluding that a simple jury instruction could cure the resulting prejudice to defendant." *Id.* at 946.¹⁴

¹⁴ See also *Cincinnati Ins. Co. v. Mid-South Drillers Supply, Inc.*, 2008 WL 220287 (Tenn. Ct. App. Jan. 25, 2008) (affirming dismissal based on the plaintiff's spoliation of evidence and noting that the plaintiff's "failure to notify [the defendants] of the results of its investigation and its agent's subsequent destruction of the blue hose, whether advertent or inadvertent, made it extremely difficult if not impossible, for the defendants to present an effective defense to counter the plaintiffs theory of the cause of the fire. Since the plaintiff bears the sole responsibility for the loss of the evidence, and since any lesser sanction than dismissal would not have been an adequate remedy, the trial court did not abuse its discretion in its decision to sanction the plaintiff by dismissing its action."); *Citizens Ins. Co. of America v. Juno Lighting, Inc.*, 635 N.W.2d 379, 382–83 (Mich. Ct. App. 2001) ("In the present case, only after the trial court carefully considered the possibility of lesser sanctions did it decide that lesser sanctions would not remedy the harm plaintiff caused by failing to preserve the

For these reasons, the trial court abused its discretion by failing to dismiss this case based on Respondent's undisputed spoliation of evidence, instead giving the jury a mere adverse inference instruction. Such an instruction was insufficient to redress the extreme prejudice to Ford, and dismissal was the only adequate remedy under the undisputed facts of this case.

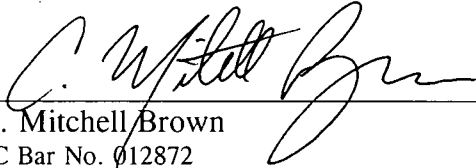
evidence. The court determined that even if it were to limit the evidence that could be presented, defendant had already been completely prejudiced in raising defenses it might have had had the fire scene been preserved This situation had deprived defendant of the 'fair playing field' to which it was entitled were the trial to be conducted fairly. In short, the court found that no fair trial could be conducted regardless of how the court limited the introduction of evidence. In drawing its conclusion, the trial court applied the correct legal standard by first considering lesser sanctions to cure the defect before dismissing the case."); *American Family Ins. Co. v. Village Pontiac-GMC, Inc.*, 585 N.E.2d 1115, 1118 (Ill. Ct. App. 1992) (affirming exclusion of evidence and dismissal based on spoliation and noting that "[i]n this case, plaintiffs intentionally allowed the most crucial piece of evidence in this case to be destroyed. Plaintiffs should have known that potential defendants to a case alleging negligence and product liability would undoubtedly want to inspect, as plaintiffs' experts had done, and perhaps test the object alleged to have caused the damage.").

CONCLUSION

For the foregoing reasons, Ford respectfully requests that this Court affirm the Court of Appeals holding that the trial court erred by failing to grant a directed verdict in favor of Ford. Alternatively, Ford requests this Court to rule that the trial court erred in not dismissing the case.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 2006-CP-10-4773

5 Star Inc., Petitioner,

v.

Ford Motor Company, Respondent.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, additional attorneys for Respondent Ford Motor Company, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified to the following address(es):

Pleadings: **Brief of Respondent**

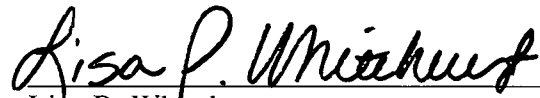
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