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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 14, 2011

QUESTION PRESENTED

Did the Court of Appeals err in substituting its view of the evidence for the jury's view of the evidence?

STATEMENT OF THE CASE

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

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

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

On September 2, 2008, the case came before Judge Harrington and a jury, and after a three day trial, the jury returned a verdict for the plaintiff in the amount of \$41,000. After Judge Harrington denied Ford's post-trial motions, Ford appealed on a number of grounds. On August 10, 2011, the Court of Appeals reversed the jury verdict because it found that there was no evidence in the record to establish the necessary elements of negligence in a products liability case. On August 23, 2011, Five Star moved for a rehearing and rehearing *en banc*, which the Court of Appeals denied on December 14, 2011.

ARGUMENT

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

The Court of Appeals reversed the jury's verdict on a single ground. In its August 10, 2011, opinion, the Court of Appeals wrote

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

We focus our analysis on the fourth element. In order to satisfy this element in a negligent design case, the plaintiff must prove negligent conduct on the part of the defendant in the design of the product at or before the time of manufacture.

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

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

(internal citations omitted)

The record in this case contains abundant evidence of Ford's negligent conduct. The record contains evidence that Ford designed the switch to carry two amperes of electricity, ordered Texas Instruments to build it to Ford's specifications, and Ford then incorporated its two amp switch in to a circuit that delivers a constant flow of 15 amperes of electricity even when the vehicle is unattended. The Court of Appeals focused on what it says is a lack of evidence that the switch is negligently designed. The Court of Appeals overlooked the abundant evidence that while there may be nothing wrong with Ford designing a switch to operate on two amperes of electricity, there is quite a bit wrong with installing a switch rated for two amps in to a circuit that delivers 75% more electricity than Ford designed the switch to handle, which is like plugging a 110 volt appliance in to a 220 volt circuit. Thus, it knowingly installed a two amp switch unprotected by a fuse in to a 15 amp circuit that continuously delivered 15 amps of electricity to the switch even when it foreseeably failed. Ford knowingly wired the switch in to its vehicles' brake light circuits that remain energized even when the engine is off and the key is not in the ignition. As a foreseeable result, the switch degrades over time. Since the switch sits below a thin membrane separating it from highly flammable brake fluid, a fire is foreseeable and nearly inevitable as evidenced by Ford's recall of the same switch for this exact problem. This is how the plaintiff's expert summarized Ford's negligence at the trial.

Q How does that [the switch fire] happen?

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

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

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

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

Q. What is the fix for that problem?

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

R O A pages 375, line 18 – 377, line 5

At trial, the plaintiff called Ford's expert, Jon Olson, a "design analysis engineer" (R O.A p 262, lines 5-6), in its case, and although Mr. Olson initially equivocated, even Ford's own expert conceded all of the material points established by the plaintiff's expert

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

A I believe that's true, yeah

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

A I believe that's true

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

A No that's not true [However on further cross examination, Mr Olson conceded this point See page 350 of the Record on Appeal at line 16 where Olson corrects himself and concedes that the answer to the question is true. "Q. We've already established that, 15 amps, right? A. Yeah "]

Q That is not true? Isn't it true that the speed control deactivation switch remains energized at all times?

A Yes, that is true.

Q Okay The same way that brake lights remain energized at all times?

A. That's correct

Q. In other words, if you're sitting in the driver's seat of your automobile and the

key's not in the ignition, you can push the brakes and the brake lights will illuminate, correct?

A. That's correct That's a requirement

Q. That's a requirement It's a safety feature, correct?

A Yes, it is.

Q Okay. And Ford builds these vehicles in conformity with federal safety regulations, correct?

A. Among others, but certainly within our own safety design guides as well as the federal standards

R O.A pages 271, line 4 -- 272, line 11

Here, the jury found that Ford was negligent by incorporating an electrical device it designed to handle two amperes in to an electrical circuit that delivered a constant source of 15 amperes of electricity. In reversing the jury verdict, the Court of Appeals never explains how the above evidence is insufficient; rather, it substitutes its view of this evidence for the jury's view, which it cannot do Questions of fact are always left to juries, and in evaluating whether there is **any** evidence to submit a case to a jury, the court is required to view all the evidence in the light most favorable to the nonmoving party *Hyland v. Pre-engineered Products, Inc.*, 308 S.C. 277, 417 SE2d 622 (Ct App 1992) ("A directed verdict motion must be granted when the evidence and all reasonable inferences, viewed in the light most favorable to the nonmoving party, creates no issue of fact.") If the evidence is susceptible to more than one reasonable inference, the case must go to the jury. *Unlimited Services Inc. v. Macklen Enterprises, Inc*, 303 S.C. 384, 401 S.E 2d 153

(1991) (“In ruling on a motions for a directed verdict or judgment *non obstante verdict*, the trial court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party, and if it is susceptible of more than one reasonable inference, the case should be submitted to the jury.”) The court is not concerned with the strength of the evidence or whether it is direct or circumstantial *Holtzscheiter v Thomson Newspapers, Inc.*, 332 S C 502, 506 S E 2d 497 (1998) (“A directed verdict on liability is properly denied where there is any evidence, direct or circumstantial, justifying submission of the issue to the jury”) “In reviewing the denial of a motion for a directed verdict, this court applies the same standard as the trial court, viewing the evidence and the inferences in the light most favorable to the non-moving party, and will not reverse the denial unless there is no evidence to support the ruling *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S C*, 385 S.C 428, 441-42, 685 S E 2d 163, 170 (2009).” *Limehouse v. Hulsey*, ___ S C ___, ___ S E.2d ___ (Opinion No 4805, filed March 10, 2011)

In reversing the trial court, the Court of Appeals expressed concerned by what it says is the plaintiff’s lack of evidence concerning Ford’s conduct. The Court of Appeals says that the plaintiff must produce evidence that Ford knew its switch design was defective when it incorporated it into the plaintiff’s vehicle. First of all, the plaintiff never alleged the switch is inherently defective. The negligence is in designing a switch to absorb two amps and inserting it in to a 15 amp, continuously operating circuit and locating it directly below highly flammable brake fluid. There is an abundance of evidence to permit a jury to decide the question of fact as to whether Ford’s conduct was or was not negligent

“Legal cause is proved by establishing foreseeability. *Bray*, 356 S C at 117, 588 S.E.2d t 95, *Small*, 329 S.C at 463, 494 S.E 2d at 842. The touchstone of proximate cause in South Carolina is foreseeability *Koester v. Carolina Rental Ctr , Inc.*, 313 S C 490, 443 S E 2d 392 (1994), *Small*, 329 S C at 463, 494 S.E 2d at 842.” *Jamison v. Ford Motor Co.*, 373 S C 248, 644 S.E.2d 755 (Ct App. 2007) “[P]roximate 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) “A products liability plaintiff must prove the product defect was the proximate cause of the injury sustained. *Small v. Pioneer Machinery, Inc.* 329 S C 448, 494 S E 2d 835 (Ct App 1997) (citing *Livingston v Noland Corp* , 293 S C 521, 362 S E.2d 16 (1987) (proof must be sufficient to show defect was direct and efficient cause of plaintiff’s injury)). Proximate cause requires proof of both causation in fact and legal cause, which is proved by establishing foreseeability. *Id*”

The Court of Appeals never explains what more the plaintiff was required to produce to demonstrate “evidence of Ford’s conduct,” absent producing the mythological “smoking gun” memo No case cited by the Court of Appeals in reversing the jury verdict stands for the proposition that a plaintiff must produce a defendant’s confession in order to submit the case to the jury. This record establishes an abundance of evidence—the plaintiff’s expert testified it was “foreseeable” that putting a two amp switch in to a 15 amp circuit unprotected would lead to a fire This is evidence of Ford’s conduct, and in testing it for sufficiency, the Court of Appeals is not permitted to usurp the jury’s fact finding

responsibility “Moreover, since ‘[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict, the evidence present by [the non-moving party] is to be believed, and all justifiable inferences are to be drawn in his favor ” [internal citations omitted] (“[W]e must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence.” *Anderson v. The Augusta Chronicle*, 355 S C 461, 585 S.E 2d 506 (Ct App. 2003), affirmed 365 S C 589, 619 S E 2d 428 (2005) Even though it is a defamation case, the *Anderson* decisions are important because the issue turned on the newspaper’s conduct in publishing a false story about the plaintiff. In other words, the defendant’s actions are evidence of its conduct Here, the question is whether Ford’s decision to insert it into a circuit that overcame its rated capacity would produce potentially damaging results This is the quintessential jury question. By their own admission, Ford’s engineers produced a switch design that was defective for the intended use and would foreseeably result in a potentially catastrophic result Ford’s incorporating of this switch in to its manufacture is direct evidence of Ford’s conduct. The jury had these facts, and thus had a basis to find the plaintiff met all the elements of negligence as charged by the trial court. The Court of Appeals is not authorized to substitute its view of this evidence for the jury’s view. “In action at law tried by jury, Court of Appeals’ jurisdiction extends merely to correction of errors of law and Court will not disturb jury’s factual findings unless review of record discloses no evidence which reasonably supports findings *Small v Pioneer Machinery, Inc.*, 329 S C 448, 494 S E 2d 835 (Ct App 1997)

It was up to Ford to counter this evidence by showing that running 15 amperes of electricity through a switch rated for two is somehow “state of the art.” Ford offered nothing, and the plaintiff’s evidence created a sufficient inference to submit the case to a jury. The trial judge did not err in allowing the jury to decide if Ford’s design was negligent or not.


Based on this record, the Court of Appeals substituted its view of the evidence for the jury’s, which it cannot do. The jury represents the reasonably prudent person, and it applied its collective “logic, common sense, experience, policy and precedent, *Odom, ibid*,” to evaluate the evidence presented. It is impossible to read this record and not see that it contains evidence of Ford’s knowingly incorporating its two amp switch in to a 15 amp circuit, which it placed directly beneath highly flammable brake fluid. The Court of Appeals does not explain why the plaintiff’s evidence is insufficient as to Ford’s conduct. Rather, it applied an incorrect standard of review to the evidence produced at trial, and substituted its view of the evidence for the jury’s view of the evidence. For this reason, the Supreme Court should grant *certiorari* to review the reasoning of the Court of Appeals and determine that the lower court exceeded its authority in reversing the jury’s verdict.

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of *certiorari* to review the Court of Appeals' decision for error

Respectfully submitted,

January 12, 2012



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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Opinion No.: 4862
Trial Court Case Number 2006-CP-10-04773

5 Star, Inc., Petitioner,

vs

Ford Motor Company, Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of this petition for *certiorari* and Appendix upon opposing counsel by placing a copy of same, postage prepaid to Respondent's counsel of record this 12th day of January 2012, to the following address Mr Curtis L. Ott and Mr David C Marshall, at Turner, Padgett, Graham & Laney, P.A at P.O Box 1473, Columbia, S C 29202, Attorneys for the Respondent, Ford Motor Company



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SC Court of Appeals

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January 10, 2012

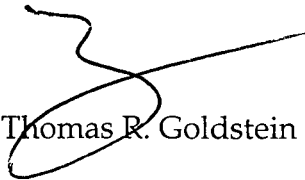
Hon. Daniel E. Shearhouse
Clerk of Court,
South Carolina Supreme Court
P O. Box 11330
Columbia, S. C. 29211

Re: 5 Star, Inc. vs. Ford Motor Company
Court of Appeals Opinion #: 4862
Trial Court Case No. 2006-CP-10-04773

Dear Mr. Shearhouse,

I enclose an original and 7 copies of a Petition for Certiorari along with a certificate of service and our firm's check in the amount of \$100.00. Would you please file these and return an extra copy to me in the self-addressed, stamped envelope? Because the Appendix is heavy, I have mailed it to your office by UPS to your street address. I am also sending one copy to the Court of Appeals. Please let me know if I must do anything further in order to perfect this request for review. With kind regards, I am

Very truly yours,
BELK, COBB, INFINGER & GOLDSTEIN, P.A.



Thomas R. Goldstein

TRG/rt

enclosure: as stated

cc: Honorable Tanya Gee, Clerk of Court
Curtis L Ott, Esq.
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