THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

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S.C. SUPREME COURT

Opinion Number 4862
Case No. 2006-CP-10-4773

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5 Star, Inc.,.. Respondent,

vs.

Ford Motor Company, ... Appellant.

Petitioner's Reply Brief

September 30, 2013

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TABLE OF CONTENTS

Table of authorities....3

Reply to Respondent's "Questions Presented" 4

Reply to Respondent's Statement of the Case.... 5

Reply Arguments.... 12

I.

A. The Petitioner correctly framed the issue as being that the Court of Appeals invaded the jury's province and substituted its view of the evidence for that of the jury.... 12

B. The trial court properly found the plaintiff's experts qualified to give opinions.... 16

II. The record contains clear and convincing evidence of proof of negligence and negligent design 22
(II A, B, & C combined in a single reply argument)

III. The petitioner proved the truck was in essentially the same condition at the time of the fire as when it left the factory....24

IV. The Court properly instructed the jury on spoliation, which became a question of fact for the jury.... 25

Conclusion 26

TABLE OF AUTHORITIES

CASES:

Bragg v. Hi-Ranger, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995) 21, 27

Crowley v. Spivey, 285 S.C. 397, 329 S.E.2d 724 (Ct. App. 1985) 13

Donald Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010).. 22

Folkens v. Hunt, 290 S.C. 194 , 348 S.E.2d 839
appeal after remand 300 S.C. 251, 387 S.E.2d 265 (Ct. App. 1986) 13

Gause v. Smithers,403 S.C. 140, 742 S.E.2d 644 (2013).................................... 16

Kershaw County Bd. Of Educ. v. U. S. Gypsum, 302 S.C. 390,
396 S.E.2d 369 (1990).. 26

McQuillen v. Dobbs, 262 S.C. 386, 204 S.E.2d 732 (1974)............................... 21

Odom v. Steigerwald, 260 S.C. 422, 196 S.E.2d 635 (1973) 13

Reiland v. Southland Equipment Service, 330 S.C. 617,
500 S.E.2d 145 (Ct. App. 1998).. 4

Stokes v. Spartanburg Regional Medical Center, 368 S.C. 515,,
629 S.E.2d 675 (Ct. App. 2006)... 26

Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).........4

Watson v. Ford Motor Company, 389 S.C. 434, 699 S.E.2d 169, (2010)................ ... 20

STATUTES AND OTHER AUTHORITIES:

S. C. Rules of Evidence. Rule 703.. 6

S. C. Rules of Evidence, Rule 705.. 6

Prosser on Torts, "Negligence: Standard of Conduct," § 28)................................13

REPLY TO RESPONDENT'S QUESTIONS PRESENTED

Ford Motor restates the question presented by this appeal to divert the Court's attention from scope of appellate review on an appeal from a jury verdict. On an appeal from a jury verdict, the appellate court's duty is to apply the law to the facts in this case as found by the jury. In an action at law, on appeal of case tried by a jury, the jurisdiction of the Court extends merely to correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence that reasonably supports the jury's findings. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976); Reiland v. Southland Equipment Service, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998) Appellate courts do not assign weight to evidence; this too is the exclusive province of the jury.

Here, the Court of Appeals reversed the jury's verdict because it found no evidence of Ford's conduct at the time of manufacture to support a verdict. The Court of Appeals determined that there is no evidence in this record proving Ford's "conduct" in 1995. It did not find the plaintiff's expert unquailed as an expert witness; rather, it found plaintiff's expert unqualified to give evidence of Ford's conduct in 1995, but erred in assigning weight to the evidence thereby invading the exclusive province of the jury. Further, the Court of Appeals overlooks testimony of Ford's expert regarding Fords' conduct in addressing any dangerous defect discovered in one of its vehicles. Evidence includes expert opinion, and rather than address the issue in this appeal: Is there any evidence in this record to support the jury's finding of negligence, Ford shifts the inquiry from the proper sphere of examining the record to a semantic attack on Petitioner's

choice of words in framing the issue on certiorari. Thus, Ford demonstrates its lack of confidence in the facts of this case.

The issue in this appeal is simple; to wit, whether there is or is not any evidence in the record to support the trial judge submitting the issue of negligence to the jury.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Ford incorrectly summarizes the case. Footnote 3 in Ford's brief at pages 2-3 is one of two salient examples of Ford's duplicity. Footnote 3 demands a detailed examination because it lifts the curtain away from Ford's deceptiveness. Footnote 3 says:

> 3. 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[1] at issue.
> (Respondent's brief at pages 2-3)

As the Court of Appeals noted in the Opinion under review, Ford concedes the fact that its switch is defective. The defective nature of the switch is key to proving Ford's negligent conduct in its design. At trial, no one denied the switch performs the function it was designed by Ford to do, that is, to deactivate the vehicle's cruise control when the driver depresses the brakes. Rather, the evident defect in the switch design is its tendency to overheat and cause a fire. The Court of Appeals opinion accurately describes the defective design when it found, "The allegedly defective quality of the switch is that it allows brake fluid, which is flammable, to remain in dangerous proximity

---

1 Ford misleads this Court. It is true that Ford defended at trial based upon the destruction of the particular truck, but it is not fair to say that Ford defended based on the destruction of the switch when the testimony was that the truck burned an extended period of time and consumed the switch in the fire. It is an interesting defense to assert that the plaintiff cannot prove his case because the defendant's negligence destroyed the evidence!

to the energized electrical circuit, separated only by a thin membrane." The "dangerous" defect described by the Court of Appeals does not involve failure of the switch to perform its function but rather its design that located constant electrical energy "in dangerous proximity" with a flammable substance. Ironically, the Court's own description of the defect sufficiently describes Ford's' negligent conduct in designing the switch. The Court errs in characterizing the switch as merely "allegedly" defective after finding, in fact, that Ford concedes the switch was defective. Even though Ford admits the switch is defective, at trial, Ford succeeded in limiting, but not excluding, evidence of its recall. The trial court declined to admit the recall as evidence of the defect, but did allow reference to it as necessary to "allow the expert or experts to testify as to experience, skill, or education as it relates to the speed control deactivation switches which are the subject matter of this lawsuit." (Appendix/Record on Appeal at page 370)

Thus, when Ford states in Footnote 3 that "the trial court properly excluded evidence of this recall," it is being, to borrow Ford's word from the trial of the case, "disingenuous."

The trial court did exclude the recall notice from going back to the jury room with the jury, but the trial court allowed reference to the recall notice as allowed by Rules 703 and 705, *S. C. Rules of Evidence*. (The trial court was clear about its ruling, which is contained at several places in the Appendix/Record on Appeal. The most succinct explanation by the trial court is at page 370, quoted above.) However, as Ford's counsel explained—see pages 474-475 of Appendix—in cases where the plaintiff did not receive a recall notice before the fire, Ford argues that the recall notice is "irrelevant" under Rule 407. On the other hand, if the victim received the recall notice

before the fire and failed to act timely, Ford interposes the same recall notice as a bar to recovery. How the same recall notice can be both a sword and a shield remains a mystery of relativism.

Ford's second paragraph on page 4 is inaccurate. As testified to at trial, Stan Shelby had the truck towed from his property February 6, 2006, over four months after the fire, after Tom Nolan came out to do his investigation, two months after writing to Ford's then counsel (Appendix at Volume 3, pages 1058 and 1059), and after the City of North Charleston threatened him with criminal prosecution for keeping it there. When Ford writes "Neither 5 Star nor its attorney notified Ford of 5 Star's potential claim or the availability of the truck for inspection or testing before destroying it," (Respondent's brief at page 4), Ford can make that statement only because it succeeded in excluding from evidence the petitioner's written efforts to notify Ford. (See Appendix at page 1058 and 1059 for counsel's December 20, 2005 and January 17, 2006, letters to Ford's counsel.) The fire occurred over the weekend of September 24-26, 2005. After the fire department responded and put out the fire, the plaintiff notified his insurance company, which took control off the scene. Only after Petitioner's insurance company took control of the scene and conducted its investigation did petitioner hire counsel, and after hiring counsel, his lawyer wrote the two letters referenced above to Ford's local counsel. See Appendix/Record on Appeal Volume 3, pages 1058 and 1059. Thereafter, after the City of North Charleston threatened the petitioner with criminal prosecution, the plaintiff arranged for the truck to be towed off his property:

Q. Did you destroy the truck to try to prevent Fiord from having a fair day in court?

A. I did not do that.

Q. And the truck sat at your place from when to when?

A. From the time of about September 26th till February 2nd.

Q. And why did you have the truck towed off your property?

A. I was put on notice by the North Charleston local people that they would give me a fine if I didn't have it towed, because it was a mess, and they have like teams of people that come out and inspect and stuff like that. So that's why I did it.

Appendix/Record on Appeal Volume 2, pages 658-659

The final incorrect statement of fact is Ford's repetition of the canard that Ford was prejudiced because "the entire body of evidence documenting the condition of the truck and the scene of the fire consists of 17 photographs taken by either an insurance adjustor or Shelby a week after the fire. . . . None of the photographs depict the allegedly defective switch. All experts also agreed that the destruction of the physical evidence severely prejudice Ford's ability to investigate and defend the matter." Respondent's brief at page 5

The reason the switch does not exist is because fire resulting from Ford's negligence consumed it. The truck burst in to flames unattended because Ford designed a switch to handle 2 amperes of electricity and then wired it in to a circuit that delivered 15 amperes of electricity that remains constantly energized and put the whole device against highly flammable brake fluid. Because the switch overheats and burns when the ignition is off, no one was around when it ignited, and the only reason it did not do more damage is because the petitioner's garage was so air-tight, the fire smoldered for a long time. In short, as Chief Norris explained, the fire burned for a long

time and consumed the switch:

Q. Where was the most extensive damage to the building?

A. The most extensive damage to the building was directly above the engine compartment.

Q. Well, does that reveal anything to you?

A. That gives me and indication that that's the area of origin of the fire. That's – the most extensive structural damage was to the rafter, roof rafter, directly above the engine compartment. The most extensive damage to the engine compartment was on the driver's side of the engine compartment.

. . .

Q. Did you form any kind of opinion on the scene as to what the cause of the fire was?

A. Yes, sir. I determined the most probable cause was a failure of the speed control deactivation switch that was on this vehicle prior to the fire. I did have some knowledge of fires occurring in this type situation.

. . .

A. I looked in the engine compartment. The battery was still partially intact. I saw no indication of any after-market electrical equipment or appliances had been attached to the building. I think I asked Mr. Shelby if there was any after-market equipment, had he installed any after-market electrical equipment, and he said no. The vehicle was not running at the time of the fire. So that's – eliminates a dolt of probabilities and possibilities of fires to start.

. . .

Q. When you ruled out all your possibilities, what was the only possibility left?

A. The speed control deactivation switch failure.

Q. O.K.

A. Heat source.

Q. Now, what about the fact that the speed deactivation control switch is not available in this courtroom today for you to look at? Dos that render your opinion unreliable?

A. No, sir.

. . .

A. My opinion is the fire originated within the engine compartment in the area of the master brake cylinder on the drives' side of the vehicle around the master brake cylinder and the speed control deactivation switch.

Q. What is your opinion with regard to the cause of the fire?

A. I believe the cause of the fire was defective speed control deactivation switch because in that area that's the only thing that will produce heat at that time.

. . .

Q. Is there any way to tell from your investigation of this scene as to how long that fire had been burning?

A. That fire had been burning for quite some time based on the amount of soot buildup inside the building. That fire had been burning for some time.

Q. Does the length of time of the fire increase or decrease the likelihood of the deactivation switch surviving the fire?

A. Yes, sir, it does.

Q. What happens? How does it?

A. The longer the fire burns, the more it's going to consume the fuel and destroy the fuel..

Q. Okay. Is it possible that the switch was completely consumed in the fire?

A. Yes, sir. In fact, this case here, the entire master brake cylinder was either consumed or melted. It was no—no longer intact on the inside of the vehicle. Appendix/Record on Appeal at pages 610-611, 612, 613, 618, 620, 622

The consumption of the switch in a fire is common. Mr. Greene testified that 80% of the switch is composed of flammable material (Appendix/R.O.A. page 529), and that in other speed control deactivation switch fires he investigated, the fire consumed the switch in all but one: "In all the fires I've investigated involving these switches, I can think of four offhand. I only found part of the remains of the switch in one fire. The other fires, the switch was consumed." (Appendix/R.O.A. pages 530-531)

The above evidence is compelling, and even if it were not, it is sufficient to support the petitioner's right to trial by jury. As set forth above, Ford did not defend its negligence on proximate cause, but instead "defended at trial based on the complete lack of evidence of negligence by Ford regarding the switch in 1995." (Respondent's brief at page 3) As discussed more fully below, the science of the defect is no more complicated than 15 is greater than 2 and an application of "basic 10th grade physics." Even Ford's expert conceded this:

Q. I mean, [field equations] it's the bedrock of basic tenth grade physics, correct?

A. That—you—that could be true." Appendix/Record on Appeal, page 420, lines

13-16)

In an effort to throw the lower court off the scent, Ford spent an extraordinary amount of effort on spoliation of evidence, which is the legal principle designed to preclude one party from obtaining an unfair advantage over another party by destroying evidence. Here, of course, the fire destroyed the evidence, and the scene is preserved in photographs. It is true that the speed deactivation control switch can be recovered and tested when the fire is quickly detected and extinguished, but where, as here, the switch burned over an entire weekend undetected, it is unlikely that anything survived to test. These are, of course, all questions of fact for the jury to determine.

REPLY TO ARGUMENT I. A

The Petitioner correctly framed the issue as being that the Court of Appeals invaded the jury's province and substituted its view of the evidence for that of the jury.

The Respondent alleges that the Petitioner failed to use the right words in framing the issue on appeal and thereby forfeits his right to judicial review. When the appellate court substituted its view of the evidence for the jury, that included substituting its view of the weight of the evidence, including the expert testimony. Rather than address the issue on its merits, Ford seeks to manufacture a "problem" by parsing language. Ludwig Wittgenstein created an important body of work on the analysis of language in framing issues. Courts find words to be important, but the function of the judicial system is not the same as that of the logician, and courts do not grant or withhold justice based on the parsing of language. Even though Ford did not challenge on proximate cause, where issues of fact must be determined, juries determine the facts based on the application of their common experience. For example even if Ford had

challenged proximate cause, "Proximate cause of the law is not necessarily the proximate cause of the logician. Legal proximate cause is determined upon mixed considerations of logic, common sense, and experience, policy, and precedent." *Odom v. Steigerwald*, 260 S.C. 422, 196 S.E.2d 635 (1973)

The issue in this case was an issue of negligence, and negligence arises out of a well-defined body of common law that establishes when and how the law provides a remedy:

> About the year 1825, negligence began to be recognized as a separate and independent basis of tort liability. Its rise coincided in a marked degree with the Industrial Revolution; and it very probably was stimulated by the rapid increase in the number of accidents cause by industrial machinery, and in particular by the invention of railways. It undoubtedly was greatly encouraged by the disintegration of the old forms of action, and the disappearance of the distinction between direct and indirect injuries, found in trespass and case. The cause of action which at last emerged from this process of reshuffling took on, in general, the aspects of the action on the case, largely because the facts upon which the initial decisions were based fitted that action. Intentional injuries, whether direct or indirect, began to be grouped as a distinct field of liability, and negligence remained as the main basis for unintended torts. Today it is not at all disputed that separate problems and principles, as well as distinct questions of policy, arise in negligence cases.
>
> *Prosser on Torts*, "Negligence: Standard of Conduct § 28 History

Actionable negligence consists of a duty on part of the defendant, a breach of that duty, and an injury to the plaintiff resulting from the defendant's breach. *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839, appeal after remand 300 S.C. 251, 387 S.E.2d 265 (Ct. App. 1986), *Crowley v. Spivey*, 285 S.C. 397, 329 S.E.2d 724 (Ct. App. 1985)

The issue raised here is that the Court of Appeals reversed the jury verdict because it found no evidence in the record to support a finding of negligence as related to Ford's conduct in 1995. The Court of Appeals found the petitioner's experts

unqualified to give an opinion as to Ford's conduct in 1995, and overlooked testimony of Fords' expert regarding Ford's conduct in addressing dangerous defects. In other words, the Court of Appeals concludes there is no expert evidence of Ford's conduct in 1995. However as may be seen in the Appendix/Record on Appeal, Ford's expert testified to the company's lackadaisical attitude toward such defects:

Q. Well, in your experience as an engineer for Ford Motor Company, if you found that there was a defect in an automobile, if it possessed a danger to persons or property, would you tell anybody or just suppress it?

A. Absolutely, I would tell.

Q. How would you tell them?

A. By returning back to the office, putting together the information that I was able to gather through my investigation, and presenting that to engineers and other people through Ford Motor Company who then take it to the next step.

Q. And the next step would be to issue what, issue some sort of notification that there might be a problem?

MR. OTT: Your Honor, objection.

THE COURT: Overruled.

THE WITNESS: Not necessarily. The next step would be let's look at more details of the investigation, how many vehicles could have this particular issue that was uncovered. If we—we could get other engineers involved that would begin investigations on what we—what we found through our initial investigation. So I think there's –there's many steps that—that occur after the initial investigation.

Appendix/Record on Appeal pages 428-429

The above testimony, in combination with Ford's admission that it designed a defective switch, is compelling evidence and sufficient to submit the question of negligence to the jury. The Court of Appeals disagreed with the jury that there was any evidence of negligence. The Court of Appeals held:

The limited evidentiary presentation by 5 Star allows us only a scant understanding of the design and operation of a speed control deactivation switch. From what little testimony there is in this record, however, we are able to determine that the switch serves as a mechanism to deactivate the cruise control when the driver presses the brake pedal. The switch is wired into the brake light circuit, which, for safety reasons, must remain energized at all times. Keeping this circuit energized allows the brake lights to be illuminated by pressing the brake pedal even when the vehicle is turned off. The switch is "redundant," meaning it serves as a back-up in case the primary deactivation switch malfunctions. The allegedly defective quality of the switch is that it allows brake fluid, which is flammable, to remain in dangerous proximity to the energized electrical circuit, separated only by a thin membrane. Greene's explanation of how this can start a fire was "the protective device [apparently a fuse] is not coordinated with the switch. The switch is rated for two amperes. The protective devise is rated for 15 amperes. So the switch can really overheat and start a fire before the 15-ampere fuse would ever blow.

Court of Appeals Opinion under Review at page 4

Thus, the Court of Appeals found that there is insufficient evidence to support a finding of negligence, and, as discussed more fully below, the evidence in the case is sufficient to allow a jury to deliberate and decide what it believes.

"A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 409, 419 (Ct. App. 2000). On appeal from a circuit court's denial of a motion for a directed verdict or a JNOV, we apply the same standard as the circuit court by viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party. *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 331032, 732 S.E.2d 166, 171 (2012). We will not reverse the circuit court's ruling on a JNOV motion unless there is no evidence to support the ruling or where the ruling is controlled by an error of law. *Law v. S.C. Dept. of Corr.*, 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006)

Gause v. Smithers, 403 S.C. 140, 742 S.E.2d 644 (2013)

Since the Court of Appeals reversed the jury's verdict because it found no evidence, it invaded the province of the jury, and therefore, the petitioner has put the central issue raised by this appeal before this Court, and Ford is clutching at straws to contend otherwise.

Reply to Argument I. B

The trial court properly found the petitioner's experts qualified to give opinions.

According to the Court of Appeals, the petitioner failed to prove that the switch was defective **in 1995**, yet the record is full of testimony from a properly qualified expert. The Court of Appeals correctly held that the design of the switch called for some expert explanation because the design of electrical components is beyond the experience of the average juror. On the other hand, it is undeniable that it does not take an expert to reason that Ford's forcing 15 amps of electricity through a switch Ford designed to handle 2 and then putting the whole device in close proximity to highly flammable brake fluid is a bad design. Greene testified to the unsafe design of the switch due to its protective device not being properly coordinated with the switch and the foreseeable danger resulting therefrom. However, Ford challenged Mr. Greene's credentials to offer expert evidence, and after extensive *voir dire*, the trial judge qualified Greene as an expert in automotive electronics. During *voir dire* (found at pages 506-510), Ford's counsel learned that Mr. Greene, a member of the Society of Automotive Engineers, has extensive experience with electrical components, including those used in automobiles:

Q. Have you ever worked for a company that manufactures component parts that are used for installation in vehicles?

A. Yes.

Q. Who was that?

A. Exar, E-X-A-R, Integrated Systems. They manufacture integrated circuits, including timers of various types that are used in automobiles.

I also did work for Variaon Associates. They manufacture microwave products that are now being used in automobiles. At the time they were not.

And Fairchild Semiconductor, which no longer exists, which at the time was also developing products for use in automobiles, but they had not been put in the field yet.

Q. So those are the companies that you worked for that did that type of work?

A. Correct.

Q. Now, have you ever personally, Mr. Greene, designed a component part for use in an automobile?

A. Not specifically for use in an automobile, but I've designed and worked on designs for component parts that would go into automobiles as well as into other products.

Q. Have your services ever been hired by an automobile manufacturer?

A. No.

Q. Have your services ever been hired by a company that supplies component parts to automotive manufacturers?

A. Yes.

Q. Who was that?

A. Delco Electric.

Q. And what case, type of case was that, Mr. Greene?

A. Delco Electric is a manufacturer of automotive electronics and marine electronics, and I was hired by them to take a look at an alleged defect in an alternator which caused a million dollar boat to burn up.

Q. So that was having to do with a boat but not specific to a vehicle.

A. It was a vehicle engine in the boat.

Q. I understand. Also, as to an automobile, have you ever done that type of work?

A. No. I've never been hired by a component manufacturer to take a look at an automobile. I have been hired by component manufacturers to take a look at buses and other large commercial type vehicles.

Q. Were those accident reconstruction cases?

A. No. Those were also fire cases.

Q. So it didn't' have to do with vehicle design; it had to do with fire cause and origin?

A. Well, it had to do with component design switch could have caused or had a part in the fire.

Interestingly, Respondent's brief contains a footnote (footnote 13 on page 17 of its brief) that includes a quote from a publication that Ford states was "excluded by the trial judge and does not appear in the record," but Ford believes Greene relied on it. Ford's brief includes quotes from the publication, "Analysis of a Ford Speed Control Deactivation Switch," about the preservation of evidence. However, Ford's footnote omits the following quote from the same publication about the design of the switch:

The SCDS (speed control deactivation switch) was manufactured by Texas Instruments design to a Ford specification design. Texas Instruments has stated the switch was **only** designed to handle a small (1-2 amperes) **intermittent** DC load. Ford installed the switches in a 15 ampere circuit. Additionally, this circuit is energized at all times.
(Appendix at page 993, emphasis added)

Mr. Greene also testified that many courts had qualified him many times in "an investigation on an electrical component as a possible cause of a fire." (Appendix/Record on Appeal page 503) The Court of Appeals' criticism of Greene's testimony goes to its weight, not its admissibility. Nowhere in the Opinion under review does the Court of Appeals explain in what particular way he is deficient other than to say he had no experience with Ford's conduct in 1995. "Neither Norris nor Greene testified to a single fact or event at or before the manufacture of this truck and this switch. Neither witness was qualified as an expert in automobile design or any other area of expertise that would enable them to offer opinion as to whether Ford's conduct was negligent." (Opinion under review at page 3) As set forth above, the Court of Appeals is incorrect. Greene's *voir dire* quoted above shows he has sufficient qualifications to speak on the fundamental defect in Ford's design that caused the switch to overheat and start a fire. He testified to the foreseeability of danger in this design based on reliable and well-established technical knowledge. The Court of Appeals never explains how the lower court abused her discretion in finding Greene qualified. As this Court held in *Watson v. Ford Motor Company*, 389, S.C. 434, 699 S.E.2d 169 (2010), the trial court's focus on qualification of an expert is to "examine the substance of the testimony for reliability":

In our view, the trial court's error in admitting Dr. Anderson's testimony is largely based on solely focusing on whether he was qualified as an expert in the field of electrical

engineering and failing to analyze the reliability of the proposed testimony. Respondents did not offer Dr. Anderson to testify generally as to the electrical wiring of a circuit system in an automobile. Rather, Respondents sought to introduce Dr. Anderson's testimony to determine a fact in issue based on the scientific hypothesis. The trial court was thus required to examine the substance of the testimony for reliability, and in failing to make this threshold determination, the trial court erred as a matter of law in admitting Dr. Anderson's testimony.

Even Ford agrees in its brief that Greene "is knowledgeable about electrical engineering generally." (Respondent's brief at page 12) Therefore, the reliability of this testimony was sound and properly admitted by the trial court. Greene testified that there is a body of literature on Ford's switch and that he was familiar with it from other investigations. Chief Norris testified to the same thing. Moreover, Ford had a full and fair opportunity to cross-examine every witness, and as this Court noted in *Donald Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010), Ford has identified no prejudice in either witness being qualified:

> However, even if the trial judge erred in qualifying Morris as an expert witness, we find Stokes–Craven was not prejudiced by the admission of this testimony. As previously stated, Stokes–Craven thoroughly cross-examined Morris regarding his lack of experience and qualifications.

The jury heard Greene's qualifications, his testimony about the fundamentals of electrical circuitry, and his summation of the initial design defect in Ford's design that creates overheating in dangerous proximity to flammable brake fluid. The jury also heard his explanation of a cheap, alternative safe design. Ford quotes Greene on page 18 of its brief in support of its argument that in 1995, "the danger of deactivation switch fires was unknown and that these fires became prevalent later on." The danger may have been unknown to anyone outside of Ford in 1995 because Ford designed the

switch to handle only a 1 to 2 ampere intermittent load and ordered Texas Instruments to manufacture to this specification. Then Ford installed the switch in a constantly-energized 15 amp circuit in vehicles like 5 Star's truck. Thus Ford knew it was placing its switch into an electrical circuit that would overload the switch's capacity because Ford designed the capacity.

> Proof of negligence can be by direct or by circumstantial evidence. "While our decisions uniformly state that the so called doctrine of *res ipsa loquitur* does not apply in this State, they have with equal uniformity recognized that negligence may be proved by circumstantial evidence as well as direct evidence. And in determining the sufficiency of circumstantial evidence, the facts and circumstances shown are to be reckoned with in the light of ordinary experience and such conclusions deduced therefrom as common sense dictates." *McQuillen v. Dobbs*, 262 S.C. 386, 204 S.E.2d 732 (1974)

As this Court held in *Bragg v. Hi-Ranger*, 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995): The burden of proving Ford's negligence may be met by showing that Ford was aware of the danger and failed to take reasonable steps to correct it. Because Ford knows 15 amps are more than 2, and because it knows that constant is different from intermittent, and because it knows that the entire circuit is protected by a 15-amp fuse, the petitioner presented sufficient evidence from which a jury could find negligence.

The Court of Appeals never explains how the trial court erred in qualifying the petitioner's expert. The test for legal error in admitting expert testimony is two-fold, and the Court of Appeals applies neither:

Reversal of a trial judge's qualification of an expert witness requires the complaint party to prove both an abuse of discretion and prejudice. See *Jenkins v. E. L. Long Motor Lines, Inc.*, 233 S.C. 87, 94, 103 S.E.2d 523, 527 (1958) (recognizing that the trial judge's ruling on the qualification of an expert would not be disturbed in the absence of an abuse of discretion); Ellis v. Davidson, 358 S.C. 509, 526, 595 S.E.2d 817, 826 (Ct.

App. 2004) (demonstrating that there must be both error on the part of the trial judge, as well as prejudice to the complaining party to warrant reversal). An abuse of discretion occurs when the decision of the trial judge is unsupported by the evidence or controlled by an error of law. *Ledford v. Pa. Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976). In order to demonstrate prejudice, there must be a "reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 590 (2005)
Austin v. Stokes-Craven Holding Corp., 387 S.C 22, 691 S.E.2d 135 (2010)

Ford argues this issue on page 14 of its brief thus: "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." This is, of course, a false statement. Ford made a conscious decision to incorporate a switch into the circuit it knew was delivering more electricity that it designed its switch to handle. Ford is never going to admit that it adopted an unwise design, and that is why it has spent hundreds of thousands of dollars to shift the blame to everyone else.

Reply to argument II, A. B. & C.

The evidence in this case is sufficient to allow a jury to find that Ford's conduct in 1995 was negligent, and the petitioner proved a reasonable alternative design, and that it was foreseeable that delivering too much electricity to a switch in close proximity to highly flammable brake fluid was negligent.

The petitioner combines his reply to II, A., B. and C. in one reply in an effort to reduce the length of this brief and because all three arguments are reformulations of the same issue; to wit, whether there was sufficient evidence to allow the trial judge to submit the case to the jury

As to Ford's argument that the petitioner failed to produce any evidence of Ford's negligence in 1995, this issue has been completely addressed in the preceding pages. As to part B of Ford's argument, the petitioner produced clear, succinct, and cogent

evidence of a reasonable alternative design, which is found in the Appendix/Record on Appeal at pages 515-516 of the Appendix/Record on Appeal:

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

A. It's not.

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

A. Oh, yes.

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

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

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

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

Thus, Ford's statement that there is no evidence of a reasonable alternative design is incorrect.

As to foreseeability, Mr. Greene also addressed that as well at pages 514-515:

And it's very foreseeable that this thin membrane will leak eventually, because when you apply the brakes on the vehicle, brake pressure increases dramatically and pushes against this membrane which, in turn, pushes the switch and opens the switch. So if you have a slight leak in this membrane, this flammable brake fluid will get on the other side where the electrical switch is, and you have a source of ignition, and then you have enclosing a whole assembly of insulating plastic which keeps the heat in there and cause the temperature to rise until it can eventually reach the ignition point and start a fire, and you have then brake fluid freely coming out into the switch, or what was the switch assembly which is now burning, and the fire rapidly accelerates from that point on.

The Court of Appeals never addresses this evidence, other than to do an excellent job at summarizing it and then calling it "scant." Whether it is "scant" or sufficient is for the jury to say. Clearly, there is evidence of foreseeability. Mr. Greene's explanation of the design defect, the alternative design, and the cost associated with it are both full and compelling. The real question—the one Ford never addresses—is why Ford designed a switch that can handle safely only 13% of the electricity delivered through it. The petitioner provided sufficient evidence e of foreseeability.

REPLY TO ARGUMENT III.

The petitioner proved the truck was in essentially the same condition at the time of the fire as when it left the factory.

Here, Ford advances an argument that is not supported by any evidence in the record. As the Court can see, the photographs of the truck, pages 1001, 1002, 1003, 1004, 1006, and 1007 demonstrate the truck is obviously in the same condition as when it left the factory other than wear and tear and being burnt up. (The photographs now before the Court are third generation copies, and admittedly are not as crisp as the original photos that went to the jury. As the original appellant, Ford asked for and received the originals from the Clerk of Court's office.) Stan Shelby testified that the

truck had no aftermarket modifications: "Q. Were there any after-market modification. A. Not to my knowledge. There was not." (Appendix, page 663). Chief Norris testified to the same thing as quoted above on page 9.

Thus, it was for the jury to say whether the truck was in substantially the same condition, and as the jury had the testimony of the owner and the photos, the trial court committed no error in allow the jury to reach this determination.

REPLY TO ARGUMENT IV

The trial court gave a charge on spoliation, and it thus became a question for the jury as to whether Ford was or was not prejudiced by the lack of the truck.

The spoliation law is fully discussed in the briefs to the Court of Appeals and since the Court of Appeals did not rely on spoliation in reversing the jury verdict, the petitioner does not repeat the arguments here except to say the doctrine of spoliation is to prevent one party from getting an advantage over another by examining evidence and then destroying it, preventing the other side the same opportunity. That did not happen here. Jon Olson and Leonard Greene operated off the same body of information, and thus each side had the same opportunity to evaluate evidence as the other. The jury heard the explanation as to why the truck was destroyed. Despite Ford's opinion in its brief that an adverse inference is "insufficient" and "dismissal was the only adequate remedy," (Respondent's brief at page 31) in this case the trial court properly gave the jury an adverse inference instruction supported by the well-established case law:

> Relying on the holding in *Welch*, our Supreme Court later upheld a jury charge which advised that "when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party." *Kershaw County Bd. Of Educ. v. U.S. Gypsum Co.*,

302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990). In *Kershaw*, the school board sued the manufacturer of the ceiling plaster that had been installed in many of Kershaw County's schools, alleging the plaster contained asbestos. The trial court issued an order requiring the manufacturer be notified prior to any asbestos being removed. Despite this order, the school board did not notify the manufacturer moved for judgment in its favor on the claims related to that school. The trial court denied the motion, but charged the jury as described above. In upholding the charge, the Supreme Court stated: "The trial court's decision was proper under the facts of this case." *Id. Stokes V. Spartanburg Regional Medical Center*, 368 S.C. 515, 629 S.E.2d. 675 (Ct. App. 2006).

CONCLUSION

It is impossible to look at the evidence in this record and conclude anything other than the Court of Appeals substituted its view of the evidence for that of the jury. As to the evidence before the jury, the Court of Appeals' summary of Petitioner's evidence quoted above on page 15 is as good as it gets in summarizing the evidence in this trial. As the Supreme Court said in *McQuillen*, while we do not have *res ipsa loquitur* in South Carolina, we do have common sense, and it can hardly be argued that Ford could not see that continuously transmitting 87% more electricity through its switch than it designed it to handle would lead to overheating. The Court of Appeals grasped this principle when it noted that Ford admits that the switch is defective because it is rated for two amperes of electricity and Ford incorporated it in to the brake light circuit which delivers a continuous flow of 15 amperes even when the key is out of the ignition and the vehicle is unattended. Ford knew the circuit delivered too much electricity to its switch because it specifically designed the switch for 2-amps or less. It is undisputed that Ford designed the switch to its specification and incorporated it in to its vehicle. Thus, the jury had sufficient evidence before it to conclude that Ford's conduct was negligent by forcing 15 amps of electricity through a 2 amp switch. The burden of

proving Ford's negligence may be met by showing that Ford was aware of its fundamentally flawed design, the potential for danger, and the failure to take reasonable steps to correct it. *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 539, 462 S.E.2d 321, 326 (Ct. App. 1995)

The Court of Appeals confused the function of the switch to operate as a speed control switch versus the function of the switch to not overheat. It is true that the Petitioner never offered evidence about the switch's capability to disengage the speed control setting because the Petitioner did not suffer an injury because he could not stop the vehicle. Rather, he suffered an injury when his unattended vehicle caught fire and burned his lawn equipment and building. Unintended fire is the defect in Ford's switch design. As the truck aged, the 2-amp switch absorbed more and more electricity at a level beyond its capacity until it overheated and ignited with the key out of the ignition, leading to the damage to 5 Star's business. Thus, there was sufficient evidence to submit the question of fact to the jury, and the Court of Appeals reversed the jury's findings only because it chose to disbelieve the Petitioner's evidence, which it is not authorized to do.

What makes this case unusual is because the petitioner in this case suffered a clearly identified loss through clearly identified negligence. Rather than accept responsibility for the petitioner's loss, Ford Motor Company has thrown resources at this case designed to thwart the petitioner's access to the courts and deny him his right to justice. Rule 1 of the South Carolina Rules of Civil Procedure states: "[These Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action." As my father, a man with of no formal education, said with the zeal of a newly

minted citizen: "Only in America can a person hire a lawyer, go into a courtroom and stand toe-to-toe with the mightiest corporation, or even the government itself, and get a fair hearing." His formulation was not as elegant as the similar formulation penned by our third Chief Justice, John Marshall, who in 1803, wrote the words in *Marbury v. Madison* that formed the skeleton of our judicial system. Ford mocks the entire grand edifice, calculating that by throwing enough resources at the dispute, it can bury the petitioner, and anyone who represents him, under tons of oppression. On the long journey to this Court, Ford has thrown every defense imaginable at Petitioner, including but not limited to: the *Noerr-Pennington* Doctrine, Motor Vehicle Safety Act, statute of limitations, improper venue, lack of subject matter jurisdiction, exclusion of warranties, misuse of the vehicle, comparative negligence, lack of privity, lack of standing, Rule 11 violation, and sovereign immunity. (See Ford's Answer at pages 153-160 of the Appendix.) However, despite the brilliance of Ford's legal team and the undisputed fact that Petitioner is out-matched, the fact remains that injured parties have a right to have their cases decided by a jury, and in reversing the jury verdict, the Court of Appeals invaded the province of the jury and improperly set aside its verdict.

Respectfully submitted.

October 1, 2013

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Opinion No.: 4862
Case No. 2006-CP-10-4773

Five Star, Inc., ... Petitioner,

vs.

Ford Motor Co., ... Respondent.

CERTIFICATE OF SERVICE

I certify that I have a copy of the Respondent's Reply Brief by depositing copies in the United States Mail, postage prepaid, on October 2, 2013, addressed to Respondent's attorneys of record, David C. Marshall and Curtis L. Ott, Turner Padgett, at P. O. Box 1473, Columbia, S.C. 29202 and C. Mitchell Brown at P. O. Box 11070, Columbia, S. C. 29211.

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