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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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., ... Respondent,

v.

Ford Motor Company, ... Appellant.

RECORD ON APPEAL
Volume I of II

Thomas R. Goldstein
Belk, Cobb, Infinger & Goldstein, P.A.
Post Office Box 71121
N. Charleston, SC 29415-1121
Phone: (843) 554-4291

Counsel for Respondent

Curtis L. Ott-
David C. Marshall
Turner Padgett Graham & Laney P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200

Counsel for Appellant

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JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, S.C. 29401-2258
RETURN SERVICE REQUESTED



www3.charlestoncounty.org

22



OTT, CURTIS L
PO BOX 1473
COLUMBIA SC 29202-1473

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRCP
OJYVD - ORDER-JURY VERDICT JUDGMENT AGAINST THE DEFENDANT

THIS JUDGMENT WAS ENTERED ON THE 8TH DAY OF SEPTEMBER, 2008 AND A COPY MAILED
FIRST-CLASS THIS 10TH DAY OF SEPTEMBER, 2008 TO ALL COUNSEL OF RECORD AND/OR
ALL PERSONS ENTITLED TO RECEIVE NOTICE.
YOU MAY VIEW AND DOWNLOAD THIS DOCUMENT AT WWW3.CHARLESTONCOUNTY.ORG

OTT, CURTIS L
P O BOX 1473
COLUMBIA , SC 29202

2006-CP-10-004773
5 STAR INC
VS.
FORD MOTOR COMPANY

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2006-CP-10-4773

5 STAR, INC.,

Plaintiffs,

v.

FORD MOTOR COMPANY,

Defendant.

VERDICT FORM

VERDICT

1. We, the Jury find for the Defendant against the Plaintiff. _____

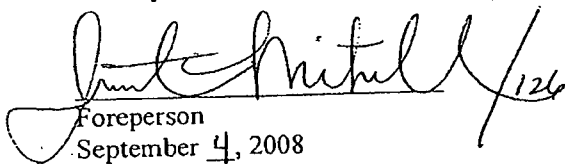
OR

2. We, the Jury, find for the Plaintiff against the Defendant in the amount of
41,000. ⁰⁰ actual damages

OR

3. We, the Jury, find for the Plaintiff against the Defendant in the amount of
_____ actual damages and _____
punitive damages.

I certify that this decision is the unanimous decision of the jury.


Foreperson
September 4, 2008

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

Case No.: 2006-CP-10-4773

5 Star, Inc.
Plaintiff

versus

Ford Motor Company
Defendant

FILED
2008 SEP 29 PM 12:32
JULIE J. ARMSTRONG
CLERK OF COURT

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the verdict has been rendered.

☒ **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. nonsuit)
☐ Rule 43(k), SCRCP (Settled);
☐ Other: _____

☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order ☐ Statement of Judgment by Court
Motion for New Trial, and Motion for Judgment Notwithstanding Verdict - Denied

Dated at Charleston, South Carolina,

September 24, 2008
Date

Judge

This judgment was entered on the _____ Day of _____, 20____, and a copy mailed first class this _____ Day of _____, 20____, to attorneys of record or to parties (when appearing pro-se) as follows:

Thomas Goldstein

Curtis Ott

Attorney(s) for Plaintiff(s)

Attorney(s) for Defendant(s)

SCR Form 4 (Rev. 2/96)

Clerk of Court

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2006-CP-10-4773

5 STAR INC.,)
Plaintiff,)

VS.)

FORD MOTOR COMPANY, et al.,)
Defendant.)

ORDER TAXING COSTS

FILED
2008 OCT 30 PM 2:57
JULIE J. ARTHUR
CLERK OF COURT

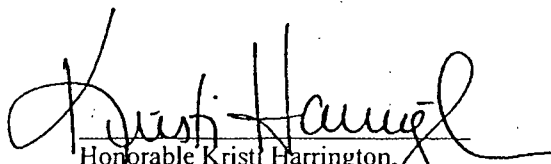
The above referenced matter was tried through a jury verdict, and the verdict of \$41,000.00 has been entered of record. Thereafter, the Plaintiff filed an application for taxation of costs supported with an affidavit in accordance with the South Carolina Rules of Civil Procedure. The Defendant filed no objection to the taxation of costs. Therefore, based on the foregoing as hereby ordered,

The costs in the amount of \$416.21 are hereby taxed to the Defendant as part of the judgment.

During trial, the parties stipulated in open court that the Defendant is entitled to a \$3,000.00 credit for compensation previously received by the Plaintiff. Therefore, based upon the agreement of the parties as reached in open court, the judgment of \$41,000.00 previously docketed in favor of the Plaintiff against the Defendant is hereby modified to reflect the credit of \$3,000.00, and therefore, judgment in the amount of \$38,000.00 is hereby entered in accordance with the jury's verdict along with costs in the amount of \$416.21.

And it is so Ordered.

October 29, 2008


Honorable Kristi Harrington,
Presiding Judge, Ninth Judicial Circuit

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2006-CP-10-4773

5 Star, Inc.,)
Plaintiff,)
vs.)
Ford Motor Company,)
Defendant.)

ORDER ON MOTION
FOR RECONSIDERATION

FILED
2008 DEC -3 PM 3:09
JULIE J. ARTHUR
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-10-5450

Stan Shelby,)
Plaintiff,)
vs.)
Ford Motor Company,)
Defendant.)

ORDER STRIKING CASE¹

Date of hearing: November 20, 2008
Plaintiff's counsel: Thomas R. Goldstein
Defendant's counsel: Curtis L. Ott
Court Reporter: Vivian Cross

Ford Motor Company filed on October 9, 2008, a motion for reconsideration on case number 2006-CP-10-4773, raising three grounds: 1. Asking the Court to reconsider its September 24, 2008, order denying judgment notwithstanding the verdict/new trial; 2. Asking the Court to amend the verdict to reflect a \$3,000.00 set off; and 3. Asking the Court to

¹The defendant has filed no motion for relief in this case. For the sake of judicial economy, I am addressing the merits of the defendant's motion in 2006-CP-10-4773 as it pertains to this case. No party objects to my treating both cases simultaneously.

1/5

reconsider its previous rulings on the ground that the plaintiff filed a new suit in the name of Stan Shelby at case number 2008-CP-10-5450. Ford asserts the plaintiff's filing of a new suit proves its position that the plaintiff prosecuted the case with the wrong real party in interest. On November 3, 2008, Ford filed a notice of appeal with the South Carolina Court of Appeals, appealing the jury verdict and this Court's previous decision to refuse Ford's application for new trial and/or judgment n.o.v.

1. Motion to Reconsider September 24, 2008 Order

As to the first matter, the Court finds that because Ford Motor Company appealed the jury verdict and this Court's September 29th Order denying a new trial/judgment n.o.v., this Court is now divested of jurisdiction by operation of South Carolina Appellate Court Rule 205. See Arnal v. Fraser, 371 S.C. 512, 641 S.E.2d 419 (2007): "Rule 205, SCACR, provides the appellate court with exclusive jurisdiction over matters on appeal. The lower court may only proceed with matters not affected by the appeal."

2. Amendment of verdict for set off

As to the second matter, the Court finds that the reformation of the verdict was addressed previously by this Court's written Order filed October 30, 2008. The parties agree.

3. Motion to Reconsider September 29, 2008, Order based on new filing

As to the third matter, Ford asserts that the plaintiff has done exactly what he told the Court he would not do—file a successive action for the same loss by a different party. The plaintiff replies that his position has been consistent throughout the case; to wit, that each and every one of Stan Shelby's claims were previously adjudicated by the three (3) day jury trial that resulted in a verdict for 5-Star, Inc. on September 4, 2008. The plaintiff in 2008-CP-10-5450 states that he is not asserting any additional claim or claims, but that the 2008 action was filed for no reason other than to prevent the expiration of the statute of limitations should the appellate

2/5

courts agree with Ford's allegation and either reverse or remand the case on appeal. The plaintiff, Stan Shelby, asserts in open court that he does not believe he has any other claims, and the jury in the case on appeal has already adjudicated each and every claim he possesses. However, Mr. Shelby also asserts that it is possible an appellate court might adopt a different position or order the case on appeal either remanded for new trial or reversed for failure to prosecute in his individual name. In that case—and only that case—he seeks to avoid being caught by the statute of limitations on a remand from the appellate courts. In other words, Shelby asserts that he has no claim unless, and only unless, the appellate courts determine that he should have prosecuted the case in his own name.

South Carolina procedure has long recognized that a litigant may file an action with the court for the purpose of tolling the statute of limitations. Rule 40(j) of the South Carolina Rules of Civil Procedure specifically addresses this: "A party may strike its complaint . . . one time as a matter of right, provided that all parties adverse to that claim . . . agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within one (1) year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken. . . ." Plaintiff's counsel previously offered to strike the case (see Plaintiff's Return to Second Motion for Reconsideration, page 2), but the defendant declined the offer. In this posture, this Court is faced with three possible resolutions: 1. Grant a new trial in 2006-CP-10-4773 based on the 2008 filing; 2. Deny the motion and allow the second lawsuit to go forward on a parallel track with the case on appeal, or 3. Fashion some remedy that allows Mr. Shelby to protect his position while Ford prosecutes the appeal and also prevents the duplication of a claim adjudicated and on appeal.

South Carolina case law offers some guidance. In Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005), the South Carolina Supreme Court took up a similar situation. This is how

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the Supreme Court summarized that case: "We certified this case from the Court of Appeals pursuant to Rule 204(b), SCACR. The issue on appeal involves the date on which the statute of limitations (SOL) for a legal malpractice claim begins to run." After a jury returned a verdict against Dr. Epstein, he retained new counsel to handle his appeal. His trial counsel stayed in the case as well. The case made its way through the normal appellate process, which resulted in the Court of Appeals affirming the verdict. Then, Dr. Epstein sued his trial lawyer for legal malpractice. The Supreme Court held that the action came too late, and even though the case was on appeal, Dr. Epstein's statute of limitations was running from the date of the jury verdict. While the Epstein case focuses primarily on an analysis of whether South Carolina should or should not adopt the "continuous representation" rule, the case establishes that a plaintiff's statute of limitations is not tolled by a case on appeal. That is the situation here. Thus, the law is clear that Ford's appeal does not toll the statute of limitations in the event the Court of Appeals or the Supreme Court finds that Stan Shelby should have prosecuted the case. The question this Court is called upon to decide is: Is Stan Shelby entitled to do something to protect himself in the event of an adverse appellate decision?

After carefully considering the pleadings in these cases, the arguments of counsel, the applicable law, I find that Mr. Shelby is allowed to do something to prevent the expiration of his claim if the appellate courts determine a new trial is required, and that the case on appeal does not divest this Court of jurisdiction to handle matters related to the 2008 case. Mindful of the limited judicial resources available in this state for the resolution of civil cases, and cognizant of the plaintiff's stipulation in open court that he seeks nothing more in his 2008 case than to protect the expiration of the statute of limitations in the event of an adverse appellate decision, I find the proper remedy is to dismiss the plaintiff's 2008 case without prejudice and provide that the statute of limitations is tolled only if the appellate court enters an opinion adverse to Mr.

4/5

Shelby. In light of Mr. Shelby's stipulation entered in open court, he has no independent or separate claim. The remedy fashioned by this Order protects both parties. It bars Mr. Shelby from asserting an independent duplicative claim unless the appellate courts determine he should have done so in the first instance, and it relieves Ford of having to defend a second case. Of course if the case on appeal is affirmed, all of this discussion is entirely moot. At the same time, this remedy protects the plaintiff from the expiration of his statute of limitations in the event he receives an adverse appellate decision. Based on the foregoing, it is hereby

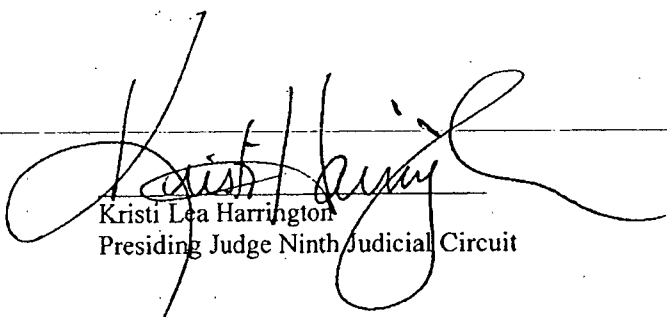
ORDERED that case 2008-CP-10-5450 is hereby dismissed without prejudice, and it is further

ORDERED that if the appellate courts determine that the case on appeal (2006-CP-10-4773) is reversed for failure to prosecute by the individual Stan Shelby, then, and only then, may Stan Shelby be permitted to refile his claim whether he does so by a new lawsuit or by a motion to amend the case on appeal, provided he does so within thirty (30) days of the date he revives the remitter in the case on appeal, and it is further

ORDERED that if the appellate courts determine that the case on appeal (2006-CP-10-4773) is affirmed, then all claims regarding the subject matter of these suits belonging to Stan Shelby, his successors, heirs, and assigns are forever ended and 2008-CP-10-5450 is then dismissed with prejudice.

And it is so Ordered.

November 25, 2008
Charleston, SC



Kristi Lea Harrington
Presiding Judge Ninth Judicial Circuit

15

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

CASE NO. 06-CP-10-_____

5 STAR INC.)

Plaintiffs,)

v.)

COMPLAINT

FORD MOTOR COMPANY,)

Defendant.)

BY _____

JULIA A. STRONG
CLERK OF COURT

2006 DEC -5 PM 2:53

FILED

The plaintiff above-named, complaining of the defendant above-named, respectfully alleges and shows unto this Honorable Court as follows:

1. That the plaintiff is a corporation, organized and existing pursuant to the laws of the State of South Carolina with its principle place of business in Berkeley County, South Carolina.
2. That the defendant, Ford Motor Company, is a corporate citizen and resident of Michigan, but maintains agents and transacts business in Charleston County.
3. The court has jurisdiction over the parties hereto and matters herein.
4. The plaintiff owned a 1996 Ford Truck, model F-250, as show by the certificate of title, dated February 7, 2005, a copy of which is attached hereto and incorporated by this reference.
5. On Friday, September 24, 2005, an employee parked the Ford F-250 truck inside 5 Star Inc.'s warehouse located on 2340 Midland Park Road.
6. That on Monday, September 26, 2005, the plaintiff entered the warehouse on 2340 Midland Park Road, and found the warehouse full of smoke. The plaintiff called the fire department, which responded shortly after the call, and discovered the fire caused by the

defective module designed and built by the defendant. A copy of the fire report is attached hereto, and incorporated by this reference.

7. That the defendant, Ford Motor Credit, is obligated to reimburse the plaintiffs for the 1996 Ford F-250 truck, along with other property destroyed by the fire caused by the defect with the cruise control on the 1996 Ford F-250 truck.

8. The defendant, Ford Motor Company, was negligent, careless, willful and wanton in the flowing particulars.

9. As a direct and proximate result of the defendant's, Ford Motor Company's, negligence and grossly negligent denial of compensation for all damages done due to the above referenced claim.

WHEREFORE, the Plaintiff demands that he be given a jury trial and prays that he be awarded a judgment for both actual damages, and punitive damages, which may be trebled by a proper finding of an act constituting an Unfair Trade Practice, for such consequential and special damages as allowed by law, pre-judgment interest, and punitive damages in an amount to be determined by the triers of fact, plus costs and such other and further relief as this Honorable Court deems just and proper. The Plaintiff stipulates that it will limit its damages to not more than \$74,999.00.

December 4, 2006

Thomas R. Goldstein
BELK, COBB, INFINGER & GOLDSTEIN, P.A.
Post Office Box 71121
Charleston, SC 29415-1121
(843) 554-4291
(843) 554-5566 (fax)
tgoldstein@cobblaw.net
ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
)
) Civil Action No.: 2006-CP-104773

5 Star, Inc.,
Plaintiff,
vs.
Ford Motor Company,
Defendant.

ANSWER OF DEFENDANT
FORD MOTOR COMPANY

[Jury Trial Demanded]

2007 MAR -1 PM 3:39
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Defendant Ford Motor Company. ("Ford") hereby answers Plaintiff's Complaint as follows. Each and every allegation not hereinafter specifically admitted, qualified, or explained, is denied.

FOR A FIRST DEFENSE

1. Ford is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 1 and, therefore, denies said allegations.

2. Answering Paragraph 2, Ford admits only so much of these allegations that allege or can be construed to allege that Ford is incorporated in the State of Delaware with its principal place of business in a state other than South Carolina, and that it transacts business in the County of Charleston, State of South Carolina.

3. Answering Paragraph 3, Ford responds that these allegations constitute legal conclusions to which no response is required. To the extent that the Court may deem a response is required, Ford denies these allegations.

4. Ford is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4 and, therefore, denies said allegations.

5. Ford is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 5 and, therefore, denies said allegations.

6. Ford denies the allegations of Paragraph 6 to the extent they allege or can be construed to allege product defect, which Ford expressly denies. Ford is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 6 and, therefore, denies said allegations.

7. Answering Paragraph 7, Ford responds that these allegations are directed toward a non-party and, therefore, no response is required. To the extent the Court may deem a response is required, Ford denies these allegations.

8. Ford denies the allegations of Paragraph 8, and demands strict proof thereof.

9. Answering Paragraph 9, Ford states that these allegations are unintelligible. As such, Ford can neither admit nor deny these allegations as presently stated. To the extent the Court may deem that a further response is required, Ford denies these allegations, including the prayer for relief that follows.

FOR A SECOND DEFENSE

10. Ford submits that Plaintiff's Complaint, in whole or in part, fails to state facts sufficient to constitute a cause of action against Ford and, thus, should be dismissed, in whole or in part, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

11. Ford submits that that Plaintiff's recovery in this matter, if any, may be barred or limited by the Economic Loss Doctrine as it exists under South Carolina law.

FOR A FOURTH DEFENSE

12. Ford submits that, upon information and belief, spoliation of evidence in this matter has prevented it from properly and adequately preparing a defense, that it has been irreparably prejudiced and, therefore, Plaintiff's recovery in this matter should be barred.

FOR A FIFTH DEFENSE

13. Ford submits that Plaintiff's claims may be barred, in whole or in part, by the Petition Clause of the First Amendment of the United States Constitution and Article I, Section-2 of the South Carolina Constitution, more commonly known as the *Noërr-Pennington* Doctrine.

FOR A SIXTH DEFENSE

14. Ford submits that Plaintiff's claims, in whole or in part, are or may be expressly or impliedly preempted by federal law, including, but in no way limited to, the Motor Vehicle Safety Act and the Federal Motor Vehicle Safety Standards, as well as the holding of the United States Supreme Court in *Buckman Company v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001) and other relevant statutory and common law authority.

FOR A SEVENTH DEFENSE

15. Ford submits that any and all causes of action asserted against it in Plaintiff's Complaint are barred by the applicable statute of limitation.

FOR AN EIGHTH DEFENSE

16. Ford submits that Plaintiff's Complaint fails for improper venue pursuant to Rule 12(b)(3) of the South Carolina Rules of Civil Procedure and the rule of law established in *Whaley v. CSC Transp., Inc.*, 2005 S.C. LEXIS 38 (S.C. 2005), *reh'g denied* 2005 S.C. LEXIS 77 (S.C. March 10, 2005).

FOR A NINTH DEFENSE

17. Ford submits that this Court lacks subject matter jurisdiction over this lawsuit and accordingly should dismiss it.

FOR A TENTH DEFENSE

18. Ford submits that at all times its vehicles were designed, manufactured and assembled in compliance with all applicable industry and governmental standards and regulations, and, therefore, Plaintiff cannot recover against Ford.

FOR AN ELEVENTH DEFENSE

19. Ford submits that its vehicles were designed, manufactured, and assembled in conformance with the prevailing industry customs and practices, and, therefore, Plaintiff cannot recover against Ford.

FOR A TWELFTH DEFENSE

20. Ford submits that its vehicles were state-of-the-art and did not present an unreasonable risk to Plaintiff or other occupants or users of this vehicle, and, therefore, Plaintiff cannot recover against Ford.

FOR A THIRTEENTH DEFENSE

21. Ford craves reference to and hereby incorporates by reference the terms, limitations, disclaimers, and exclusions of any warranties issued with the purchase of the vehicle at issue.

FOR A FOURTEENTH DEFENSE

22. Ford submits that the damages for which Plaintiff seeks recovery may have been due to and proximately caused by the abuse, misuse, or improper use of the subject vehicle, and, therefore, Plaintiff may not recover against Ford.

FOR A FIFTEENTH DEFENSE

23. Ford submits that the damages for which Plaintiff seeks recovery may have been due to and proximately caused by the modification or alteration of the subject vehicle, and, therefore, Plaintiff may not recover against Ford.

FOR A SIXTEENTH DEFENSE

24. Ford submits that the damages for which Plaintiff seeks recovery were due to and proximately caused by voluntary actions taken in full knowledge of any associated risk, of which one, in the exercise of due care, should have known or appreciated, and, therefore, this voluntary assumption of risk is a complete bar to this action; or, in the alternative, a facet of comparative negligence.

FOR A SEVENTEENTH DEFENSE

25. Ford affirmatively pleads the doctrine of comparative negligence and alleges that the negligence and/or recklessness of Plaintiff were greater than any negligence, if any, which may be established against Ford, and, therefore, Plaintiff is barred from recovery. Ford further alleges that any injury and damage sustained by Plaintiff were due to and caused by the negligence and/or willfulness of Plaintiff, combining, concurring and contributing with the negligence and/or willfulness, if any, on the part of Ford, and that any amount of recovery awarded to Plaintiff for the alleged injuries and damage shall be reduced by the Court based on the percentage of negligence and/or willfulness attributed to Plaintiff. Ford reserves the right to amend this defense to include the particular allegations of negligence at the conclusion of discovery.

FOR AN EIGHTEENTH DEFENSE

26. Ford submits that Plaintiff's claims are barred, in whole or in part, by lack of

privity.

FOR A NINETEENTH DEFENSE

27. Ford submits that it may be entitled to a set-off or credit for any amount paid to Plaintiff by any third party as compensation for the injuries and damages for which Plaintiff seeks recovery.

FOR A TWENTIETH DEFENSE

28. Ford submits that Plaintiff lacks standing and/or capacity to sue under the South Carolina Unfair Trade Practices Act, codified at *S.C. Code Ann. §§ 39-5-10, et seq.*

FOR A TWENTY-FIRST DEFENSE

29. Ford denies Plaintiff's claim for punitive damages. An award of punitive damages under South Carolina law violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, and Article I, Section 3 of the South Carolina Constitution in that:

- (a) The judiciary's ability to correct a punitive damage award only upon a finding of passion, prejudice or caprice is inconsistent with due process guarantees;
- (b) Any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;
- (c) Any award of punitive damages based upon the wealth of Ford violates due process guarantees;
- (d) The juror's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;
- (e) Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness;
- (f) Plaintiff's claims for punitive damages violates the equal protection clause of the Fourteenth Amendment of the United States Constitution, and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of Ford; and

- (g) Any award of punitive damages for conduct or activity of Ford outside the State of South Carolina is inconsistent with the interest of federalism.

Plaintiff's claim for punitive damages violates the federal doctrine of separation of powers and Article I, Section 3 of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government, which invades the province of the legislative branch of government. Ford submits that like provisions of governing foreign law may likewise violate constitutional guarantees.

FOR A TWENTY-SECOND DEFENSE

30. Ford submits that Plaintiff's Complaint fails inasmuch as Plaintiff has failed to demonstrate timely compliance with Rule 11(a) of the South Carolina Rules of Civil Procedure and that said Complaint should be stricken.

FOR A TWENTY-THIRD DEFENSE

31. Ford pleads applicability of the 2005 Tort Reform Statutes, S.C. Code Ann. §§ 15-38-15; 15-7-30, -100; 36-2-803(B), and other pertinent statutory sections; and specifically affirmatively pleads apportionment of fault among joint tortfeasors.

FOR A TWENTY-FOURTH DEFENSE

32. Ford alleges that it has not yet had an opportunity to conduct a sufficient investigation or to engage in adequate discovery regarding the circumstances of Plaintiff's allegations. Ford intends to act as best it can to inform itself of the pertinent facts and prevailing circumstances surrounding any reported damage as alleged in Plaintiff's Complaint, and gives notice of its intent to assert any further affirmative defenses that its information gathering process may indicate is supported by fact and law. Ford thus reserves the right to amend this Answer and assert such defenses.

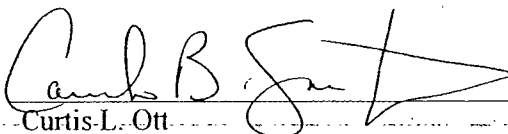
WHEREFORE, having fully answered Plaintiff's Complaint, Ford prays that the

Complaint be dismissed, with prejudice, and for such other and further relief as the Court may deem just and proper.

TURNER, PADGET, GRAHAM & LANEY, P.A.

February 27, 2007

By:



Curtis L. Ott

Carmelo B. Sammataro

Post Office Box 1473

Columbia, SC 29202

Phone: (803) 254-2200

Fax: (803) 799-3957

**ATTORNEYS FOR DEFENDANT
FORD MOTOR COMPANY**

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

5 Star, Inc.,

Plaintiff,

vs.

Ford Motor Company,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2006-CP-10-4773

AFFIDAVIT OF JON S. OLSON, P.E.

PERSONALLY appeared before the undersigned Notary Public, Jon S. Olson, P.E., who upon being duly sworn did depose and say as follows:

1. I have been employed by Ford Motor Company ("Ford") for nearly fourteen years and I have held the position of Design Analysis Engineer for approximately six years. I have nearly seventeen years experience as an Automotive Engineer in the fields of automotive component and system designs, vehicle development and testing, component and vehicle manufacturing and assembly, and engineering analysis. My current resume is attached as Exhibit A to this Affidavit.

2. My job duties include investigating claims concerning problems or alleged defects with Ford vehicles. I am familiar with the allegations of Plaintiff's Complaint filed in this case concerning the 1996 Ford F-250 truck, VIN 1FTHX25H6TEA43869.

3. Ford maintains records concerning the vehicles sold and manufactured, and I am familiar with the types of records maintained. According to the records maintained on the 1996 Ford F-250 truck identified in Plaintiff's Complaint, it was manufactured on November 3, 1995 and sold on November 15, 1995.

4. Ford initiated Recall 05S28 in January of 2005.

5. Ford expanded Recall 05S28 on or about September 14, 2005 to include the 1996

Ford F-250 truck identified in Plaintiff's Complaint. The recall related specifically to the Speed Control Deactivation Switch installed in the vehicle. The recall was issued due to concerns that some Speed Control Deactivation Switches in some vehicles may overheat, smoke, or burn, possibly resulting in underhood fire.

6. The mere fact that Ford initiated Recall 05S28 and that a vehicle is included in the recall population does not automatically mean the Speed Control Deactivation Switch will overheat, smoke, burn, or catch fire.

7. Most vehicles subject to Recall 05S28 never experience overheating, smoking, burning, or fire with respect to the Speed Control Deactivation Switch.

8. There are many possible causes of fires that occur in vehicles, including, but not limited to, accidental ignition, arson, wiring failure, modification of component parts, aftermarket modifications, fluid leaks, other defects, etc.

9. The mere fact that the 1996 Ford F-250 truck identified in Plaintiff's Complaint was allegedly damaged by fire does not automatically mean the Speed Control Deactivation Switch caused the fire.

10. I am not aware of the Plaintiff, nor anyone acting on its behalf, notifying Ford regarding potential claims stemming from the Speed Control Deactivation Switch installed in the 1996 Ford F-250 truck identified in Plaintiff's Complaint prior to Plaintiff destroying the vehicle.

11. I have reviewed the only five photographs of the subject 1996 Ford F-250 truck taken after the alleged fire at issue. These photos are attached as Exhibit B to this Affidavit.

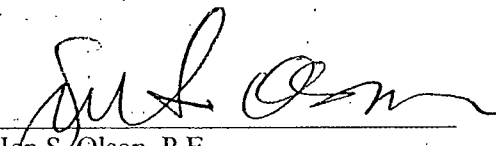
12. Without inspecting and/or testing the subject 1996 Ford F-250 truck and the Speed Control Deactivation Switch installed therein, and based solely on the five photographs of the subject vehicle, it is impossible for any person to determine, to a reasonable degree of scientific certainty, the cause and origin of the fire that allegedly damaged the vehicle.

13. Without inspecting and/or testing the subject 1996 Ford F-250 truck and the Speed Control Deactivation Switch installed therein, and based solely on the five photographs of the subject vehicle, it is impossible for any person to rule out other potential causes of the fire that allegedly damaged the vehicle.

14. Without the ability to inspect and/or test the subject 1996 Ford F-250 truck and the Speed Control Deactivation Switch installed therein, and based solely on the five photographs of the subject vehicle, it is impossible for Ford to determine the cause or origin of the alleged fire, or determine whether the Speed Control Deactivation Switch installed in the vehicle played any role in the alleged fire.

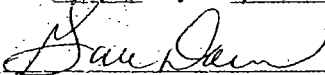
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FURTHER THE AFFIANT SAYETH NOT.


Jon S. Olson, P.E.

SWORN TO AND SUBSCRIBED BEFORE ME

this 26th day of MARCH, 2008.


Notary Public for Oakland County MI
Active in Wayne County MI

My Commission Expires: 12-01-2013

GALE DAWSON
NOTARY PUBLIC
OAKLAND COUNTY
MY COMMISSION EXPIRES 12/01/2013
ACTING IN THE COUNTY OF WAYNE
STATE OF MICHIGAN

Exhibit A



CURRICULUM VITAE

(Revision Date: 3/01/2008)

Jon S. Olson, P.E.

Education

1999 Masters, Business Administration, Leadership
Baker College, Flint, MI
1991 Bachelor of Science, Mechanical Engineering Technology
Lake Superior State University, Sault Ste. Marie, MI

Memberships

Professional Engineer, Wisconsin, #37965-006
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National Fire Protection Association – Membership #2288823
Society of Automotive Engineers – Membership #6107762928

- Member - Accident Investigation/Reconstruction Practices Committee
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Ford Motor Company

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System Engineering Department, Powertrain System Engineering, Ford Motor Company

- Mustang Fuel System Design and Release
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- Lead Engineer for Launch of Fuel Tank Programs
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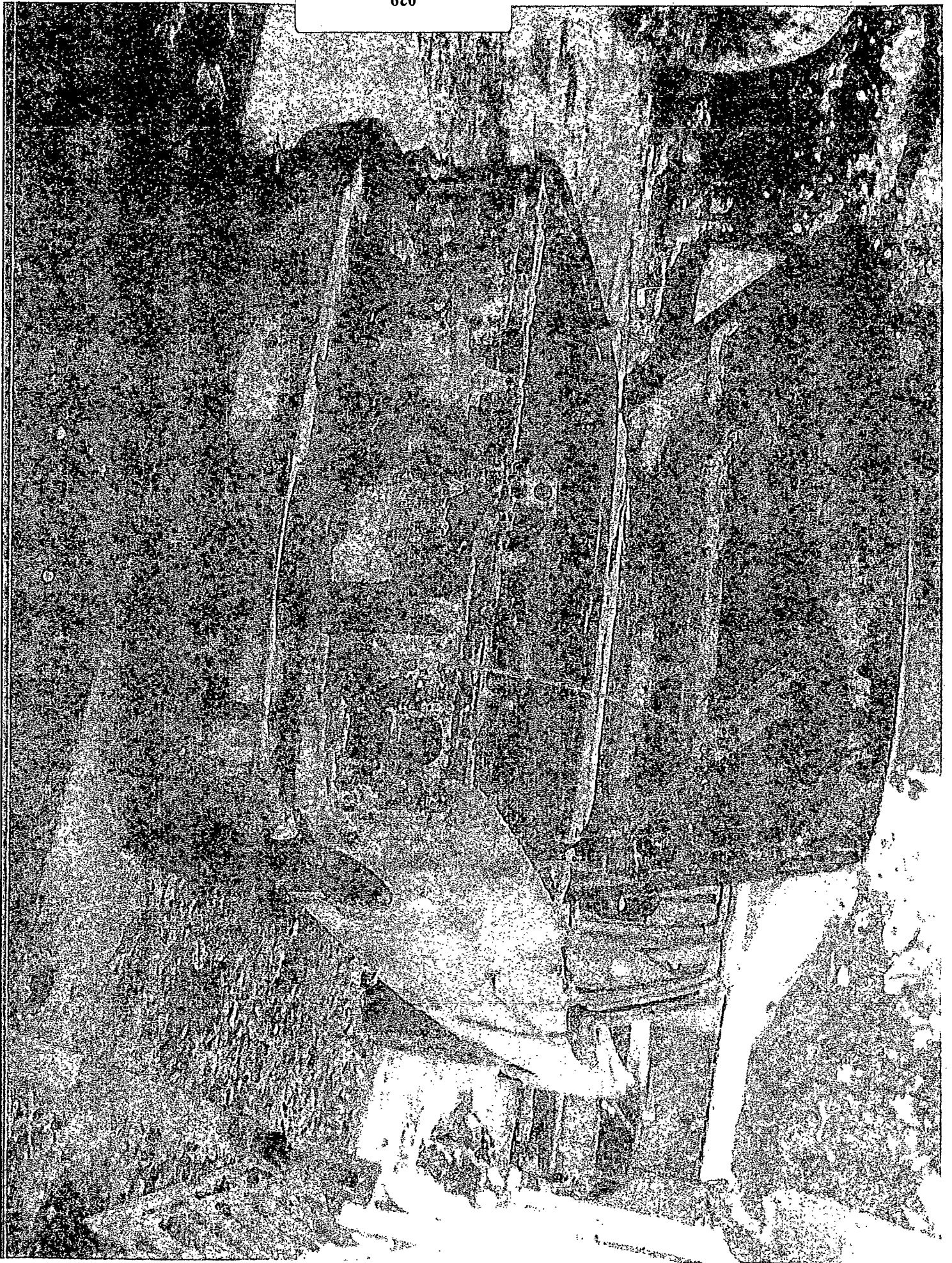
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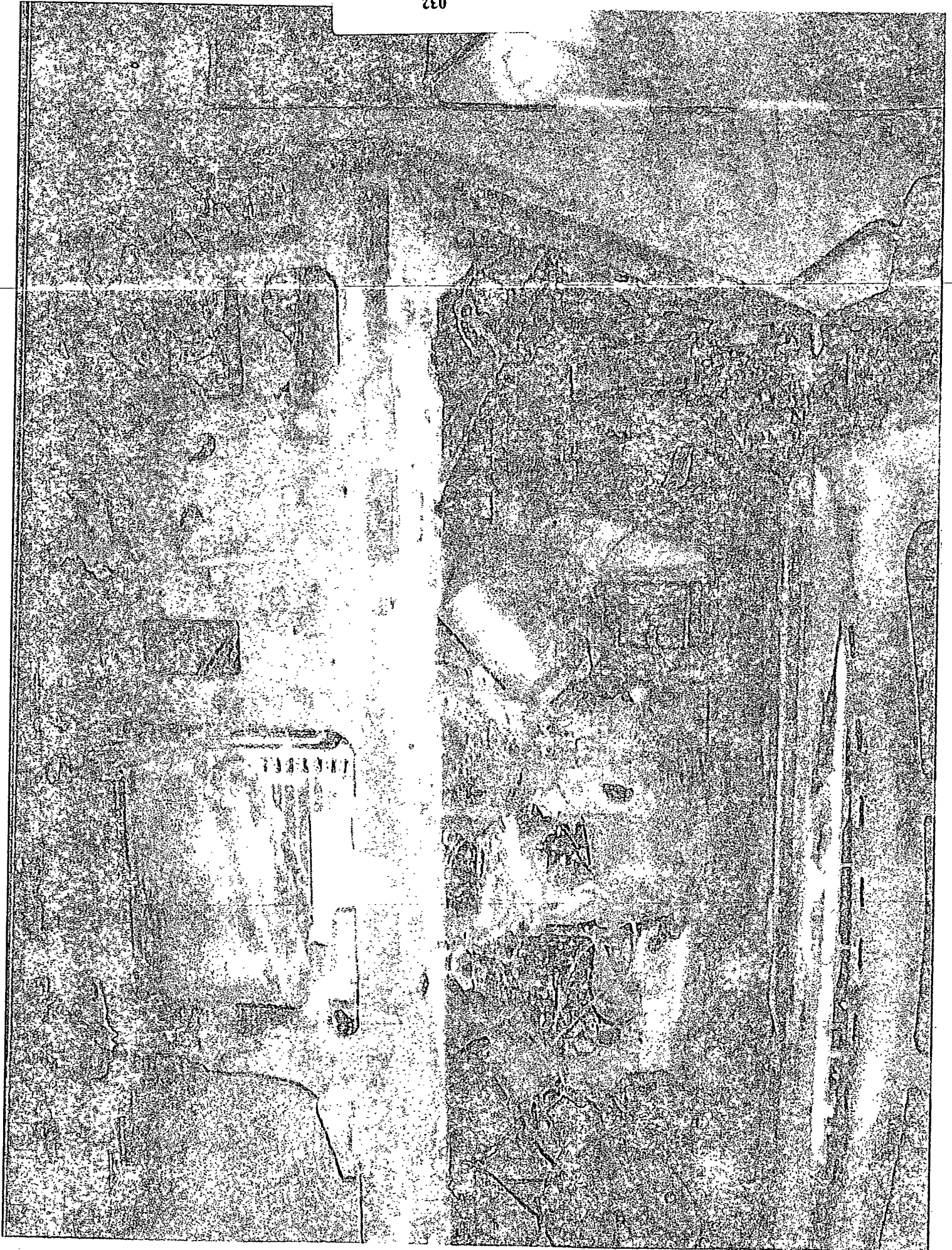
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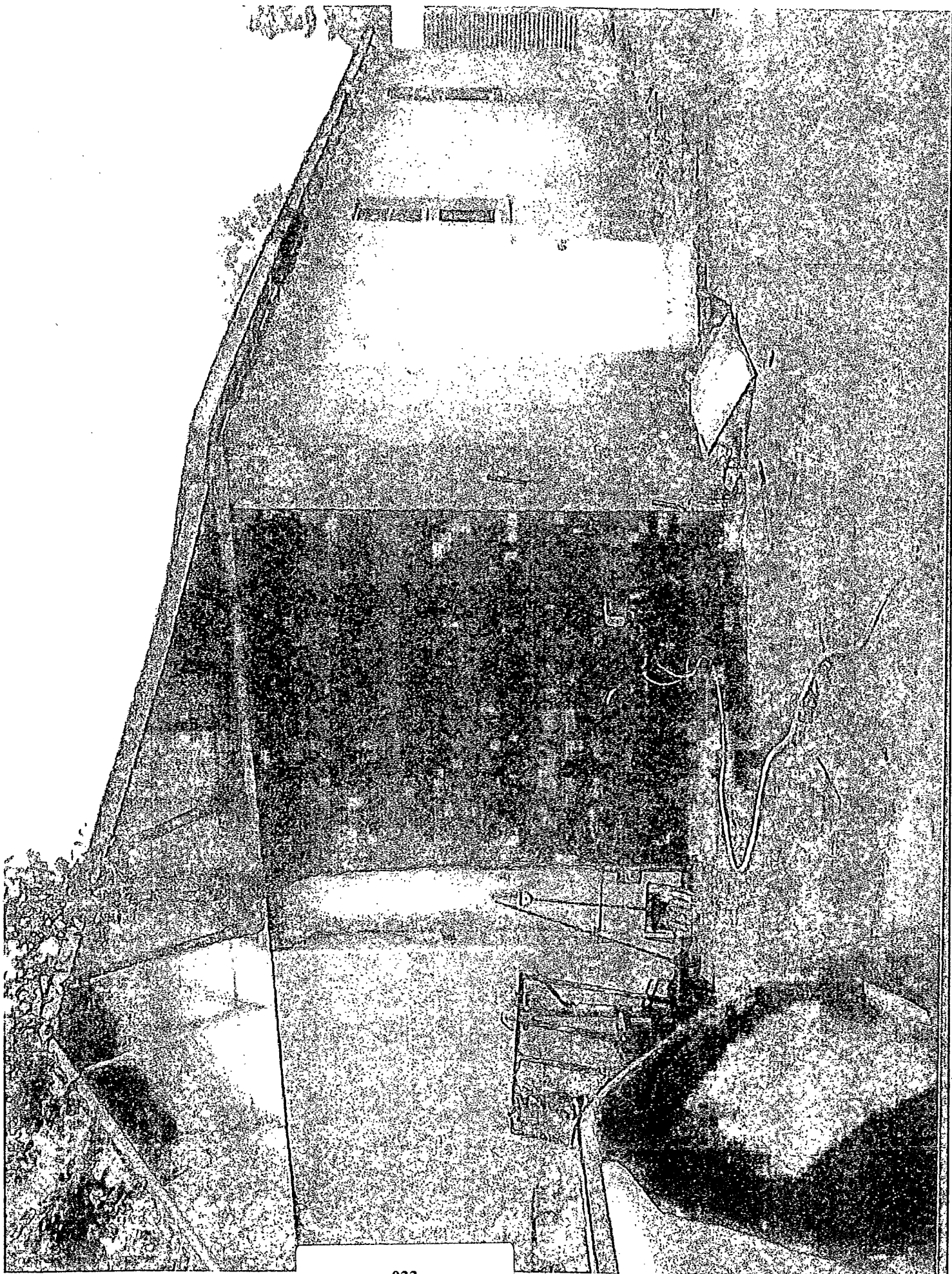
Exhibit B











IN THE COURT OF COMMON PLEAS

Civil Action No.: 2006-CP-10-4773

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AFFIDAVIT OF JON S. OLSON, P.E.

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250 trucks with a GVW over 8,500 pounds.

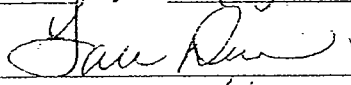
7. Accordingly, the subject vehicle was included in the August 2006 supplement to 05S28 and my prior affidavit should be corrected regarding this issue.

FURTHER THE AFFIANT SAYETH NOT.


Jon S. Olson, P.E.

SWORN TO AND SUBSCRIBED BEFORE ME

this 28th day of August, 2008.


Notary Public for Oakland Acting in Wayne

My Commission Expires: 12-01-2013

GALE DAWSON
NOTARY PUBLIC
OAKLAND COUNTY
MY COMMISSION EXPIRES 12/01/2013
ACTING IN THE COUNTY OF WAYNE
STATE OF MICHIGAN

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

5 Star, Inc.,

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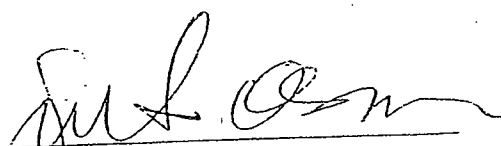
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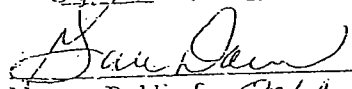
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- Participant – Product Development Engineering course work, Dearborn, MI

1998 – *Advanced Vehicle Technology Fuel System Engineering Course*

- Participant – Fuel and Evaporative System Design, Dearborn, MI

EXHIBIT B

CELEF 21N 291 VIN 1FTHX25H6TEA43869

	SUGGESTED RETAIL PRICE	AMOUNT
F259 4X2 SUPERCAB PICKUP/155	19175 00	16765 00
1996 MODEL YEAR		
Y2 OXFORD WHITE CLEARCOAT		
6V ROYAL BLUE VINYL		
XL TRIM		
99H 5.8L EFI V-8 ENGINE	NC	NC
44E ELECTRONIC 4-SPD AUTO TRANS	971 00	825 00
T35 LT235/85RX16E BSW ALL-SEASON	NC	NC
X39 3.55 RATIO REGULAR AXLE	NC	NC
209 #1 P/L 4025/GVWR 8800 LBS	NC	NC
153 FRONT LICENSE PLATE BRACKET	NC	NC
512 SPARE TIRE AND WHEEL	267 00	227 00
52N SPD CONTROL/TILT STEERING WHL	382 00	326 00
545 BRT LOW-MOUNT SWINGAWAY MIRROR	46 00	38 00
572 AIR CONDITIONING -- CPC FREE	805 00	685 00
587 AM/FM ELECTRONIC STEREO/CLOCK	148 00	125 00
76C ARGENT REAR STEP BUMPER	100 00	85 00
NOT FOR AMBULANCE USE. USING THIS VEHICLE TO PRODUCE AN AMBULANCE VOIDS FORD WARRANTY.		

TOTAL VEHICLE & OPTIONS	21895 00	19078 00
DESTINATION & DELIVERY	615 00	615 00
SCHEDULE A (MEMO)	.00	

TOTAL FOR VEHICLE 22510 00

14 U.S. GAL GAS FACTORY 24 00
 PRICED DORA 50
 BATCH-ID SK27104662 N RB 2X
 PRICE LEVEL 610340X25 VIN: 1FTHX25H6TEA43869
 SHIPPING WEIGHT 4703 LBS.

THIS INVOICE MAY NOT REFLECT THE FINAL COST OF THE VEHICLE IN VIEW OF THE POSSIBILITY OF FUTURE REBATES, ALLOWANCES, DISCOUNTS AND INCENTIVE AWARDS FROM FORD MOTOR COMPANY TO THE DEALER.

FDA/ILMOA ASSESSMENT	INVOICE TOTAL	LESS HOLDBACK FOR DEALER ACCOUNT	LESS APPROX FINANCING COST FOR DEALER ACCOUNT	MEMO: FAVOR LESS HOLDBACK & FIN COST	A PLAN
.00	19,715.50	655.00	255.00	18,805.50	18,817.50
655.00	80.00	2310.00	.50	575.00	16514.00

SOLD TO JONES FORD INC 21N291
 P.O. BOX 62829
 NORTH CHARLESTON SC 29419

TO 2 76 6 STATE SC RC47

SHIP TO (IF OTHER THAN ABOVE)

DATE INV PREPARED 10 27 9 ITEM NUMBER 5 21L236B TRIM 6V TRANSIT 17

SHIP THROUGH

INVOICE & UNIT IDENTIFICATION NO. 1FTHX25H6TEA43869 KTP LT. TRK FORD MOTOR CREDIT 000001
 TEA43869 1F X25 19951027 951027 SK271 N 610 21N291
 THIS INVOICE TO BE USED FOR THE BILLING OF VEHICLES ONLY

DEALER'S COPY

2 19715.50 KUI

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

5 Star, Inc.,

Plaintiff,

vs.

Ford Motor Company,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2006-CP-10-4773

**FORD MOTOR COMPANY'S
MOTION *IN LIMINE* TO EXCLUDE
EVIDENCE OF OTHER ACCIDENTS,
INCIDENTS, LAWSUITS AND/OR
SETTLEMENTS INVOLVING FORD
VEHICLES**

MOTION

Defendant Ford Motor Company ("Ford") anticipates that Plaintiff may attempt to introduce evidence of other accidents, incidents, complaints, lawsuits and/or settlements involving Speed Control Deactivation Switches ("SCDS") installed in other Ford vehicles in an attempt to prove that the subject 1996 Ford F-250 truck or its component parts were defectively designed, manufactured, and/or installed. Particularly, Plaintiff may attempt to make reference to or enter evidence involving other: (1) verdicts; (2) settlements; (3) judgments; (4) orders; (5) National Highway Safety Transportation Administration complaints and/or recalls; (6) litigation; or (7) fire-related incidents involving 1996 Ford F-250 trucks or other Ford vehicles equipped with SCDS. Ford submits this type of evidence should be excluded because (1) it is not "substantially similar" to this case and thus not relevant to any disputed issue; (2) even if the Court deems such evidence relevant, it should be excluded because any probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues and undue consumption of time; (3) any evidence relating to events that occurred after the manufacture date of the subject vehicle, November 5, 1995, is inadmissible under South Carolina substantive law precluding introduction of post-manufacture evidence. *Bragg v. Hi-Ranger, Inc.*, 462 S.E.2d 321

(S.C. Ct. App. 1995); and (4) other complaints and lawsuits are inadmissible hearsay. See Rules 401, 402, 403 and 802, S.C.R.E. Accordingly, Ford now files this motion *in limine* to exclude all such evidence.

LEGAL ARGUMENT

Plaintiff may attempt to introduce evidence of other incidents involving vehicle fires allegedly stemming from the improper design, manufacture, and installation of the SCDS at issue in this lawsuit to convey improperly to the jury that Plaintiff's 1996 Ford F-250 truck, or that all Ford vehicles equipped with SCDS, are inherently defective and prone to catching fire. However, such anecdotal evidence of other incidents, claims or lawsuits is not probative of any issue in this case. Furthermore, to even qualify for admission, such evidence must meet the stringent standards of "substantial similarity," which Plaintiff cannot do in this case. See *Whaley v. CSX Transportation, Inc.*, 609 S.E.2d 286, 300 (S.C. 2005).

Even if such evidence were deemed relevant, the probative value that any other SCDS and/or vehicle fire incident, claim, or lawsuit might have would be substantially outweighed by the considerable prejudice inherent in such evidence. Evidence of other incidents would only mislead, confuse and inflame the jury. Such distraction with collateral matters improperly influences the deliberative process. Moreover, introduction of other, unrelated incidents and claims would result in undue burden upon the court due to an enormous consumption of time required to conduct a series of "mini-trials" or "trials within a trial" to explain, examine and distinguish the circumstances particular to each proffered event. Pursuant to the allegations of the Complaint, this case concerns a vehicle and fire at Plaintiff's place of business and no other. The Court should keep it that way by precluding Plaintiff from introducing evidence of other, unrelated fire incidents.

A. Anecdotal Evidence of Other, Unrelated Vehicle Fire Incidents Is Irrelevant and Inadmissible.

Only relevant evidence is admissible. S.C.R.E. 402. Relevant evidence includes that which is sufficiently related to any fact that is *of consequence* in the case. S.C.R.E. 401. Because Ford does not dispute that vehicle fires can and do, under certain circumstances and for various reasons, occur, any evidence offered to prove that non-consequential fact is completely irrelevant and inadmissible under the procedural rules. The obvious reason for proffering other incidents is to parade before the jury one vehicle fire incident after another and leave the hanging inference that the vehicle fire in the instant case is due to the alleged improper design, manufacture, and/or installation of the SCDS installed in the subject F-250 truck as opposed to the numerous other possible causes of the fire at issue. Nothing could be less helpful and more misleading to the jury, and nothing could be more prejudicial to Ford, especially given the fact that Plaintiff unilaterally destroyed the subject vehicle without any notice to Ford thereby depriving Ford of any opportunity to inspect it.

By the same token, other settlements, verdicts, judgments and/or orders against automobile manufacturers, like Ford Motor Company, are completely irrelevant because they do not tend to prove or disprove any disputed fact in this case. S.C.R.E. 401, 402. In particular, the circumstances surrounding the incidents that underlie other settlements, verdicts, judgments or orders will be substantially different from the circumstances underlying this case. They are likely to involve vehicles other than the subject F-250 truck or involve different factual circumstances from the ones presented in the instant case. Therefore, references to other settlements, verdicts, judgments, or orders would serve no legitimate purpose other than to confuse the jury and severely prejudice Ford's defense. S.C.R.E. 403.

B. Any Evidence of "Other Incidents" Is Inadmissible Without Proof of Substantial Similarity.

Evidence of "other incidents" is admissible only if the proponent of the evidence first demonstrates that the other accidents occurred under "substantially similar" circumstances. See *Whaley v. CSX Transportation, Inc.*, 609 S.E.2d 286, 300 (S.C. 2005) ("Because evidence of other accidents may be highly prejudicial, plaintiff must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue.") (citing *Buckman v. Bombardier Corp.*, 893 F. Supp. 547, 552 (E.D.N.C. 1995)); *Jimenez v. Daimler Chrysler Corp.*, 269 F.3d 439, 456 (4th Cir. 2001); *Johnson v. Ford Motor Co.*, 988 F.2d 573 (5th Cir. 1993); *Rye v. Black & Decker Mfg. Co.*, 889 F.2d 100 (6th Cir. 1989); *Weir v. Crown Equip.*, 217 F.3d 453 (7th Cir. 2000); *Lovett ex rel. Lovett v. Union Pacific R.*, 201 F.3d 1074 (8th Cir. 2000). The proponent of evidence of other accidents must inform the court "of the specific facts of previous accidents in order to make a seasoned determination as to whether the prior accidents are substantially similar." *Barker v. Deere & Co.*, 60 F.3d 158, 163 (3d Cir. 1995). In the absence of such a foundation, a court cannot make a determination of substantial similarity. *Id.*; see also, *Finchum v. Ford Motor Co.*, 57 F.3d 526, 533 (7th Cir. 1995) (no abuse of discretion in excluding evidence where a party fails to establish proper foundation of substantial similarity); *De Pue v. Sears, Roebuck & Co.*, 812 F. Supp. 750, 752 (W.D. Mich. 1992) (burden of proving substantial similarity is on the proponent).

The requirement of "substantial similarity" is especially strict when a proponent is trying to show that a product is defective or unreasonably dangerous, because this evidence weighs directly on the ultimate issue to be decided by the jury. See, e.g., *Jones v. Otis Elevator*, 861 F.2d 655, 661 (11th Cir. 1988); *Nachtsheim v. Beech Aircraft*, 847 F.2d 1261, 1268-69 (7th Cir. 1988). In these types of cases, courts require "the alleged defect [to be] similar" to that which

caused other accidents sought to be introduced into evidence. *Buckman*, 893 F. Supp. at 552. Other incidents are not "substantially similar" simply because they involve the same make and model of vehicle and the same type of alleged problem. In *Julander v. Ford Motor Co.*, 488 F.2d 839, 846-47 (10th Cir. 1973), for example, the other accidents at issue involved Ford Broncos with alleged steering or braking problems similar to the "over steering" problem alleged against the subject 1968 Bronco. 488 F.2d at 843-45. Despite these common features, the court still found the required level of similarity "singularly lacking." 488 F.2d at 847.

Due consideration of vehicle factors, accident factors, and the alleged defect are essential to an analysis of substantial similarity. See, e.g., *Lovett ex rel. Lovett v. Union Pacific R. Co.*, 201 F.3d 1074, 1080-81 (8th Cir. 2000) (excluding other accident evidence; incidents did not involve same year of vehicle or a collision with a locomotive, did not occur at a railroad crossing, did not result in a rollover, and did not involve similar speeds).

1. Vehicle Factors.

For other accidents to have any degree of relevancy, they must involve the same or a virtually identical vehicle. See, e.g., *Uitts v. General Motors*, 411 F. Supp. 1380, 1382-83 (E.D. Pa. 1974) (discovery of recall information on models different than the model in question precluded because it would not generate admissible evidence); *Jordan v. General Motors*, 624 F. Supp. 72, 74 (E.D. La. 1985) ("Because the recall campaign dealt with a different model year and because the defect involved in the recall campaign is distinctly different from the defect alleged in this case and involved in a different section of seat assembly, it appears that introduction of evidence dealing with the recall campaign is not relevant"). To meet this "same vehicle" requirement, Plaintiff must show that the other incidents it seeks to introduce involved a 1996 Ford F-250 truck like the one in the instant case. Without this showing of substantial

similarity to this and other factors, evidence of other accidents, incidents and claims must be excluded.

2. Incident Factors.

Plaintiff must also demonstrate that the other incidents occurred under the same or reasonably similar circumstances. Plaintiff simply cannot meet this burden as the incident at issue in this case involves a unique combination of accident factors: the subject F-250 truck had been in service for more than nine years and 225,000 miles at the time of fire; the repair and maintenance schedule for the subject vehicle is unique; the facts surrounding the fire are unique; the spoliation issue is specific to this case; and Plaintiff's damages are unique. Without addressing the particular facts of each allegedly similar event, it is safe to assume that most of the events do not have these critical factors in common with the incident at issue in these proceedings.

3. Alleged Defect.

Plaintiff must also establish that any other incidents arguably involved the same type of alleged defects. Otherwise, the other accidents and claims certainly have no bearing on any relevant issues. See, e.g., *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 97-98 (3d Cir. 1983) (evidence of other accidents involving U-bolts should have been excluded because those bolts were a different type than the one in issue and because they suffered from a different alleged defect (loosening vs. snapping)). Unless Plaintiff here can show that the prior incidents were arguably caused by the same defects as alleged in this case, the evidence of the other accidents should not be admitted. Because other incidents cannot always be attributed to a single particular cause, it is especially important to enforce the "substantial similarity" rule. Merely saying that an incident is substantially similar because it involved a Ford vehicle or a fire

emanating from the vehicle's engine compartment is a direct affront to the "substantial similarity" rule. Therefore, this Court should exclude all references to any alleged other incidents not meeting the substantially similar criteria.

C. The Probative Value of Evidence Of Other Incidents Is Substantially Outweighed By Unfair Prejudice.

Even if the Court concludes that any of the other incidents could meet the test of relevance, that is, that they are "substantially similar" to the subject case, that analysis would only be the *first step*. Before admitting such evidence, the Court must also weigh the dangers of unfair prejudice to Ford, confusion of the jury, and needless expenditure of time in conducting "mini trials" under S.C.R.E. 403.

Courts routinely rely on Rule 403 to exclude evidence of other incidents. *See, e.g., Whaley*, 609 S.E.2d at 300 ("Because evidence of other accidents may be highly prejudicial, plaintiff must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue"); *Lovett*, 201 F.3d at 1081 ("admitting similar incident evidence also threatens to raise extraneous controversial issues, confuse the issues, and be more prejudicial than probative"); *Yellow Bayou Plantation v. Shell Chem.*, 491 F.2d 1239, 1242-43 (5th Cir. 1974) (list of lawsuits and complaints received by defendant was "evidence of such faint probative value and high potential for unfair prejudice" as to be properly excluded as evidence that defendant "knew or should have known" that the product was defective); *Uitts*, 411 F. Supp at 1383 ("Proof of prior accidents or occurrences are not easily admitted into evidence, since they can often result in unfair prejudice, consumption of time and distraction of the jury to collateral matters") (citations omitted), *aff'd*, 513 F.2d 626 (3rd Cir. 1975). The injection of other accidents or incidents evidence into this lawsuit would certainly result in many, if not all of the negative factors set forth in and contemplated by Rule 403, S.C.R.E.

D. Hearsay Evidence of Other Accidents and Incidents Should Be Excluded.

Even if the Court determines that some evidence of other incidents could be admitted in the appropriate circumstance, the Court should exclude the same as hearsay. To date, not a single person involved in other accidents has been listed as a witness. On timeliness grounds alone, any such witness should not be allowed to testify either live or by deposition from other cases. Plaintiff may also resort to documentary evidence of other incidents. In order for documents from other incidents to be admitted into evidence at the trial of this case, Plaintiff must first establish the proper foundation for those documents, although it is clear that it is unable to do so. Claims and complaints filed in other actions about other accidents or incidents are clearly hearsay. *See Roberts v. Harnischfeger Corp.*, 901 F.2d 42, 45 (5th Cir. 1989) (excluding as hearsay a memorandum prepared by one of defendant's employees that briefly summarized notices of pending litigation against the defendant); *Johnson v. Ford Motor Co.*, 988 F.2d 573 (5th Cir. 1993); *Babb v. Ford Motor Co.*, 535 N.E. 2d 676 (Oh. App. 1987); *Kroeger v. Ford Motor Co.*, 527 N.W. 2d 178 (Neb. 1995). As such, these complaints would fall squarely within Rule 801(c); S.C.R.E., with no recognized hearsay exception.

Further, claims letters and complaints are most often double hearsay because they consist of an out-of-court statement made by a claimant to his attorney and then restated in some fashion by the claimant's attorney. In cases of hearsay within hearsay, all hearsay components must fall within rule-based exception in order to be admissible. S.C.R.E. 805; *see also, Shell v. Parrish*, 448 F.2d 528 (6th Cir. 1971).

The danger of admitting hearsay evidence of other lawsuits is particularly acute. In *Julander*, the Tenth Circuit Court of Appeals was especially concerned about the effect on the jury of the evidence of these other cases:

In our considered view, the error in the instant case cannot be glossed over by labeling it as only harmless error. The fact that seven others had brought suit against Ford over the Bronco was of course damaging to Ford. And in this regard counsel in closing argument advised the jury that they had only seen the "tip of the iceberg." ...This error was not harmless, and therefore we have no choice but to reverse.

Julander, 488 F.2d at 848-849. Accordingly, any hearsay and double hearsay reports should be excluded. See *McKinnon v. Skil Corp.*, 638 F.2d 270 (1st Cir. 1981).

E. Plaintiffs Should Establish Substantial Similarity Outside the Presence of the Jury.

Without waiving its position stated above, and in the event that the Court considers such evidence, to avoid the risk of confusing the jury and injecting undue prejudice into the trial, Ford respectfully requests that the Court require Plaintiff to lay the foundation for substantial similarity outside the presence of the jury. See *Jimenez*, 269 F.3d at 456 ("the better course in the circumstances might have been to exclude the evidence of the other accidents until it was more clearly demonstrated that they were caused by a 'substantially similar' defect ..."). For all of the reasons discussed herein, to allow Plaintiff to make this showing in the jury's presence would undoubtedly and irreparably prejudice Ford.

CONCLUSION AND CERTIFICATION

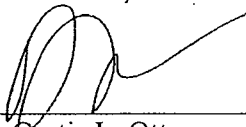
For all of the reasons stated herein, Ford respectfully requests the Court enter an order excluding at trial any reference to or evidence, testimony, or argument relating to any other accidents, incidents, complaints, lawsuits, settlements, verdicts, judgments or orders whether or not involving Ford F-250 trucks or other Ford vehicles equipped with SCDS. The undersigned counsel hereby certifies, pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, that consultation with Plaintiff's counsel would likely serve no useful purpose in resolving the instant motion.

(Signature page to follow.)

TURNER, PADGET, GRAHAM & LANEY, P.A.

August 29, 2008

By:


Curtis L. Ott

David C. Marshall

Post Office Box 1473

Columbia, SC 29202

Phone: (803) 254-2200

Fax: (803) 799-3957

**ATTORNEYS FOR DEFENDANT
FORD MOTOR COMPANY**

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vehicle was parked inside Plaintiff's warehouse on September 24, 2005, along with various items of lawn maintenance equipment such as tractors, lawn mowers, weed eaters, and pressure washers. When Plaintiff's owner returned to the warehouse two days later, on September 26, 2005, he discovered the vehicle completely burned inside the warehouse. Additionally, other equipment inside the warehouse had also been burned. Plaintiff alleges the fire was caused by an allegedly defective Speed Control Deactivation Switch ("SCDS"), a part Ford recalled in 2006. Plaintiff's Complaint asserts a single cause of action for negligence and seeks recovery for an unspecified amount of actual and punitive damages in an amount not to exceed \$74,999.00.

Ford timely answered Plaintiff's Complaint on March 1, 2007, denying the allegations. Discovery reveals that Plaintiff unilaterally had the subject vehicle and the allegedly defective component part destroyed on or about February 2, 2006—over ten months prior to commencing this civil action. Furthermore, Plaintiff did not notify Ford of its decision to have the subject vehicle destroyed prior to doing so, although Plaintiff contacted its attorney prior to making that decision. As a result of Plaintiff's spoliation of the only piece of physical evidence in this case, Ford was deprived of any opportunity to inspect the subject vehicle or test the allegedly defective component part. While Plaintiff attempts to introduce expert testimony regarding the cause and origin of the alleged fire, Plaintiff has not identified any witness to testify regarding the alleged defect in either design or manufacture of the vehicle's SCDS, or provide an alternative feasible design as required under South Carolina product liability law.

LEGAL ARGUMENT

Ford anticipates that Plaintiff will seek to interject references, argument, and evidence in this case regarding design matters, events, incidents, documents, and other facts that occurred or came into existence *after* the manufacture and sale of the subject vehicle in 1995, including

Recall 05S28. In particular, Ford anticipates that, among other things, Plaintiff will attempt to introduce argument and evidence including, but not necessarily limited to, the following: (1) testing, analysis, and/or design changes relating to the SCDS occurring after the manufacture and sale of the subject vehicle in 1995, including National Highway Transportation Safety Administration ("NHTSA") Recall 05S28; and (2) other accidents, incidents, claims, or lawsuits involving vehicle fires allegedly attributed to defective SCDS installed in other Ford vehicles. Plaintiff will likely seek to utilize such post-manufacture evidence in an attempt to establish its claim for design or manufacture defect, and possibly its claim for punitive damages.

The basic underpinning of Ford's argument is embodied in the South Carolina law discussed in greater detail below. In filing the instant motion, Ford does not intend to limit application of additional South Carolina law or rules of evidence to only those items enumerated herein; rather, Ford's argument highlights the South Carolina principle of strictly focusing upon the date of manufacture in a product liability case, as well as this principle's broad application to the wide categories of evidence Plaintiff may seek to introduce in this trial.

The vehicle at issue in this litigation—a 1996 Ford F-250 truck with vehicle identification number ("VIN") 1FTHX25H6TEA43869—was finally assembled by Ford on November 3, 1995, and sold as a new vehicle on November 15, 1995. *See* Affidavit of Jon S. Olson, previously filed in support of Ford's Motion for Summary Judgment and attached hereto as Exhibit A. Thus, the vehicle was in service for nearly ten years prior to the incident complained of in Plaintiff's Complaint. Despite its numerous years of reliable service, Ford now finds itself defending a 1996 model year Ford F-250 truck in the year 2008. Nevertheless, under the clear dictates of South Carolina law, Ford and the 1996 Ford F-250 truck at issue are to be judged at the time of the vehicle's manufacture. Accordingly, any post-manufacture evidence is

not relevant to any of the determinations to be made under South Carolina product liability law, and must be excluded on that basis. See S.C.R.E. 402. Moreover, even if such post-manufacture evidence were otherwise probative, a point Ford vigorously contests and does not concede, such evidence would be highly prejudicial given the confines of South Carolina substantive law. See S.C.R.E. 403. Lastly, such post-manufacture evidence, specifically Recall 05S28, should be excluded because it constitutes subsequent remedial measures. See S.C.R.E. 407. Therefore, Plaintiff should be barred from introducing or relying on evidence of design changes, conduct, incidents, and events that occurred subsequent to the manufacture of the 1996 Ford F-250 truck that is the subject of this action, including Recall 05S28.

A. South Carolina Product Liability Law

Under the governing tenets of South Carolina product liability law, regardless of the theory of recovery, the relevant focus is on the condition of the product and/or the conduct of the manufacturer *at the time of the product's manufacture or sale*; to wit:

A product must be measured against a standard existing at the time of sale or against reasonable customer expectations held at the time of sale. 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.

Bragg v. Hi-Ranger, Inc., 462 S.E.2d 321, 331 (Ct. App. 1995) (citing *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 337 (4th Cir. 1991); *Doe v. Miles Laboratories*, 927 F.2d 187, 193 (4th Cir. 1991)). In its decision overturning a jury verdict against an automobile manufacturer, the Fourth Circuit Court of Appeals agreed that, even for purposes of determining punitive damages, the relevant time period to consider is the date that the vehicle or its component part was designed and "delivered from the factory." See *Jimenez v. Daimler Chrysler Corp.*, 269 F.3d 439, 450-453 (4th Cir. 2001). In *Jimenez*, the Fourth Circuit analyzed and ultimately precluded

post-design evidence on the issue of punitive damages. *Id.* The Court found that none of the evidence supported a finding of wrongdoing at the time of the vehicle's design and manufacture, which was the relevant time period to be considered. *Id.* It necessarily follows that post-manufacture evidence is likewise not relevant to establish negligence at the time of a product's manufacture or sale.

South Carolina so closely adheres to the rule that a product manufacturer is to be judged by standards at the time of manufacture or sale that *there is no post-sale duty to warn* recognized under South Carolina law. Stated differently, "a manufacturer . . . has no duty to notify previous purchasers of its products about later developed safety devices or to retrofit those products if the products were not defective under standards existing at the time of the manufacture or sale." *Bragg*, 462 S.E.3d at 331. Further, while not pled by Plaintiff in this case, the focus of strict products liability is on the condition of the product *at the time it leaves the seller's hands.*" Restatement (Second) of Torts § 402A, *comment g* (emphasis added).¹ The same holds true for the single negligence cause of action pled by Plaintiff in this case.

Applying the above-cited law to the present case, any evidence or argument relating to design changes, conduct, incidents, and events that occurred subsequent to the manufacture of the 1996 Ford F-250 truck that is the subject of this action, including Recall 05S28, should be excluded because the evidence post-dates the manufacture and sale of the subject vehicle. Such exclusion is not only proper, but also necessary pursuant to the governing provisions of South Carolina substantive and procedural law and the rules of evidence.

¹ As the Court is well aware, the official comments to § 402A, including *comment g*, have been legislatively adopted as the statutory law of South Carolina. See S.C. Code Ann. § 15-73-30; *Clayton v. General Motors*, 286 S.E.2d 129, 131 (1982).

B. Testing, Analysis, and/or Design Changes Regarding the SCDS Occurring After the Manufacture and Sale of the Subject Vehicle in 1995, Including NHTSA Recall 05S28, Should Be Excluded From Evidence

Ford anticipates that Plaintiff will attempt to introduce testimony and documents regarding Ford's testing, analysis, and/or design changes relating to the SCDS occurring after the manufacture and sale of the subject vehicle in 1995, including NHTSA Recall 05S28. Ford anticipates that Plaintiff will attempt to rely on such documents to prove not only the alleged defect at issue and negligence on the part of Ford, but also to establish that Ford was aware of, but chose to disregard, a problem with the SCDS on the date of manufacture of the subject vehicle.

As noted previously, the subject 1996 Ford F-250 truck was finally assembled by Ford on November 3, 1995, and sold as a new vehicle on November 15, 1995. Subsequent to the date of manufacture and sale, in January 2005, Ford, in conjunction with NHTSA, announced Field Service Action 05S28 (NHTSA Campaign No. 05V017000), which recalled certain Ford vehicles with SCDS. Subsequent investigation by Ford and NHTSA ultimately led to an expansion of Field Service Action 05S28 in September 2005 (NHTSA Campaign No. 05V388000). The September 2005 recall expansion included certain 1994-2002 Ford F-250 trucks with a Gross Vehicle Weight ("GVW") of less than 8,500 pounds.² In August 2006, Recall 05S28 was again expanded to include certain 1996 Ford F-250 trucks with a GVW over 8,500 pounds, including the subject vehicle. See Supplemental Affidavit of Jon Olson, attached hereto as Exhibit B.

All of these events occurred *after* the manufacture of the subject Ford F-250 truck at issue in this case. Nevertheless, Plaintiff has repeatedly attempted to introduce evidence of

² Ford's objection to the introduction of a Ford Recall 05S28 notice dated September 2005 and referring to a 2001 Ford Expedition vehicle is set forth in a separate motion *in limine* on the topic.

Recall 05S28 and other post-manufacture evidence in an attempt to prove either product defect or negligence of Ford in designing or manufacturing the subject vehicle. Ford has objected to use of this putative evidence at all stages of these proceedings and strenuously objects to their introduction at trial. In accordance with the dictates of *Bragg v. Hi-Ranger*, 462 S.E.2d at 331, Ford submits that all such evidence and testimony post-dates the manufacture and sale of the subject vehicle and is, therefore, irrelevant and inadmissible. Moreover, even if such evidence were deemed to have some probative value, such value is outweighed by the prejudice that will inure to Ford's defense as the analyses and recall identified above post-date the manufacture and sale of the subject vehicle.

Additionally, and perhaps more importantly, such post-manufacture evidence, specifically Recall 05S28, should be excluded from evidence under Rule 407, S.C.R.E., which specifically prohibits the introduction of subsequent remedial measures to prove negligence or culpable conduct on the part of the defendant. See *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 653-54, 615 S.E.2d 440, 448 (2005) (holding that evidence of subsequent remedial measures was improperly admitted and therefore ordering a new trial, in part, as a result). The rule states:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Rule 407, S.C.R.E. The Supreme Court also held that "Rule 407 bars the introduction of any change, repair, or precaution that under the plaintiff's theory would have made the accident less likely to happen, unless the evidence is offered for another purpose." *Webb* at 653, 615 S.E.2d at 448 (focusing on the literal language of the rule).

Under Rule 407, it is clear that Plaintiff cannot use evidence of Recall 05S28 to prove negligence or culpable conduct on the part of Ford. Without this evidence, Plaintiff is left with no independent evidence of negligence on the part of Ford with respect to the design or manufacture of the subject vehicle, and therefore cannot satisfy its burden of proof in this case. *See Rife v. Hitachi Const. Machinery Co., Ltd.*, 363 S.C. 209, 215-18, 609 S.E.2d 565, 568-70 (Ct. App. 2005) ("liability for negligence requires, in addition to the above, proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design"). Nevertheless, Ford anticipates Plaintiff will attempt to introduce evidence of Recall 05S28 to prove that the subject vehicle was defective, which Ford strenuously objects. Even if such evidence of subsequent remedial measures is deemed admissible by the Court, its probative value is substantially outweighed by the prejudice to Ford and therefore should be excluded. Rule 403, S.C.R.E. Additionally, introduction of such evidence would confuse or mislead the jury regarding the purpose or effect of the evidence. Should the Court insist that such subsequent remedial measures and post-manufacture evidence is admissible as evidence of defect, which Ford expressly objects, the Court should issue a jury instruction describing the limited consideration to be given by the jury, specifically that it cannot be considered as evidence of negligent conduct. Rule 407, S.C.R.E.

C. Other Accidents, Incidents, Claims, or Lawsuits

Ford anticipates that Plaintiff will attempt to interject improper and irrelevant evidence or testimony regarding other accidents, incidents, claims, or lawsuits involving Ford vehicle fires attributed to Speed Control Deactivations Switches that were alleged to be improperly designed, manufactured, and/or installed in Ford vehicles that occurred after November of 1995. Aside from the fact that any evidence of other incidents must be "substantially similar" as a predicate to

its admission, any such evidence of events after the manufacture of the vehicle must be excluded under the substantive law of South Carolina that governs product liability actions. It is a common approach for plaintiffs in products liability actions to attempt to interject other accidents, claims, and lawsuits in an attempt to inflame the jury. This is done under the guise of proving defective design. Here, however, South Carolina law is quite clear that post-manufacture evidence is inadmissible to establish either liability or a basis for punitive damages. For these reasons, as well as the reasons set forth in Ford's motion *in limine* to exclude evidence of other incidents, Ford asks that the Court stand guard against the introduction of such extraneous argument and evidence.

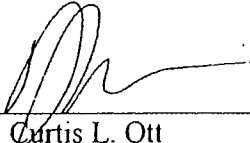
CONCLUSION AND CERTIFICATION

For all of the foregoing reasons, Ford respectfully requests the Court to grant this motion *in limine* to exclude all post-manufacture argument and evidence. The undersigned counsel for Ford hereby certifies, pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, that consultation with Plaintiff's counsel would likely serve no useful purpose in resolving the instant motion.

August 29, 2008

By:

TURNER, PADGET, GRAHAM & LANEY, P.A.


Curtis L. Ott
David C. Marshall
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

**ATTORNEYS FOR DEFENDANT
FORD MOTOR COMPANY**

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

5 Star, Inc.,

Plaintiff,

vs.

Ford Motor Company,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2006-CP-10-4773

**FORD MOTOR COMPANY
MOTION FOR NEW TRIAL**

JULIE J. ARMSTRONG
CLERK OF COURT

2008 SEP 15 PM 4:09

FILED

Pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, as well as the Thirteenth Juror Doctrine, Defendant Ford Motor Company ("Ford") hereby moves the Court for a new trial. Ford files this motion as an alternative to its Motion for Judgment Notwithstanding the Verdict, and specifically reserves all grounds raised therein.¹

GROUNDS

Ford's motion for new trial is based upon the following grounds:

1. The verdict in Plaintiff's favor is unsupported by the evidence and is against the manifest weight of the evidence, and, thus, the Court should invoke its authority under the "thirteenth juror" doctrine to grant a new trial because the evidence does not support the verdict. *See Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990) (affirming trial court's grant of new trial absolute under thirteenth juror doctrine).

2. Because Plaintiff failed to prove the essential elements of a negligence claim for products liability based on defective design, the jury's verdict is based upon passion, prejudice, speculation, conjecture, and/or matters outside the evidence and proof adduced at trial, and,

¹ If necessary, Ford consents to the Court hearing its motion in a circuit other than where trial was held.

therefore, Ford is entitled to a new trial absolute.

- a. Plaintiff presented insufficient evidence to satisfy its burden of proof as to all four elements of its claim for negligence products liability/design defect.
- b. Plaintiff presented no record evidence establishing the existence of an alternative feasible design.
- c. Plaintiff presented no record evidence establishing proximate cause of the subject fire, other than "deduction" of its experts based on other incidents involving other Ford vehicles.
- d. Plaintiff spoliated the only piece of physical evidence and therefore relied exclusively on circumstantial evidence, which is insufficient to prove a product liability case.
- e. Plaintiff presented no record evidence establishing its damages in general or that the named Plaintiff sustained the alleged damages, rather than Standley Shelby personally or other corporate entities owned by Mr. Shelby, such as Shelby Holdings, Inc., and the jury awarded 5 Star, Inc., damages for which it was not legally entitled to recover.
- f. Despite being admonished by the Court on two separate occasions to disregard a witnesses' testimony regarding a "recall" for the subject vehicle or allegedly defective component part, the jury disregarded the Court's clear instructions, and, lacking any evidence in support thereof, returned a verdict in Plaintiff's favor based on the improper statements that were stricken from the record, thereby depriving Ford of its right to a

fair trial.

- g. The jury's verdict was the result of passion and prejudice based upon Plaintiff's counsel violation of the Golden Rule in asking the jurors to place themselves in Plaintiff's shoes. *See State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006) (holding that a party's improper "Golden Rule" argument deprived the defendant of his right to a fair trial).
- h. The jury's verdict of \$41,000.00 indicates it improperly awarded Plaintiff for an amount of damages that does not represent the actual alleged damages, and therefore disregarded the Court's clear instructions and based its verdict on matters not in evidence, thus depriving Ford of its right to a fair trial.

3. The verdict in Plaintiff's favor is the result of prejudicial legal error, including error in the admission and exclusion of evidence, error in the instructions to the jury, error in not granting Ford a mistrial, and improper conduct of Plaintiff's counsel, and, therefore, Ford is entitled to a new trial.

- a. The Court erred in failing to exclude the testimony of Plaintiff's proffered experts Leonard A. Greene and Benjamin Norris when both witnesses' opinions were not based on reliable scientific methods and therefore were irrelevant.
- b. Admission of any evidence, argument or testimony of other incidents, including fires in unrelated Ford vehicles, was improper, irrelevant, and highly prejudicial and should have been excluded under Rules 402, 403, and 407 of the South Carolina Rules of Evidence as inadmissible post-

manufacture evidence and on the additional basis that such testimony was not substantially similar and therefore irrelevant. *See, e.g., Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005) (“Because evidence of other accidents may be highly prejudicial, ‘[a] plaintiff must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident at issue.’”) (internal citation omitted). Additionally, permitting Plaintiff to establish its case based solely on the “deduction” of its experts based on other incidents involving other Ford vehicles under the guise of circumstantial evidence was improper.

- c. The Court erred in failing to grant Ford’s motion for mistrial and costs on three separate occasions when, in gross and deliberate violation of the Court’s ruling *in limine*, and without even first approaching the bench to address the Court’s previous ruling, Plaintiff’s counsel, Plaintiff’s retained expert, and Plaintiff himself mentioned the word “recall” and indicated there was a recall for the subject vehicle or part. Furthermore, Plaintiff’s counsel’s improper closing arguments regarding the number of objections made by counsel for Ford at trial and the number of motions or documents filed with the Court, despite being informed immediately prior by the Court that it would reiterate its charge that the jury may not consider such items, was highly prejudicial to Ford. Finally, a mistrial should have been granted, and Ford now is entitled to a new trial, based on the overall conduct of Plaintiff’s counsel in repeatedly asking questions that any first-

year lawyer would know were improper that caused Ford to object an inordinate number of times and frequently on the same issues previously ruled upon by the Court. Although the Court sustained nearly all of Ford's objections, the repeated objections and cumulative effect deprived Ford of its right to a fair trial.

- d. Ford is entitled to a new trial due to Plaintiff's counsel's repeated attempts to violate the Court's ruling *in limine* and have its expert witnesses testify regarding "governmental publications" regarding Speed Control Deactivation Switches in Ford vehicles. Although the Court sustained nearly all of Ford's objections to this improper testimony, Plaintiff's counsel's conduct deprived Ford of its right to a fair trial.
- e. Plaintiff's counsel violated the Golden Rule in his closing argument and improperly asked the jurors to place themselves in Plaintiff's shoes in a clear attempt "to completely destroy all sense of impartiality of the jurors, and ... arouse passion and prejudice" which deprived Ford of its right to a fair trial. *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006) (holding that an attorney's improper "Golden Rule" argument deprived the defendant of his right to a fair trial).
- f. Ford is entitled to a new trial based on the cumulative effect of all of Plaintiff's counsel's improper conduct at trial, which together collectively deprived Ford of its right to a fair trial.
- g. The Court erred in allowing Plaintiff's expert Greene review two documents that were excluded from evidence and opine that they put Ford

on notice of this fire incident and Plaintiff's potential claim.

- h. The Court erred in allowing the case to go to the jury based upon a finding that Plaintiff presented circumstantial evidence as to all four elements of its claim for negligent design defect, as well as proximate cause and alternative feasible design.
- i. The Court erred in allowing testimony and evidence, over Ford's objection, regarding damages allegedly sustained by nonparties to this litigation, namely Standley Shelby personally and Shelby Holdings, Inc. The uncontested testimony revealed that the Plaintiff in this case, 5 Star, Inc., only sustained damage to the subject vehicle, if any, but that other nonparties incurred the alleged damages associated with rental equipment, replacement lawn and office equipment, and building repair, if any. Allowing Plaintiff to recover for damages it did not sustain and is not legally entitled to recover was improper and subjects Ford to the potential for double recovery for the same damage.
- j. The Court erred in allowing testimony regarding Plaintiff's improper method of calculation of "business interruption" damages based solely on alleged lost revenues. In a case such as this, lost profits are the proper measure of damages, and Plaintiff presented no relevant evidence supporting its claim for lost profits, which requires proof of the number of jobs lost, amount each job would have brought in, and net profit lost after all expenses, wages, overhead and other items were paid. Accordingly, the Court erred in allowing Plaintiff to recover for business interruption

based solely on its alleged 2004 Gross Receipts.

- k. The Court erred in allowing Plaintiff to recover \$8,000 for the subject vehicle without any record evidence as to the fair market value of the vehicle at the time of fire, and in spite of Plaintiff's purchase of the truck for \$1,500 seven months before the fire.
- l. The Court erred in not applying the Economic Loss Doctrine to limit Plaintiff's alleged damages.
- m. The Court erred in allowing Plaintiff to recover \$14,041 in alleged damages to office and lawn equipment without any record evidence as to the specific items that were allegedly damaged or their fair market value at the time of fire.
- n. The Court erred in allowing Plaintiff to recover both rental fees and replacement costs for the same items of personal property allegedly destroyed in the fire.
- o. The Court erred in submitting jury instructions with the omission of charges stating that (1) Plaintiff bears the burden of proving the vehicle must have been in substantially the same condition at both the time of sale and time of fire; and (2) the vehicle is to be measured against standards existing at the time of manufacture and sale. Additionally, the Court erred in failing to fully charge Ford's proposed jury instructions numbered 11, 21, 23, 24, 47, 50, 53-60, and others discussed in the extensive charge conference held with the Court.

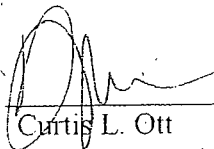
4. In the alternative to Ford's motion for new trial absolute for the grounds set forth herein, Ford moves for a new trial *nisi remittitur* because the amount of the verdict is unsupported by the facts and law, and is excessive in light of the evidence presented at trial. Specifically, the jury's verdict of \$41,000.00 should be reduced by the Court to the proper measure of damages. *See Holroyd v. Requa*, 603 S.E.2d 417 (S.C. Ct. App. 2004).

Ford relies on all grounds set forth in its Motion for Directed Verdict made at the close of Plaintiff's case-in-chief and renewed at the close of all evidence, as well as in Ford's Motion for Judgment Notwithstanding the Verdict, and the same are incorporated as if set forth *verbatim* herein. Ford also relies upon its memorandum in support of its post-trial motions to be filed in support hereof, as well as the governing procedural and substantive law of the United States and this State, and any oral argument the Court may permit in support of the instant motion. For all of these reasons, Ford hereby moves for a new trial.

TURNER, PADGET, GRAHAM & LANEY, P.A.

September 15, 2008

By:



Curtis L. Ott
David C. Marshall
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

**ATTORNEYS FOR FORD MOTOR
COMPANY**

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
)
) Civil Action No.: 2006-CP-10-4773

5 Star, Inc.,

Plaintiff,

vs.

Ford Motor Company,

Defendant.

FORD MOTOR COMPANY'S
MEMORANDUM IN SUPPORT OF
ITS MOTION FOR NEW TRIAL

2009 SEP 23 PM 2:56
J. ARMSTRONG
CLERK OF COURT

FILED

Defendant Ford Motor Company ("Ford") hereby submits this memorandum in support of its motion for new trial pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, as well as the Thirteenth Juror Doctrine. Ford moves for a new trial in the alternative to its motion for judgment notwithstanding the verdict, and specifically reserves all grounds raised therein.

INTRODUCTION

During trial, the Court made numerous evidentiary rulings permitting Plaintiff to inject extraneous, irrelevant, incompetent, and prejudicial evidence and testimony in this case. These rulings, coupled with the conduct of Plaintiff's counsel at trial, tainted the jury's deliberative process, resulting in a grossly excessive and unfair verdict that must be set aside, or, in the alternative, remitted by the Court. In light of these evidentiary errors and the resulting excessive verdict, Ford hereby moves the Court for a new trial absolute or in the alternative new trial *nisi remittitur* to correct these errors and ensure a fair verdict at the re-trial of this action.

ARGUMENT

- A. The verdict in Plaintiff's favor is unsupported by the evidence and is against the manifest weight of the evidence, and, thus, the Court should invoke its authority under the thirteenth juror doctrine to grant a new trial.

It is well settled in South Carolina that "a trial judge may grant a new trial upon the facts if the judge determines the verdict is contrary to the fair preponderance of the evidence." *McEntire v. Mooregard Exterminating Services, Inc.*, 353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003). "The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when it finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts." *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). "The effect is the same as if the jury failed to reach a verdict." *Id.* The judge, as the thirteenth juror, "hangs" the jury. *Id.* Neither the judge nor the jury is required to give reasons for this outcome. *Id.* Because the result of the "thirteenth juror" vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings. *Id.* Unlike a motion for directed verdict, the trial judge weighs the evidence under the thirteenth juror doctrine and need not view it in the light most favorable to the opposing party. Moreover, the question of whether to grant a new trial upon the facts is one addressed to the discretion of the trial judge. *McEntire*, 353 S.C. at 633, 578 S.E.2d at 748.

For the reasons set forth in Ford's motions for judgment notwithstanding the verdict and new trial, and the supporting memoranda for each, the Court should grant Ford a new trial under the thirteenth juror doctrine because the jury's verdict is unsupported by the evidence.¹

B. Because Plaintiff failed to prove the essential elements of a negligence claim for products liability based on defective design, the jury's verdict is based upon passion, prejudice, speculation, conjecture, and/or matters outside the evidence and proof adduced at trial, and, therefore, Ford is entitled to a new trial absolute.

For the reasons set forth in Ford's memorandum in support of its motion for judgment notwithstanding the verdict, which is incorporated by reference as if stated *verbatim* herein,

¹ Plaintiff's argument that this doctrine does not apply because "Ford presented no evidence to controvert the Plaintiff's case" overlooks the basic principle that a defendant bears no burden of proof. Rather, if Plaintiff fails to satisfy its burden of proof, it is the duty of the Court to enter judgment as a matter of law or grant a new trial.

Plaintiff failed to satisfy its burden of proof, and therefore, the jury's verdict was based on matters not in evidence, thus entitling Ford to a new trial absolute. Additionally, the jury disregarded the Court's clear instructions and improperly based its verdict on statements concerning a "recall" for the subject vehicle or allegedly defective component part that were stricken from the record, thus depriving Ford of its right to a fair trial. Also, the jury's verdict was the result of passion and prejudice based upon Plaintiff's counsel's improper closing arguments regarding the number of objections made by Ford and clear violation of the Golden Rule in asking the jurors to place themselves in Plaintiff's shoes. *See State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006) (holding that a party's improper "Golden Rule" argument deprived the defendant of his right to a fair trial). For all of these reasons, Ford is entitled to a new trial absolute.

C. The verdict in Plaintiff's favor is the result of prejudicial legal error, including error in the admission and exclusion of evidence, error in the instructions to the jury, error in not granting Ford a mistrial, and improper conduct of Plaintiff's counsel, and, therefore, Ford is entitled to a new trial absolute.

1. Prejudicial legal error.

Ford identified numerous grounds for new trial in its motion. Ford hereby incorporates by reference its arguments set forth in its motions in *limine* on the relevant topics. For instance, Ford respectfully submits that Court erred in failing to exclude the testimony of Plaintiff's proffered experts Leonard Greene and Benjamin Norris when both witnesses' opinions were not based on reliable scientific methods and therefore were irrelevant. Likewise, Ford submits the Court erred in admitting evidence, argument or testimony of other incidents or claims of fires in unrelated Ford vehicles with speed control.

Additionally, Ford submits that the Court erred in permitting Plaintiff to establish its case based solely on the "deduction" of its experts based on other incidents involving other Ford vehicles under the guise of circumstantial evidence. In order for the "thousands" of other incidents or claims mentioned by Plaintiff's experts at trial to be circumstantial evidence in this case, there must be some independent physical evidence tending to establish that this was a Speed Control Deactivation Switch fire. However, Plaintiff offered no physical evidence of this fire, and could not because Plaintiff authorized the spoliation of all physical evidence. Mr. Greene admitted both in his deposition and trial testimony that there was no physical evidence of this fire, and that the circumstantial evidence would not be any different if someone deliberately set the vehicle on fire. However, he testified he "deduced" from the "thousands" of other incidents or claims involving allegations of Speed Control Deactivation Switch fires in other unrelated Ford vehicles that the subject fire must have been caused by the same component part. Plaintiff then convinced the Court this was circumstantial evidence sufficient to survive directed verdict. However, since Plaintiff presented no independent evidence tending to establish that the subject fire was caused by the Speed Control Deactivation Switch, the jury was left to speculate as to the potential similarities or differences between this fire and all other vehicle fires, which all experts agreed happen for a multitude of reasons. *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965) ("Where circumstantial evidence is relied upon to establish liability, the plaintiff must show such circumstances as would justify the inference that his injuries were due to the negligent act of the defendant, and not leave the question to mere conjecture or speculation."). As a result, Plaintiff relied exclusively on general testimony of other incidents or claims to prove its case, under the guise of circumstantial evidence, which Ford attempted to prevent by filing its motion in *limine* on the topic. This was improper and warrants a new trial.

See, e.g., Hall-Edwards v. Ford Motor Co., 971 So.2d 854, 860 (Fla. Ct. App. 2007) (“Here, throughout the trial, numerous references were made to other cases without laying a foundation for substantial similarity. Moreover, this evidence improperly became a ‘feature of the trial.’ Because no foundation was laid establishing a substantial similarity between Hall’s accident and other accidents referenced by plaintiff throughout the trial, the trial court abused its discretion in admitting this evidence and the verdict must be set aside....”) (internal citations omitted).

2. Conduct at trial.

The conduct of counsel at trial can warrant the need for a new trial when it “infects” the trial with unfairness thereby making the jury’s verdict a denial of due process. *See, e.g., State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996). Additionally, while a single point of error raised alone may be insufficient to warrant a new trial, the cumulative effect of multiple errors is enough to require a new trial. *State v. Freeman*, 319 S.C. 110, 123-24, 459 S.E.2d 867, 875 (Ct. App. 1995) (citing *Myers v. Moffett*, 312 S.W.2d 59, 65 (1958) (conduct of counsel of defendant in interrogation of witnesses and in argument to jury affected trial in such a way as to have substantial, prejudicial influence on verdict, so as to justify granting a new trial); *Ryan v. United Parcel Service*, 205 F.2d 362, 365 (1953) (although perhaps no one of the errors standing alone would call for reversal, in their totality they do)). As our courts have stated, “the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal.” *Id.*

It is under this law, in part, that Ford moves for a new trial. Plaintiff’s Return to Ford’s motion for new trial claims that counsel for Ford, in setting forth its arguments, attacked Plaintiff’s counsel personally and violated the “civility oath.” However, Plaintiff’s counsel misinterprets Ford’s position—Ford in no way attacked any individual personally, but instead

argued that Plaintiff's pretrial conduct and Plaintiff's counsel's trial tactics, which included spoliation of the most crucial pieces of physical evidence; conduct at trial that violated the Court's rulings, mischaracterization of witness testimony, numerous improper questions asked solely to invoke Ford's objections, and improper arguments to the jury, prevented Ford from its constitutional right to a fair trial.

First, the Court erred in failing to grant Ford's motion for mistrial and costs on three separate occasions when, in deliberate violation of the Court's ruling in *limine*, and without even first approaching the bench to address the Court's previous ruling, Plaintiff's counsel, Plaintiff's retained expert, and Plaintiff's owner mentioned the word "recall" and represented to the jury there was a recall for the subject vehicle or part. The Court was clear in its ruling in *limine* that the recall was to be excluded from evidence. Ford prepared for trial and gave its opening statement in accordance with the Court's ruling. However, Plaintiff's counsel, in direct violation of the Court's ruling, asked his own witness, who was a Ford employee called in Plaintiff's case in chief, if a reasonable fire cause and origin expert would check if there was a recall for the vehicle as part of his investigation. Prior to receiving an answer, Ford objected and the jury was excused to address the issue. Plaintiff justified its question by relying on the Court's pre-trial ruling allowing Plaintiff's experts to testify to the specific other investigations or incidents where a Speed Control Deactivation Switch was alleged to have caused a fire. In doing so, Plaintiff's counsel blurred the Court's ruling on the two topics and convinced the Court that somehow the recall was relevant to Mr. Olson's qualifications under Rule 702, SCRE. After Ford's motions for mistrial and costs were denied, the jury returned and Plaintiff's counsel, rather than getting an answer to the question that caused the motions, which the Court ruled he was allowed to do, moved on to other topics and never returned to the recall.

Ford immediately recognized that Plaintiff's counsel failed to introduce the recall into evidence through Mr. Olson's testimony as the Court would have allowed, and therefore did not redirect him on any topic so as to avoid allowing the recall into evidence. Despite this, Plaintiff maintains that the recall came into evidence through Mr. Olson, and even further represents to the Court in its Return to Ford's post trial motions—in three separate paragraphs—that "Ford's expert testified that consulting the recall literature is one of the first places he would look in investigating a suspicious fire;" that "its own expert testified he consulted the recall notice in forming his opinion;" and that "its expert mentioned the recall notice that he relied on in forming his opinion." All three of these assertions are mistaken or inaccurate; Mr. Olson never answered Plaintiff's counsel's question that led to the initial motions for mistrial and costs, and Plaintiff never returned to the topic.

Second, Plaintiff's retained expert witness, Mr. Greene, testified during his direct examination that there was a recall for the subject vehicle and that he relied on it to formulate his cause and origin opinions. Ford again objected and moved for a mistrial and costs, but the Court merely instructed the jury to disregard Mr. Greene's testimony as non-responsive. Plaintiff's counsel's solicitation of this testimony was improper and in clear violation of the Court's *limine* rulings. Lastly, and perhaps more egregiously, Mr. Shelby, who sat through the afternoon of motions in *limine* and understood the Court's ruling excluding the recall from evidence, in a completely non-responsive answer to a question confirming he had no inspections performed on the vehicle to evaluate its claims in this case, testified that he was told by his insurance adjuster that there was a recall for the subject vehicle. Again, the Court ordered the jury to disregard the testimony as non-responsive and denied Ford's renewed motions for mistrial and costs. While the recall was properly excluded from evidence, the three incidents where the jury was informed

of a recall for the vehicle through the questioning and testimony of Plaintiff's counsel, Plaintiff's expert, and Plaintiff's owner, deprived Ford of its right to a fair trial.

In this same respect, Plaintiff's counsel repeatedly asked questions of witnesses that were repetitive and attempted to illicit testimony in violation of the Court's rulings. For instance, Plaintiff's counsel attempted, on countless occasions, to introduce the same "governmental publication" regarding Speed Control Deactivation Switch fires, which the Court repeatedly excluded from evidence. In doing so, Plaintiff drew numerous objections from Ford, all of which were sustained. Then, immediately after an extensive charge conference where the Court indicated it would reiterate its instruction that the jury is to disregard the number of objections by counsel, Plaintiff's counsel began his closing argument by pointing out the number of objections by Ford throughout trial. Once again, this required counsel for Ford to object, which was again sustained. Minutes later, Plaintiff's counsel explained to the jury the number of lengthy documents and motions Ford filed with the Court in this case. Once again, Ford objected, and once again, the Court sustained the objection to the improper argument. However, Plaintiff's counsel's improper closing argument in these two aspects injected unfairness into the trial, allowed the jury to consider matters not in evidence, and deprived Ford of its right to a fair trial. What other reason could there have been for such arguments, especially in light of the Court's decision to reiterate its instruction on the topic which was specifically told to counsel minutes before?

Plaintiff's counsel also violated the "Golden Rule" in his closing argument and improperly asked the jurors to place themselves in Plaintiff's shoes in a clear attempt to destroy all sense of impartiality of the jurors and arouse passion and prejudice, which ultimately deprived Ford of its right to a fair trial. *See State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006)

(holding that an attorney's improper "Golden Rule" argument deprived the defendant of his right to a fair trial). "An argument asking the jurors to place themselves in the victim's shoes tends to destroy completely all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." *State v. Rice*, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007). Such an argument "is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. Regardless of the nomenclature used, any argument that importunes the jurors to places themselves in the victim's shoes is disallowed Golden Rule Argument." *Id.*

Plaintiff's counsel violated the "Golden Rule" in its closing argument by telling the jury Ford would treat them the same way in such a situation. Plaintiff's counsel then told the jury that if they experience a problem with a Ford vehicle, not to bother notifying Ford because Ford will not help them. This argument was intended to destroy the jurors' sense of impartiality and arouse passion and prejudice, which is inherently unfair and expressly disallowed by the Golden Rule. This argument alone justifies Ford's request for a new trial.

Ford submits that each single act of Plaintiff's counsel's conduct at trial is sufficient to warrant the granting of a new trial, but stresses that the cumulative effect of all of Plaintiff's counsel's conduct, which includes the decision to destroy all physical evidence of this fire without first notifying Ford, collectively deprived Ford of its right to a fair trial and requires the Court to grant a new trial. *State v. Freeman*, 319 S.C. 110, 123-24, 459 S.E.2d 867, 875 (Ct. App. 1995).

3. Jury charges.

"The trial court must charge the current and correct law applicable to issues raised in the pleadings and supported by the evidence." *Holroyd v. Requa*, 361 S.C. 43, 64, 603 S.E.2d 417,

428 (Ct. App. 2004) (citing *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000)). Ford submits the Court erred in submitting jury instructions with the omission of charges stating that (1) Plaintiff bears the burden of proving the vehicle must have been in substantially the same condition at both the time of sale and time of fire; and (2) the vehicle is to be measured against standards existing at the time of manufacture and sale. Additionally, the Court erred in failing to fully charge Ford's proposed jury instructions numbered 11, 21, 23, 24 and others discussed in the extensive charge conference held with the Court.

In a product liability action, regardless of the theory on which a plaintiff seeks recovery, he must establish three elements: (1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant. *Small*, 329 S.C. at 462-63, 494 S.E.2d at 842; *Bragg*, 319 S.C. at 539, 462 S.E.2d at 326. Further, liability for negligence requires, in addition to the above, proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design. *Rife v. Hitachi Const. Machinery Co., Ltd.*, 363 S.C. 209, 215-18, 609 S.E.2d 565, 568-70 (Ct. App. 2005); *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998); *Madden v. Cox*, 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985).

When discussing the instructions the Court would give the jury, the Court indicated it agreed with Ford that the Plaintiff bears the burden of proving that the product, at the time of the incident, ~~was in essentially the same condition as when it left the hands of the defendant.~~

However, in what appeared to be a simple oversight, the Court omitted from its instructions to the jury this crucial element of Plaintiff's burden of proof. When counsel for Ford brought this oversight to the Court's attention, the Court indicated this point of law was covered by giving an

instruction that the product must reach the ultimate user without a substantial change in the condition in which the defendant sold it. Ford noted that the differences in these two instructions. First, the elements of a claim for product liability design defect, which were set forth in Ford's proposed request to charge number 11 and cited above, make clear that the product must be in the same condition at the time of sale and time of incident. However, the charge given to the jury merely indicated the product had to reach the user without a substantial change in condition. The charge given by the Court does not take into consideration the fact that the user may receive the product in the same condition as it was sold, but then make such repairs or modifications that change the product's condition. This distinction is crucial in this case, where the product is a ten-year old vehicle with over 227,500 miles that all experts testified they would expect several underhood items to have been replaced over time. Therefore, the user may have received the vehicle in the same condition, but still made repairs or modifications that altered the condition such that it was not in essentially the same condition at the time of fire as it was at the time it left Ford's control in November of 1995.

Second, Ford's counsel brought to the Court's attention the fact that the Court seemingly overlooked portions of the written charges provided to counsel when giving its instructions to the jury. More specifically, the Court did not charge the jury that a product is to be measured against a standard existing at the time of sale or against reasonable consumer expectations at the time of sale. *See Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 548-49, 462 S.E.2d 321, 331 (Ct. App. 1995). This too was a crucial omission from the Court's instructions where the only testimony presented at trial from Plaintiff's experts was "hindsight opinions." *Id.* ("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."). Likewise, Ford specifically asked that this language

from *Bragg* be charged to the jury in its proposed request number 21, but the Court denied the same. Lastly, Ford submits the Court erred in failing to fully charge Ford's proposed jury instructions numbered 11, 21, 23, 24 and others discussed in the extensive charge conference held with the Court. For these reasons, Ford submits it is entitled to a new trial absolute.

D. In the alternative to Ford's motion for new trial absolute for the grounds set forth herein, Ford moves for a new trial *nisi remittitur* because the amount of the verdict is unsupported by the facts and law, and is excessive in light of the evidence presented at trial.

In the alternative to Ford's motion for new trial absolute, Ford moves for a new trial *nisi remittitur*. Specifically, Ford submits that the jury's verdict of \$41,000.00 should be reduced by the Court to the proper measure of damages. See, e.g., *Holroyd v. Requa*, 361 S.C. 43, 603 S.E.2d 417 (Ct. App. 2004). "It is well settled that judges have the authority to grant to a defendant a new trial *nisi remittitur*. In such cases, the judge may not impose a substitute for the jury verdict on an unwilling plaintiff. He may give to the defendant the right to a new trial unless the plaintiff agrees to remit a portion of the verdict. If the plaintiff chooses not to remit a new trial is essential." *Graham v. Whitaker*, 282 S.C. 393, 401, 321 S.E.2d 40, 45 (1984).

Ford hereby incorporates by reference its arguments set forth in its memorandum in support of its motion for judgment notwithstanding the verdict on this issue. The jury's verdict of \$41,000.00 improperly awarded damages to Plaintiff for which it was not legally entitled to recover. Additionally, to the extent Plaintiff is allowed to seek recovery for the alleged damages, Plaintiff failed to satisfy its burden of proof as to all required elements. Most importantly, Plaintiff did not present evidence of its alleged damages in accordance with the "reasonable certainty standard." *Proctor v. Dept. of Health and Environmental Control*, 368 S.C. 279, 315-16, 628 S.E.2d 496, 515-16 (Ct. App. 2006). As such, the jury was left to speculate as to the amount of damages Plaintiff claims to have sustained, which was improper and requires a new

trial. Plaintiff's counsel recognized it could not satisfy the "reasonably certainty standard" by arguing to the jury that they can award more or less than the requested amount. This very argument runs counter to the law of this State, which holds that the plaintiff bears the burden of proving the value of all damages alleged. See *McFail v. Barnwell County*, 57 S.C. 294, 35 S.E. 562, 565 (1900) ("The law allows actual damages. That throws upon the plaintiff the burden of proving his damage, and the jury cannot go beyond that."); *Sparrow v. Toyota of Florence, Inc.*, 302 S.C. 418, 422, 396 S.E.2d 645, 647 (Ct. App. 1990) ("The burden is on the plaintiff to prove the measure of his damages.") (citing *Jackson v. Midlands Human Resources Center*, 296 S.C. 526, 374 S.E.2d 505 (Ct. App. 1988)). The fact that the jury awarded Plaintiff an amount of damages neither requested nor supported by the evidence indicates it based its verdict on speculation or matters not in evidence.²

Ford maintains, as it has done throughout trial, that the only damages the Plaintiff in this case, 5 Star, Inc., sustained, if any, was the loss of the subject 1996 Ford F-250 truck. While Ford maintains that recovery for this item of damage is also improper for the reasons set forth in its motion and memorandum for judgment notwithstanding the verdict, should the Court disagree and find that Plaintiff is allowed to recover for the loss of the vehicle, Ford asks the Court to remit the jury's verdict from \$41,000.00 to the proper measure of damages.

CONCLUSION

For all these reasons, Ford is entitled to a new trial absolute, or in the alternative, a new trial *nisi remittitur*.

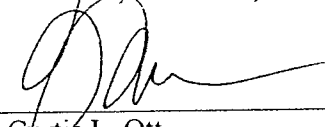
(Signature page to follow.)

² At most, should the Court allow Plaintiff to recover for every element of its alleged damages, regardless of ownership, the evidence at trial only supported a maximum verdict of \$23,662.70.

TURNER, PADGET, GRAHAM & LANEY, P.A.

September 22, 2008

By:


Curtis L. Ott

David C. Marshall

Post Office Box 1473

Columbia, SC 29202

Phone: (803) 254-2200

Fax: (803) 799-3957

**ATTORNEYS FOR FORD MOTOR
COMPANY**

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

5 Star, Inc.,

Plaintiff,

vs.

Ford Motor Company,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2006-CP-10-4773

**FORD MOTOR COMPANY'S
MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT**

2008 SEP 15 PM 4:08
JULIE B. ARSTRONG
CLERK OF COURT
PY

FILED

Pursuant to Rule 50(b) of the South Carolina Rules of Civil Procedure, Defendant Ford Motor Company ("Ford") hereby moves the Court to set aside the verdict entered in this case on September 5, 2008, and to enter judgment in favor of Ford in accordance with its motions for directed verdict at the close of Plaintiff's case in chief, and renewed at the close of evidence. Based on the grounds listed below, the evidence is insufficient to support a verdict for Plaintiff, and the evidence affirmatively demonstrates Ford is entitled to judgment as a matter of law on Plaintiff's negligence cause of action for product liability design defect. Ford further requests a hearing on this motion before the Court within ten (10) days after service hereof, or as soon thereafter as counsel may be heard.¹

GROUNDS

1. Plaintiff failed to present admissible and sufficient expert testimony or other record evidence sufficient to satisfy its burden of proof as to any of the four essential elements of its negligence claim for products liability based on an alleged design defect—that (1) it was injured by the product; (2) the injury occurred because the product was in a defective condition,

¹ If necessary, Ford consents to the Court hearing its motion in a circuit other than where trial was held.

unreasonably dangerous to the user; (3) the product, at the time of the incident, was in essentially the same condition as when it left the hands of the defendant; and (4) the manufacturer breached its duty to exercise reasonable care to adopt a safe design. See *Rife v. Hitachi Const. Machinery Co., Ltd.*, 363 S.C. 209, 215-18, 609 S.E.2d 565, 568-70 (Ct. App. 2005); *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995); *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998); *Madden v. Cox*, 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985).

2. Plaintiff failed to present admissible and sufficient expert testimony or other record evidence sufficient to establish an alternative feasible design of the Speed Control Deactivation Switch and subject 1996 Ford F-250 truck that existed at the time it left Ford's custody and control in November 1995, as Plaintiff is required to do pursuant to the law of products liability in South Carolina. Moreover, Plaintiff failed to establish that any of the speculative, hypothetical or conceptual alternative designs offered at trial were tested or feasible as of the date of manufacture of the subject vehicle, or satisfied the same utility of the allegedly defective design. Failure to adduce competent expert testimony establishing such an alternative feasible design has been deemed "fatal" to a products liability cases under South Carolina law. See, e.g., *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995).

3. Ford is entitled to judgment as a matter of law based on the undisputed extreme prejudice and substantial disadvantage to Ford resulting from Plaintiff's spoliation of the only physical and material evidence in this case—the subject 1996 Ford F-250 truck and Speed Control Deactivation Switch. Plaintiff's own experts conceded Ford was extremely prejudiced both in its ability to refute the proffered opinions of Plaintiff's experts, and in Ford's ability to inspect this crucial evidence to arrive at its own conclusions regarding the origin and cause of

this fire. By allowing this case to go to the jury with only a spoliation charge that permitted an inference that the destroyed truck and switch would have been adverse to Plaintiff, which the jury by returning a verdict for Plaintiff obviously chose not to infer, improperly allowed Plaintiff to profit from its owner's and/or its attorney's admitted wrongdoing without any consequence, sanction or penalty. See, e.g., *Silvestri v. General Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001).

4. Plaintiff failed to present admissible and sufficient expert testimony or other record evidence sufficient to establish that the alleged defective condition of the subject 1996 Ford F-250 truck proximately caused the fire at issue. See *Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E.2d 93 (2003) ("A products liability plaintiff must prove the product defect was the proximate cause of the injury sustained."). In this same respect, the mere fact that a product malfunctions does not demonstrate the manufacturer's negligence or the product's defectiveness. *Sunvillas Homeowners Ass'n v. Square D Co.*, 391 S.E.2d 868, 870 (S.C. Ct. App. 1990). Likewise, South Carolina law has repeatedly rejected the doctrine of *res ipsa loquitur*. See, e.g., *Hadfield v. Gilchrist*, 343 S.C. 88, 100, 538 S.E.2d 268, 275 (Ct. App. 2000) ("the doctrine of *res ipsa loquitur* does not prevail in this state"). Plaintiff's experts, rather than relying on reliable scientific methods, merely "deduced" from other fire claims involving similar defects in other Ford vehicles that the subject incident was caused by the allegedly defective Speed Control Deactivation Switch, which was improper and insufficient to satisfy Plaintiff's burden of proof regarding proximate cause in this case.

5. Plaintiff failed to present admissible and sufficient expert testimony or other record evidence sufficient to establish that the alleged defective condition of the subject 1996 Ford F-250 truck proximately caused its alleged damages, rather than damages to Standley

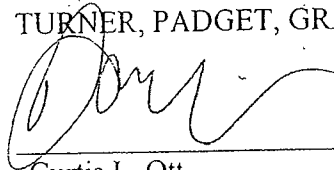
Shelby personally or other corporate entities owned by Mr. Shelby, such as Shelby Holdings, Inc. Rather, the uncontested evidence and testimony reveals that the named Plaintiff in this action, 5 Star, Inc., only sustained damage to the subject vehicle, if any, and that all other damages discussed at trial were actually sustained by persons or entities not parties to this action for which recovery herein is improper. Additionally, to the extent the Plaintiff is entitled to recover for the personal property damages alleged at trial, it failed to present adequate testimony or evidence regarding each item that was allegedly damaged or the fair market value of each at the time of fire. Lastly, regarding Plaintiff's claim for business interruption, Plaintiff presented no record evidence regarding the actual lost profits resulting from the fire, if any, which is the only proper measure of damages for such claim. For these reasons, Plaintiff failed to satisfy its burden of proof regarding damages and Ford is entitled to judgment notwithstanding the verdict.

In addition to the above-stated grounds, Ford incorporates herein by reference all grounds previously raised in their motions for directed verdict made at trial, the memorandum of law in support hereof to be filed in advance of a hearing, the governing procedural and substantive law of South Carolina, and any oral argument the Court may permit in support of the instant motion.

TURNER, PADGET, GRAHAM & LANEY, P.A.

September 15, 2008

By:



Curtis L. Ott
David C. Marshall
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

**ATTORNEYS FOR FORD MOTOR
COMPANY**

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

5 Star, Inc.,

Plaintiff,

vs:

Ford Motor Company,

Defendant.

) IN THE COURT OF COMMON PLEAS

) Civil Action No.: 2006-CP-10-4773

)
)
)
) **FORD MOTOR COMPANY'S**
) **MEMORANDUM IN SUPPORT OF**
) **ITS MOTION FOR JUDGMENT**
) **NOTWITHSTANDING THE VERDICT**

BY
JULIE J. ARNETT
CLERK OF COURT
2008 SEP 23 PM 2:08

FILED

Pursuant to Rule 50(b) of the South Carolina Rules of Civil Procedure, Defendant Ford Motor Company ("Ford") hereby submits this memorandum in support of its motion for judgment notwithstanding the verdict.

INTRODUCTION

In accordance with its motions for directed verdict at the close of Plaintiff's case in chief, and renewed at the close of evidence, Ford moves the Court to set aside the verdict for Plaintiff entered in this case on September 5, 2008, and to enter judgment in Ford's favor.

LEGAL STANDARD

A motion for judgment notwithstanding the verdict may be granted "if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568 (1998). "In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Sabb v. South Carolina State Univ.*, 350 S.C. 416, 427 (2002). "However, where the only reasonable inference from the evidence is that there has been a failure of proof as to a material element of the plaintiff's cause of action, it becomes the duty of the court to resolve the issue against the party having the burden of proof by directing a verdict."

Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 534-35 (Ct. App. 1995) (citing *Horton v. Greyhound, Corp.*, 241 S.C. 430 (1962)).

ARGUMENT

Based on the grounds listed below, the evidence presented at trial is insufficient to support a verdict for Plaintiff, and the evidence affirmatively demonstrates Ford is entitled to judgment as a matter of law on Plaintiff's negligence cause of action for product liability design defect.

- A. Ford is entitled to judgment as a matter of law based on the undisputed extreme prejudice and substantial disadvantage to Ford resulting from Plaintiff's unilateral spoliation of the only physical and material evidence in this case—the subject 1996 Ford F-250 truck and allegedly defective Speed Control Deactivation Switch.**

Ford is entitled to judgment notwithstanding the verdict based on Plaintiff's unilateral and undisputed spoliation of evidence. *See, e.g., Silvestri v. General Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001). Plaintiff's own experts conceded Ford was extremely prejudiced both in its ability to refute the proffered opinions of Plaintiff's experts, and in Ford's ability to inspect this crucial evidence to arrive at its own conclusions regarding the origin and cause of this fire. By allowing this case to go to the jury with only a spoliation charge that permitted an inference that the destroyed truck and switch would have been adverse to Plaintiff, which the jury by returning a verdict for Plaintiff obviously chose not to infer, improperly allowed Plaintiff to profit from its owner's admitted wrongdoing without any consequence, sanction or penalty. ~~Such a result is inherently unfair and constitutes the most egregious form of injustice, which both~~ the United States legal system and South Carolina Rules of Civil Procedure strive to prevent. *See* Rule 1, SCRCPP ("These rules ... shall be construed to secure the just, speedy, and inexpensive determination of every action.").

Spoliation of evidence refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. See *Silvestri*, 271 F.3d at 590; *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2nd Cir. 1999) (citing Black's Law Dictionary 1401 (6th ed.1990)). The duty to preserve material evidence arises not only during litigation, but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation. *Silvestri*, 271 F.3d at 591; *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998). See also *Stokes v. Spartanburg Regional Medical Center*, 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006).

The right to impose sanctions for spoliation 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, 45-46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (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) (recognizing "that when 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"); cf. Rule 37(b)(2), SCRCP (authorizing sanctions for violations of discovery orders).

The policy underlying this inherent power of the courts is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth. *Silvestri*, 271 F.3d at 590. "[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 Equipment*, 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.*

Dismissal is severe and constitutes the ultimate sanction for spoliation. *Silvestri*, 271 F.3d at 593. 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)). But 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 the Supreme Court noted in *Chambers*, district courts have discretion “to fashion an appropriate sanction for conduct which abuses the judicial process.” 501 U.S. at 44-45. “The Court went on to point out that ‘outright dismissal of a lawsuit, which we had upheld . . . is a particularly severe sanction, yet is within the court’s discretion.’” *Chambers*, 501 U.S. at 45.

In fashioning appropriate sanctions, courts have focused not only on the conduct of the spoliator, but also on the prejudice resulting from the destruction of the evidence. *See, e.g., Squitieri v. New York*, 669 N.Y.S.2d 589, 590-91 (N.Y. App. Div. 1998); *Kirkland v. New York City Housing Auth.*, 666 N.Y.S.2d 609 (N.Y. App. Div. 1997). “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. In *Silvestri*, the Court of Appeals for the Fourth Circuit applied these principles and ultimately held:

In sum, we agree with the district court that Silvestri failed to preserve material evidence in anticipation of litigation or to notify General Motors of the availability of this evidence, thus breaching his duty not to spoliage evidence.

When we turn to the prejudice suffered by General Motors, we agree with the district court's finding that the spoliation was "highly prejudicial." It denied General Motors access to the only evidence from which it could develop its defenses adequately.

[W]e conclude that the district court's finding that General Motors was "highly prejudiced" was not clearly erroneous and that in the peculiar circumstances of this case, the court's order dismissing this case, although severe, was not an abuse of discretion.

Silvestri, 271 F.3d at 592-95.

In this case, it is undisputed that Plaintiff's owner, after hiring an attorney, had the subject vehicle and all component parts destroyed prior to giving notice to Ford that this crucial evidence would be destroyed. This spoliation of the only physical and material evidence extremely prejudiced Ford's ability to adequately defend against Plaintiff's allegations. Plaintiff's experts conceded these facts. Therefore, both considerations of *Silvestri* are satisfied in this case and justify dismissal of Plaintiff's claims.

This outcome is further supported by the reasoning of the South Carolina Supreme Court in *Kershaw County Bd. of Educ. v. U.S. Gypsum*, 302 S.C. 390, 396 S.E.2d 369 (1990), as well as courts across the country.¹ In *Kershaw County*, the Supreme Court ultimately held that

¹ See, e.g., *Cincinnati Ins. Co. v. Mid-South Drillers Supply, Inc.*, 2008 WL 220287 (Tenn Ct. App. Jan. 25, 2008) (affirming dismissal based in the plaintiff's spoliation of evidence: "[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 plaintiff's 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

dismissal was inappropriate because there was no evidence that the defendant was “unduly prejudiced” by the spoliation or that dismissal “would serve to protect the rules of discovery.” *Id.* at 395, 396 S.E.2d at 372. The Supreme Court stated that dismissal was not appropriate “in this case” or “under the facts of this case” four separate times in two paragraphs, clearly indicating its intent to limit the specific holding to the facts of that case. In a broader sense, the Supreme Court recognized that dismissal is appropriate when a defendant is “unduly prejudiced” by the spoliation, or when dismissal “would serve to protect the rules of discovery” (as part of the Rules of Civil Procedure), or when the spoliation is the result of “intentional misconduct.”

Id. Not surprisingly, these are the same considerations set forth in *Silvestri* and other cases.² All

not remedy the harm plaintiff caused by failing to preserve the 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.”); *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66 (Minn. Ct. App. 1998) (“The trial court intended its sanction to offset the prejudice resulting to respondent from appellants’ spoliation of vital evidence. On the record before us, we cannot say ‘that no reasonable person would agree’ with the appropriateness of the trial court’s sanction. There was, therefore, no abuse of discretion.”); *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: “In 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.”); *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 943 (11th Cir. 2005) (applying Georgia law) (“The vehicle was, in effect, the most crucial and reliable evidence available to the parties at the time plaintiff secured representation.... For these reasons, we believe the resulting prejudice to the defendant incurable, and dismissal necessary.... 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.”); *King v. American Power Conversion Corp.*, 181 Fed.Appx. 373 (4th Cir. 2006) (unpublished) (“In sum, the district court concluded that the Kings were at least negligent in failing to take steps to ensure American Power received sufficient notice about the possibility of a claim that its product caused the fire or information regarding the location of the allegedly defective product. As in *Silvestri*, the Kings’ conduct, although perhaps insufficient by itself to justify dismissal, does not preclude dismissal because it is of sufficient culpability in light of the severity of the prejudice to American Power’s ability to defend. Accordingly, we reject the argument that the Kings’ conduct prevents dismissal.”).

² Additionally, while not an issue in this case, *Silvestri* appears to be in accord with South Carolina law that does not recognize an independent tort for spoliation of evidence. See *Austin v. Beaufort County Sheriff’s Office*, 377 S.C. 31, 659 S.E.2d 122 (2008).

of these factors are present in the instant case, and individually each factor is sufficient to warrant judgment notwithstanding the verdict in favor of Ford.

First, the undisputed testimony of Plaintiff's experts' was that Ford is both "extremely prejudiced" and "substantially disadvantaged" as a result of Plaintiff's conduct. Further, both experts recognized the inherent unfairness of the situation to Ford's defense. This uncontradicted testimony demonstrates that Ford's request for dismissal is not unreasonable as Plaintiff would have the Court believe. The level of prejudice to Ford alone justifies dismissal. Second, dismissal in this case is the only way to "protect the rules of discovery" as envisioned by the Supreme Court in *Kershaw County*, which are to "be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRPC. The only "just" result in this case is dismissal; Ford was so highly prejudiced by Plaintiff's conduct that it could not present any defense to Plaintiff's allegations, as Plaintiff pointed out in its Return to Ford's post-trial motions. Finally, the undisputed testimony from Plaintiff's owner was that he disposed of the vehicle intentionally, after consulting his attorney in this case and contemplating this very litigation, and that he did so with no expectation that the vehicle would be stored or preserved. Further, Plaintiff's owner candidly testified that he did not care what happened to the vehicle or its component parts after it was towed from his property. This testimony demonstrates the intentional decision to have the vehicle destroyed, no matter the motivation, thus depriving Ford of any opportunity for inspection. Any argument from Plaintiff that his decision to have the vehicle destroyed must have been malicious is unsupported by the reasoning of *Silvestri* or *Kershaw County* when the resulting prejudice is so extreme, as it is in this case. Therefore, all of the factors and considerations are satisfied and require judgment in favor of Ford.

Lastly, Ford notes that Plaintiff references the “well-developed body of law in South Carolina” on spoliation, yet cites not one single South Carolina case on the topic in its Return to Ford’s post-trial motions. Instead, Plaintiff goes on the offensive by challenging Ford’s decision of what grounds to cite as a basis for its motions and criticizing Ford’s defense strategy—after it destroyed all of the evidence in this case. The Court should not take Plaintiff’s assertions on the law of South Carolina on faith alone. South Carolina law specifically allows the result Ford requests herein when all of the requisite factors are satisfied, as they are in this case.

Similarly, Ford expressly takes exception to Plaintiff’s statement that, “Despite having practically unlimited scientific resources at its disposal, Ford *chose* not to offer an explanation of the fire.” As recognized by all of Plaintiff’s experts, Ford was left to defend against Plaintiff’s allegations after Plaintiff, represented by counsel at the time, unilaterally decided to destroy all of the physical evidence, thereby prejudicing Ford to such an extreme extent that it could not offer an alternate explanation for the fire. The only “choice” that was made was that of the Plaintiff in depriving Ford of the opportunity to inspect the evidence and make its own determinations. Despite its spoliation, Plaintiff amazingly has the audacity to maintain that Ford should have put up a better defense.

For the reasons set forth herein, and based on the extreme prejudice in Ford’s ability to defend against Plaintiff’s claims as a result of Plaintiff’s unilateral spoliation of evidence, Ford is entitled to judgment notwithstanding the verdict.

~~B. Plaintiff failed to present admissible and sufficient expert testimony or other record evidence to satisfy its burden of proof as to any of the essential elements of its negligence claim for product liability design defect.~~

A product liability action may be brought under several theories of recovery, including negligence, strict liability, and warranty. *See Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 494

S.E.2d 835 (Ct. App. 1997); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995). However, in this case, Plaintiff chose only to bring a single cause of action for negligence against Ford alleging the Speed Control Deactivation Switch in the subject 1996 Ford F-250 truck was defective.

In a product liability action, regardless of the theory on which a plaintiff seeks recovery, he must establish three elements: (1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant. *Small*, 329 S.C. at 462-63, 494 S.E.2d at 842; *Bragg*, 319 S.C. at 539, 462 S.E.2d at 326. Further, liability for negligence requires, in addition to the above, proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design. *Rife v. Hitachi Const. Machinery Co., Ltd.*, 363 S.C. 209, 215-18, 609 S.E.2d 565, 568-70 (Ct. App. 2005); *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 505 S.E.2d 354 (Ct. App. 1998); *Madden v. Cox*, 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985). Additionally, under any products liability theory, a plaintiff must prove the product defect was the proximate cause of the damages sustained. See *Bray v. Marathon Corp.*, 356 S.C. 111, 588 S.E.2d 93 (2003).

Regarding the first element, Plaintiff is required to prove affirmatively that it was damaged by the product. Ford maintains that Plaintiff failed to satisfy this requirement because Plaintiff did not own the property allegedly damaged.³ Similarly, Plaintiff did not prove that its alleged damages were caused by the defective and unreasonably dangerous condition of the product, because there was no testimony regarding the actual condition of the switch, or even that it was original equipment.

³ Ford refers to Section E of this memorandum below for a more thorough analysis of the fatal defects in Plaintiff's alleged damages.

Plaintiff failed to satisfy the third element of its claim as well. The record is absent of any evidence tending to establish that the subject vehicle was in essentially the same condition at the time of fire as it was when it left Ford's control in November of 1995. The vehicle was nearly ten years old at the time of fire and had been driven over 227,500 miles since its manufacture and sale. Given the vehicle history consisting of over nine years of reliable use, each expert witness testified he would expect that numerous items would have been replaced prior to the fire, including, but not limited to, spark plugs, spark plug wires, light wiring, belts, hoses, as well as possibly the engine or radiator. Plaintiff presented no evidence regarding the service or maintenance history of the vehicle prior to Plaintiff's purchase seven months prior to the fire. Therefore, the jury was left to speculate whether the vehicle was in substantially the same condition at the time of fire after nine full years of use by some third party who did not testify. Since the record is devoid of any evidence tending to establish that the vehicle was in essentially the same condition at the time of fire as it was when it left Ford's control, Plaintiff failed to carry its burden of proof for this element.

These conclusions importantly and naturally flow from Plaintiff's destruction of the vehicle before any examination could be conducted to determine what parts may have been replaced after Ford initially sold the vehicle. Plaintiff's spoliation of the truck essentially made it impossible for either party to present evidence as to the condition of the vehicle prior to the fire or establish what parts were or were not replaced over time.

~~Moreover, Plaintiff presented no evidence that Ford failed to exercise reasonable care in~~
adopting the design utilized for the subject vehicle. This element requires proof that Ford's conduct was negligent in November of 1995, when Ford manufactured this truck. Plaintiff's expert witness, Leonard Greene, testified he was unaware as to Ford's knowledge or conduct at

that time. The only possible record evidence that Ford was negligent in designing the truck was the fire itself; however, that evidence cannot establish Ford's negligence. *Sunvillas Homeowners Ass'n v. Square D Co.*, 301 S.C. 330, 333-34, 391 S.E.2d 868, 870 (Ct. App. 1990) ("the mere fact that a product malfunctions does not demonstrate the manufacturer's negligence or the product's defectiveness").

Lastly, Plaintiff failed to prove the alleged defect was the proximate cause of the damages sustained.⁴ For these reasons, Plaintiff failed to satisfy its burden of proof as to all of the elements of its cause of action, and Ford is entitled, as a matter of law, to judgment notwithstanding the verdict.

C. Plaintiff failed to present admissible and sufficient expert testimony or other record evidence to establish an alternative feasible design of the Speed Control Deactivation Switch that existed at the time it left Ford's custody and control in November of 1995.

South Carolina law expressly requires proof of an alternative feasible design in product liability cases alleging design defects. See *Bragg*, 319 S.C. at 546, 462 S.E.2d at 330 (affirming directed verdict for defendant in part because the plaintiff failed to present an alternative feasible design) (citing *Stanczyk v. Black & Decker, Inc.*, 836 F.Supp. 565 (N.D. Ill. 1993) ("plaintiff must introduce evidence that an alternative design is feasible and cannot rely upon mere conceptual design theories")). See also *Jamison v. Ford Motor Co.*, 373 S.C. 248, 644 S.E.2d 755 (Ct. App. 2007) (recognizing that alternative feasible design is "a critical and material element of [a plaintiff's] defective design claim"); *Disher v. Synthes (U.S.A.)*, 371 F.Supp.2d 764, 771-72 (D.S.C. 2005) ("Further, to survive summary judgment, it is 'crucial' that a plaintiff also demonstrate that a 'feasible,' or workable, design alternative exists under the

⁴ Ford refers to Section D below for a more thorough evaluation of Plaintiff's proof of proximate cause.

circumstances.... Not only has plaintiff failed to proffer any alternative design or to identify anyone else who has produced such a design, he has proffered no evidence that any such alternative design would be feasible or practical. In determining whether an alternative design is practical or feasible, courts will look to see whether a risk-utility analysis has been conducted to weigh the benefits of any new design against the costs and potentially adverse consequences of the design.”) (citing *Claytor v. General Motors Corp.*, 277 S.C. 259, 265, 286 S.E.2d 129, 132 (1982) (identifying the factors to consider as part of a cost-benefit analysis, including the usefulness and desirability of the particular product)); *Little v. Brown & Williamson Tobacco Corp.*, 243 F.Supp.2d 480, 495-96 (D.S.C. 2001) (noting that failure to provide such evidence is “fatal to a product liability case” under South Carolina law: “Thus, the existence of a safer alternative design is a crucial aspect of a product liability case in South Carolina.”)).

In this case, Plaintiff simply failed to present any record evidence of an alternative feasible design of the Speed Control Deactivation Switch and/or the subject 1996 Ford F-250 truck that existed at the time it left Ford’s custody and control in November of 1995. Rather, Mr. Greene merely gave three “conceptual design theories” or so-called “fixes” without any evidence that they were feasible in 1995 when this vehicle was manufactured or satisfied the same utility. Mr. Greene candidly testified he could not present a prototype of an alternatively designed switch, but relied solely on his conceptual ideas which existed solely in his mind. This lack of evidence is fatal to Plaintiff’s case, and Ford is entitled to judgment notwithstanding the verdict.

D. ~~Plaintiff failed to present admissible and sufficient expert testimony or other record evidence tending to establish that the alleged defective condition of the subject 1996 Ford F-250 truck and Speed Control Deactivation Switch proximately caused the fire at issue.~~

Under any products liability theory, a plaintiff must prove the product defect was the proximate cause of the damages sustained. See *Bray v. Marathon Corp.*, 356 S.C. 111, 588

S.E.2d 93 (2003) (“A products liability plaintiff must prove the product defect was the proximate cause of the injury sustained.”); *Disher v. Synthes (U.S.A.)*, 371 F.Supp.2d 764, 772 (D.S.C. 2005) (“As with the issue of defective design, plaintiff must establish proximate cause through competent expert testimony.”). However, in this case, Plaintiff failed to present admissible and sufficient expert testimony or other record evidence tending to establish that the alleged defective condition of the Speed Control Deactivation Switch and 1996 Ford F-250 truck proximately caused the fire at issue.

Plaintiff's experts, rather than relying on reliable scientific methods as envisioned by South Carolina Rule of Evidence 702 and associated case law, merely “deduced” from other fire claims involving similar *allegations* of defects in other Ford vehicles that the subject incident was caused by the allegedly defective Speed Control Deactivation Switch. This methodology was improper and insufficient to satisfy Plaintiff's burden of proof. As admitted by Mr. Greene, his testimony as to causation was based on the “thousands of other claims” involving allegedly defective Speed Control Deactivation Switches in other Ford vehicles. When counsel for Ford objected to the admission of Plaintiff's experts' testimony, Plaintiff's counsel convinced the Court that it was based on circumstantial evidence; however, the admission of Plaintiff's experts' causation opinions on this basis was improper.

The fact remains that there is no independent scientific basis for Plaintiff's experts' causation opinions solely because Plaintiff destroyed the vehicle and allegedly defective component part before anyone could conduct a proper investigation to evaluate Plaintiff's allegations. Both Mr. Greene and Mr. Norris testified their opinions were not capable of being tested or subjected to peer review. Additionally, there are no “quality control procedures” to ensure the reliability of their opinions. Rather, both experts testified their opinions were contrary

to the recognized and authoritative scientific guides for fire investigation embodied in NFPA 921. Therefore, both Mr. Greene's and Mr. Norris' opinions failed to satisfy any of the requirements of reliability and therefore should have been excluded. *See State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979).

As Plaintiff's sole evidence of causation was based on this improper classification of "circumstantial evidence," Plaintiff failed to satisfy its burden of proof regarding proximate cause. "Where circumstantial evidence is relied upon to establish liability, the plaintiff must show such circumstances as would justify the inference that his injuries were due to the negligent act of the defendant, and not leave the question to mere conjecture or speculation." *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965). Rather than introducing proper circumstantial evidence of proximate causation, which could have been done by simply inspecting and locating the Speed Control Deactivation Switch and performing any one of the numerous tests discussed at trial that could confirm if the switch caused the fire or was merely a victim of the fire, the jury was left to decide this case on mere speculation and conjecture, coupled by the irrelevant and improper testimony regarding the "thousands" of other incidents with similar allegations, none of which were established by proper foundation regarding "substantial similarity." *Whaley v. CSX Transportation, Inc.*, 609 S.E.2d 286, 300 (S.C. 2005) ("Because evidence of other accidents may be highly prejudicial, plaintiff must present a factual foundation for the court to determine that the other accidents were substantially similar to the accident-at-issue.").

Ford recognized Plaintiff's intention to prove its case through testimony of other unrelated incidents or claims, and filed a motion *in limine* seeking the exclusion of such evidence or testimony for that very reason. As Ford has maintained all along, in order for the "thousands"

of other incidents or claims mentioned by Plaintiff's experts at trial to be circumstantial evidence in this case, there must be some independent physical evidence tending to establish that this was a Speed Control Deactivation Switch fire.⁵ Then, there must be a showing of substantial similarity of the referenced other fires and fire at issue. The Court recognized this principle in its instructions to the jury, where it charged: "For circumstantial evidence to be sufficient to warranty the finding of a fact, the circumstances must lead to that fact with reasonable certainty." Allowing the Plaintiff to prevail by relying on such testimony of other incidents without the proper foundation of "reasonable certainty" is reversible error. *See, e.g., Hall-Edwards v. Ford Motor Co.*, 971 So.2d 854, 860 (Fla. Ct. App. 2007) ("Here, throughout the trial, numerous references were made to other cases without laying a foundation for substantial similarity. Moreover, this evidence improperly became a 'feature of the trial.' Because no foundation was laid establishing a substantial similarity between Hall's accident and other accidents referenced by plaintiff throughout the trial, the trial court abused its discretion in admitting this evidence and the verdict must be set aside....") (internal citations omitted).

In this same regard, "our Supreme Court has held that while any product can be made safer, the fact that it is not does not automatically mean the product is unreasonably dangerous." *Bragg*, 319 S.C. at 543, 462 S.E.2d at 328. Likewise, "the mere fact that a product malfunctions does not demonstrate the manufacturer's negligence or the product's defectiveness." *Id.* *See also Sunvillas Homeowners Ass'n v. Square D Co.*, 301 S.C. 330, 333-34, 391 S.E.2d 868, 870 (Ct. App. 1990) (same); *Jones v. Danek Medical, Inc.*, 1999 WL 1133272, *6 (D.S.C. 1999)

⁵ In this same respect, Plaintiff's argument that the creation of MDL No. 1718 in the Eastern District of Michigan somehow evidences Ford's concession that all alleged Speed Control Deactivation Switch fires involve "similar characteristics" is incorrect. The only common issues in the cases transferred to the MDL litigation are the allegations and theories of product defect. Therefore, in the interest of judicial economy, those federal cases with the same *allegations* of defect were consolidated for discovery common to all cases. However, the cases will be remanded to the local district courts for fact-specific discovery, such as vehicle service and maintenance history, circumstances surrounding the fire, damages, etc.

("the fact that a product malfunctions [does not] indicate the existence of defect"); *McCrary v. Sears Roebuck & Co.*, 1997 WL 675572, *1 (D.S.C. 1997) ("Without testimony to identify a specific defect in the treadmill, a jury would be left to improperly speculate ... as to the cause of the alleged malfunction. [The plaintiff] cannot base his claim of product defect solely on the fact that his treadmill malfunctioned."); *Campbell v. Robbins Tire & Rubber Co.*, 256 S.C. 230, 234, 182 S.E.2d 73, 75 (1971) ("The mere fact that the tube exploded does not demonstrate the manufacturer's negligence nor tend to establish that the tube was defective."). Under this law, the mere fact that the subject vehicle was burned by fire cannot be deemed circumstantial evidence of product defect or proximate causation, as Plaintiff would have the Court believe.

This conclusion necessarily follows from the fact that South Carolina has continually and repeatedly refused to recognize the doctrine of *res ipsa loquitur*, which would otherwise allow a jury to infer negligence of the defendant based on the mere fact that an accident occurred. See *Hadfield v. Gilchrist*, 343 S.C. 88, 100, 538 S.E.2d 268, 275 (Ct. App. 2000) ("the doctrine of *res ipsa loquitur* does not prevail in this state"); *Snow v. City of Columbia*, 305 S.C. 544, 555, 409 S.E.2d 797, 803 (Ct. App. 1991) ("South Carolina does not recognize the rule of *res ipsa loquitur*"); *Bain v. Self Memorial Hosp.*, 281 S.C. 138, 141, 314 S.E.2d 603, 605 (Ct. App. 1984) (citing *Legette v. Smith*, 265 S.C. 573, 578, 220 S.E.2d 429, 430 (1975)) ("Adoption of this doctrine was recently considered by our Supreme Court and rejected."); *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965) ("the so called doctrine of *res ipsa loquitur* does not apply in this State"); ~~*Hicklin v. Jeff Hunt Machinery Co.*, 226 S.C. 484, 85 S.E.2d 739, 744~~ (1955) ("this Court has never adopted the doctrine of *res ipsa loquitur* and ... the mere breaking or giving way of machinery or an appliance in itself is not sufficient to support an inference of negligence"); *Mahon v. Spartanburg County*, 205 S.C. 441, 32 S.E.2d 368, 370 (1944) ("the

mere proof of the collapsing of the bridge is not of itself sufficient evidence of negligence to warrant sending the case to the jury"); *Shields v. Chevrolet Truck*, 195 S.C. 437, 12 S.E.2d 19, 23 (1940) ("That the doctrine of res ipsa loquitur does not obtain in this State needs no citation of authority. There must be some evidence as the proximate cause of an injury or damage before one may be legally held liable therefore."); *Gilland v. Peter's Dry Cleaning Co.*, 195 S.C. 417, 11 S.E.2d 857, 858 (1940) ("It is quite true that this Court has refused to adopt the doctrine of res ipsa loquitur ... where the burden rests upon a party to prove negligence we hold that he cannot meet this burden by relying on the theory that the thing speaks for itself or that the very injury indicates negligence."); *McMillan v. General American Life Ins. Co.*, 194 S.C. 146, 9 S.E.2d 562, 577 (1940) ("The meaning of the rule is that there must be some evidence arising out of the testimony which elucidates the issues of fact, and which enables the jury to form an intelligent conclusion. It does not authorize the admission of speculative, theoretical, and hypothetical views."); *Hunsucker v. State Highway Dept.*, 182 S.C. 441, 189 S.E. 652, 654 (1937) ("It is fundamental that the plaintiff, in an action of this nature, must prove the material allegations of his complaint by the preponderance of the evidence. He cannot depend upon the doctrine res ipsa loquitur [which] does not prevail in this state."); *Heath v. Town of Darlington*, 175 S.C. 27, 177 S.E. 894, 895 (1934) ("the doctrine of res ipsa loquitur does not obtain in this state"); *Westin v. Hillyer*, 160 S.C. 541, 158 S.E. 390, 391-92 (1931) ("We can find no authority in this state which holds that the rule res ipsa loquitur obtains in this state."); *Green v. Southern Railway Co.*, 72 S.C. 398, 52 S.E. 45, 47 (1905) ("The cause of the accident is purely conjectural. There is no more reason to suppose it was due to a defect in the machine than to an unconscious error of the plaintiff in its operation, or to some other undiscoverable cause for which neither party was responsible."). For these reasons, Ford is entitled to judgment notwithstanding the verdict.

E. Plaintiff failed to present admissible and sufficient expert testimony or other record evidence tending to establish that the alleged defective condition of the subject 1996 Ford F-250 truck and Speed Control Deactivation Switch proximately caused Plaintiff's alleged damages.

Plaintiff failed to present admissible and sufficient expert testimony or other record evidence sufficient to establish that the alleged defective condition of the subject 1996 Ford F-250 truck proximately caused Plaintiff's alleged damages, rather than damages to Standley Shelby personally or other corporate entities owned by Mr. Shelby, such as Shelby Holdings, LLC. Rather, the uncontested evidence and testimony reveals that the named Plaintiff in this action, 5 Star, Inc., only sustained damage to the subject vehicle, if any, and that all other damages discussed at trial were actually sustained by persons or entities not parties to this action. Additionally, to the extent Plaintiff is allowed to recover for the personal property damages alleged at trial, such as the various items of lawn and office equipment, it failed to present adequate testimony or evidence regarding each item that was allegedly damaged or the fair market value of each at the time of fire. Further, Plaintiff was improperly allowed to recover both the cost of rental equipment and the cost of replacement equipment. Lastly, regarding Plaintiff's claim for "business interruption," Plaintiff presented no record evidence regarding the actual lost profits resulting from the fire, if any, which is the only proper measure of damages for such claim. For these reasons, Plaintiff failed to satisfy its burden of proof regarding damages and Ford is entitled to judgment notwithstanding the verdict.

1. The Plaintiff was improperly allowed to recover damages it did not sustain.

The Plaintiff in this case is 5 Star, Inc., which is a South Carolina domestic corporation registered in good standing with the Secretary of State. *See* Exhibit A hereto. A corporation is an independent legal entity, separate and distinct from its officers and shareholders. *See, e.g., Costas v. First Federal Savings and Loan Ass'n*, 283 S.C. 94, 102, 321 S.E.2d 51, 56 (1984) ("It

is recognized that a corporation is an entity separate and distinct from its officers and stockholders, and that its debts are not the individual indebtedness of its stockholders. This is expressed on the presumption that the corporation and its stockholders are separate and distinct ... and this oft-stated principal is equally applicable, whether the corporation has many or only one stockholder.”) (citing *Olin Matherson Chemical Corp. v. Planters Corp.*, 236 S.C. 318, 144 S.E.2d 321 (1960)); *Mangum v. Maryland Cas. Co.*, 330 S.C. 573, 576, 500 S.E.2d 125, 127 (Ct. App. 1998) (“A corporation is not a natural person and maintains a separate and distinct identity apart from its shareholders.”); *Hunting v. Elders*, 359 S.C. 217, 597 S.E.2d 803 (Ct. App. 2004) (“At the outset, it is recognized that a corporation is an entity, separate and distinct from its officers and stockholders, and that its debts are not the individual indebtedness of its stockholders.”). Just as an individual officer or shareholder is not liable for the corporation’s debts, the individual cannot recover for the corporation’s damages and neither can the corporation recover for the officer’s or shareholder’s individual damages, as they are separate and distinct legal entities under the law.

As the only party-plaintiff in this case was 5 Star, Inc., the only damages that were recoverable were those of 5 Star, Inc. Ford stressed this in its motion *in limine* regarding the proper measure of damages, and objected to the admissibility of all evidence of damages not actually sustained by 5 Star, Inc. at trial. While Plaintiff’s owner, Mr. Shelby, testified he was the sole officer and shareholder and that 5 Star, Inc. was an S-corporation, therefore making no distinction between him and the corporate entity, such a claim is not recognized under South Carolina law. The fact that 5 Star, Inc. is an S-corporation is only relevant for federal taxation purposes. If one of 5 Star, Inc.’s customers was injured by an employee of 5 Star, Inc. and wanted to sue for his damages, Mr. Shelby would likely recognize that Ford’s position is correct

in this regard—that Mr. Shelby and 5 Star, Inc. are separate legal entities under the law. Had Mr. Shelby desired to seek recovery for his individual damages, he should have made himself a party-plaintiff in addition to the corporation. His individual income comes from the corporation, just as all the employees of 5 Star, Inc. Most importantly, 5 Star, Inc. cannot recover damages sustained by other non-parties, such as Mr. Shelby or other corporate entities owned by Mr. Shelby, including Shelby Holdings, LLC, which is another separate South Carolina domestic limited liability corporation registered in good standing with the Secretary of State. See Exhibit B hereto.

The testimony at trial was clear regarding the alleged damages. First, the truck was titled to and owned by Plaintiff, 5 Star, Inc., and Plaintiff purchased the truck seven months prior to the fire for \$1,500.00. The other items of damages the Court allowed to go to the jury, and for which the jury awarded damages, included \$3,121.70 for rental equipment/pressure washers, \$14,041.00 for replacement of lawn and office equipment, \$5,000.00 for building repair, and some amount of “business interruption.” In a likely attempt to garner sympathy from the jury, Mr. Shelby was clear in his testimony that he paid, out of his own pocket, the costs associated with the rental and replacement equipment, and that doing so set him and his business back. He also was allowed to testify, over objection, about his personal memorabilia allegedly lost in the fire and the emotional impact the fire had on his life. Regarding the damages to the building, Mr. Shelby testified that another corporate entity, Shelby Holdings, LLC, owned the property and building. However, Mr. Shelby maintained that he paid for the building repair out of his own pocket. Lastly, Mr. Shelby’s testimony regarding “business interruption” made clear that it represented his lost time in having to get the business back on track rather than actual lost profits as a result of the fire.

Despite Mr. Shelby's testimony that he, individually or through an unrelated company, sustained the damages consisting of \$3,121.70 for rental equipment/pressure washers, \$14,041.00 for replacement of lawn and office equipment, \$5,000.00 for building repair, and some amount of business interruption, the Court allowed the jury to consider these damages as those of 5 Star, Inc., based on Plaintiff's argument that there is no difference between them. This improperly allowed 5 Star, Inc. to recover damages it did not actually sustain. Given this result, Ford is now subject to double recovery for the same damage—there is seemingly nothing stopping Mr. Shelby or Shelby Holdings, LLC from filing another lawsuit against Ford for the same damages. This is demonstrated in a simple example: if A, B, and C are in an accident, and A sues C as a result, A cannot recover any damages B may have sustained; instead, if B wants to seek recovery for its damages, it has to join A's lawsuit or file a separate one, and each party is only allowed to recover damages for which it sustained. Another example regarding damage to the building: if A is renting a house from B and the house and A's contents are damaged by fire, A can only recover for the contents and B can only recover for the house itself. If a party does not own the property that was allegedly damaged, then the party was not damaged. There is no more simple principle in tort law than this.

Plaintiff presented no evidence at trial that 5 Star, Inc. sustained the alleged damages. To the contrary, Mr. Shelby testified he personally paid for such items out of his own pocket, thereby making any recovery by 5 Star, Inc. improper as a matter of law. As a result, Ford was entitled to directed verdict on Plaintiff's claims for \$3,121.70 for rental equipment/pressure washers, \$14,041.00 for replacement of lawn and office equipment, \$5,000.00 for building repair, and any amount of "business interruption," and is now entitled to judgment

notwithstanding the verdict.⁶

2. **To the extent Plaintiff herein is allowed to recover for damages actually sustained by non-parties to this litigation, it failed to present adequate testimony or evidence regarding each item of personal property that was allegedly damaged or the fair market value at the time of fire.**

The record is simply devoid of any evidence or testimony regarding the specific items of personal property—office and lawn equipment and pressure washers—that were allegedly destroyed in the fire, or the fair market value of each. Plaintiff attempted to introduce this evidence by introducing a handwritten list, which the Court properly excluded from evidence. However, the Court allowed Mr. Shelby to testify about each item lost and his understanding of the value, over Ford's objection. Rather than outlining or explaining the specific items that were allegedly destroyed in the fire, Plaintiff discussed only the first item on the list—a "Sharp" fax machine—which Plaintiff testified he replaced. Plaintiff also testified in general terms that he lost mowers, blowers, tractors, etc. in the fire, but offered no record evidence as to the details of each or their fair market value at the time of fire. While Plaintiff improperly sought recovery for the replacement cost of each item, it offered no evidence as to what those amounts were either. Plaintiff's attorney, in closing, simply put a number before the jury: \$14,041.00. However, Plaintiff failed to satisfy its burden of proof as to these damages, and thus Ford is entitled to judgment as a matter of law.

3. **Plaintiff was improperly allowed to recover both the cost of rental equipment and the replacement cost for the same equipment.**

Mr. Shelby testified that he rented pressure washers for several months after the fire, just as he had been doing on a routine basis prior to the fire when the ones he owned were not working properly. Mr. Shelby also testified that he ended up replacing the pressure washers that

⁶ At most, should the Court allow Plaintiff to recover for every element of its alleged damages, regardless of ownership, the evidence at trial only supported a maximum verdict of \$23,662.70.

were damaged by the fire. Over objection, the jury was allowed to, and ultimately did, award damages for both the rental and replacement costs for the same items of equipment. Under the proper measure of damages, as expressed by the *Restatement (Second) of Torts* §§ 927-928, which have been cited by the appellate courts of this State, any costs associated with rentals is only recoverable when the main product at issue is capable of being repaired. While the product is being repaired, a party may recover the costs for rentals; however, when the product is incapable of being repaired and must be replaced, then the proper measure of damages is the fair market value at the time of loss with no allowance for loss of use. This makes sense, because otherwise, a plaintiff would receive a windfall.

4. **Ford was entitled to directed verdict on Plaintiff's claim for "business interruption" because Plaintiff presented no record evidence regarding the actual lost profits resulting from the fire, if any, which is the only proper measure of damages for such claim.**

Plaintiff was improperly allowed to recover for alleged "business interruption" as a result of the fire. As briefed in its motion *in limine* regarding the proper measure of damages, and stressed by Ford throughout trial, the only recoverable damages in South Carolina in this regard are lost profits. As with all damages alleged in this case, Plaintiff bears the burden of proving lost profits in accordance with the "reasonable certainty standard." *Proctor v. Dept. of Health and Environmental Control*, 368 S.C. 279, 315-16, 628 S.E.2d 496, 515-16 (Ct. App. 2006). "The crucial requirement in lost profits determinations is that they be established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative." *Id.* (citing *Drews Co., Inc. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 371 S.E.2d 532 (1988); *South Carolina Fin. Corp. of Anderson v. West Side Fin. Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 336 (1960)). "The proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the

cause and the amount of the loss can be logically and rationally drawn.” *Id.* (citing 22 Am.Jur.2d Damages § 641 (1988)).

At trial, Plaintiff’s owner testified that the “business interruption” damages represent the amount of time it took him to get the business back on track. Accordingly, Plaintiff calculated the \$18,000.00 figure presented to the jury by dividing the company’s 2004 gross receipts of roughly \$290,000.00 by 241 days to arrive at a daily rate of \$1,200.00, which he then multiplied by 15 days, which Mr. Shelby testified was the estimated amount of time it took to get the business back up and running. In no way does this satisfy the legal burden of proof—much less to a reasonable degree of certainty—regarding Plaintiff’s claim for lost profits as a result of the fire. Rather, the jury was allowed to speculate as to the relationship of Plaintiff’s 2004 gross receipts to actual lost profits resulting from the fire in September 2005. Plaintiff’s counsel recognized this in his closing by telling the jury it may award more or less than the \$18,000.00 guesstimate of “business interruption” damages. This argument endorses the fact that there was not sufficient evidence—to a reasonable degree of certainty—for the jury to consider in evaluating this claim for damages. Rather, the jury was left to speculate, which was improper. *Proctor*, 368 S.C. at 315-16, 628 S.E.2d at 515-16 (“The crucial requirement in lost profits determinations is that they be established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative.”).

In order to recover damages for lost profits, Plaintiff was required to prove the number of jobs lost by 5-Star, Inc. as a result of the fire. Then, Plaintiff was required to prove how much money each such job would have brought in to the company. Lastly, Plaintiff was required to prove what amount of the gross income would have been attributed to expenses, overhead or employee salaries, and which portion would be considered “profits” of the business. There was

simply no evidence satisfying these elements presented at trial, and therefore Plaintiff should not have been allowed to recover any amount of lost profits.

Merely indicating that the business was shut down for a certain number of days—while at the same time testifying Plaintiff required rental equipment to keep the business running—and then taking the gross income or receipts (rather than net profit) from the previous calendar year to calculate a daily rate of loss does not satisfy the legal burden of proof for claims of lost profits. Moreover, Plaintiff's 2004 gross income has no relevance or probative value as to the determination of lost profits allegedly resulting from the September 2005 fire, and therefore should have been excluded from evidence as Ford requested in its motion *in limine*. In this same respect, using any amount, whether gross receipts, income or profits, from any calendar year, in order to calculate an alleged daily rate of loss does not accurately reflect the specific lost profits sustained by Plaintiff as a result of the fire, nor does it represent the proper measure of damages or satisfy the legal burden of proof.⁷

Additionally, Plaintiff's owner should not have been allowed to recover lost profits under the guise of "business interruption" based on the time and effort he personally spent in "getting the business back up and running." As set forth above, the named Plaintiff in this case is 5 Star, Inc., the lawn maintenance and pressure washing company. Therefore, it is the company, and not the Plaintiff's owner, that would be entitled to pursue recovery for its damages. Mr. Shelby candidly testified that 5 Star, Inc. continued to pay its employees after the fire. Therefore, Mr. Shelby would have continued to receive his salary or wage after the fire, just as all 5 Star, Inc.

⁷ For instance, Plaintiff likely had a different number of customers in 2004 and 2005, which would affect the gross income and net profits of each year regardless of the fire, but this is not considered in Plaintiff's improper method of calculation. Also, Plaintiff likely had more customers in the spring and summer months than in the fall and winter, which would affect Plaintiff's improper method of calculation but is likewise not considered.

employees. Either way, since he is not a party to this lawsuit, any personal damages Mr. Shelby alleges as a result of the fire may not be recovered in this case.

5. The only damages Plaintiff arguably sustained as a result of the fire was the loss of the subject 1996 Ford F-250 truck, for which recovery was improper.

First, Plaintiff failed to present any record evidence regarding the fair market value of the subject 1996 Ford F-250 truck at the time of fire. Therefore, the jury was left to speculate as to its value, coupled by Plaintiff's counsel's request for \$8,000.00 when Plaintiff's owner testified he paid \$1,500.00 for the vehicle seven months prior to the fire. Therefore, Ford was entitled to judgment as a matter of law based on Plaintiff's failure to satisfy its burden of proof in this regard. Additionally, recovery for the subject vehicle should have been disallowed under the tenants of the Economic Loss Doctrine as it exists under South Carolina law. Ford hereby incorporates by reference its arguments set forth in its motion *in limine* on this matter as if fully set forth herein, and maintains that it is entitled to judgment as a matter of law.

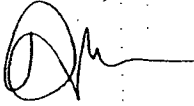
CONCLUSION

The foundation of the spoliation doctrine is that one should not profit from his own wrongdoing. That principle is especially true when the judicial process is abused and a defendant is denied the ability to defend a plaintiff's allegations. This scenario is precisely what unfolded at trial. Simply stated, the Court's failure to dismiss this case allowed Plaintiff to profit from its wrongdoing, whether intentional or not. Moreover, but just as important, Plaintiff's spoliation made it impossible for Plaintiff to carry its burden of proof in a product liability action for negligence premised on design defect. Accordingly, Ford is entitled to judgment

notwithstanding the verdict, both based on fairness and Plaintiff's failure to prove the essential elements of its claim.

TURNER, PADGET, GRAHAM & LANEY, P.A.

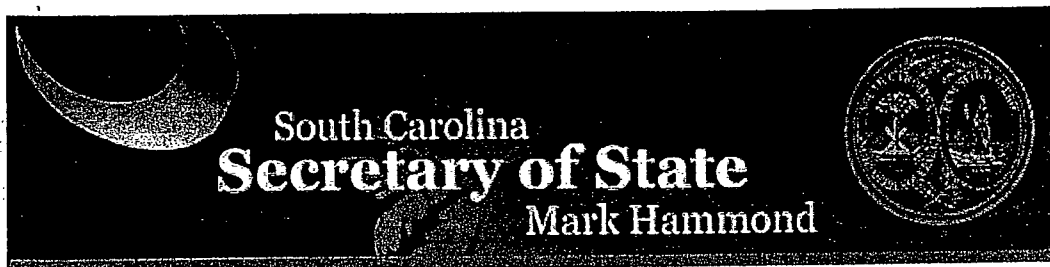
September 22, 2008

By: 

Curtis L. Ott
David C. Marshall
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

**ATTORNEYS FOR FORD MOTOR
COMPANY**

EXHIBIT A

**5 STAR, INC.**

Note: This online database was last updated on 9/21/2008 6:05:27 PM.
See our Disclaimer.

DOMESTIC / FOREIGN:	Domestic
STATUS:	Good Standing
STATE OF INCORPORATION / ORGANIZATION:	SOUTH CAROLINA Profit

REGISTERED AGENT INFORMATION

REGISTERED AGENT NAME:	STANLEY W SHELBY
ADDRESS:	1306 LARK LN
CITY:	HANAHAN
STATE:	SC
ZIP:	29406
SECOND ADDRESS:	

FILE DATE:	11/13/2001
EFFECTIVE DATE:	11/13/2001
DISOLVED DATE:	//

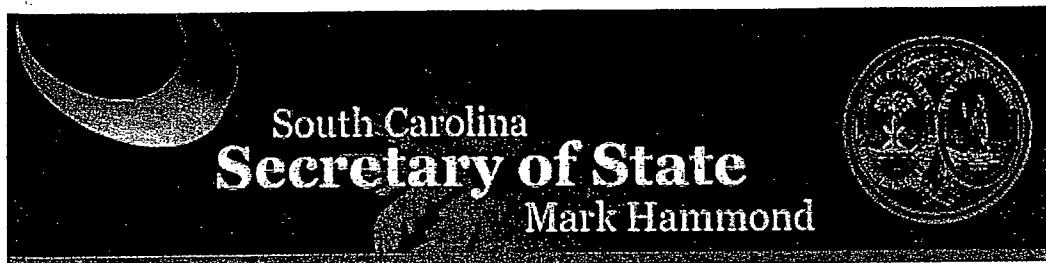
Corporation History Records

CODE	FILE DATE	COMMENT	Document
Incorporation	11/13/2001	INCORPORATION	Image

Disclaimer: The South Carolina Secretary of State's Business Filings database is provided as a convenience to our customers to research information on business entities filed with our office. Updates are uploaded every 48 hours. Users are advised that the Secretary of State, the State of South Carolina or any agency, officer or employee of the State of South Carolina does not guarantee the accuracy, reliability or timeliness of such information, as it is the responsibility of the business entity to inform the Secretary of State of any updated information. While every effort is made to insure the reliability of this information, portions may be incorrect or not current. Any person or entity who relies on information obtained from this database does so at his own risk.

Physical Address // Edgar Brown Building - 1205 Pendleton Street Suite 525 Columbia, SC 29201
Postal Address // P.O. Box 11350 Columbia, SC 29211

EXHIBIT B

**SHELBY HOLDINGS, LLC**

*Note: This online database was last updated on 9/16/2008 6:03:13 PM.
See our Disclaimer.*

DOMESTIC / FOREIGN:	Domestic
STATUS:	Good Standing
STATE OF INCORPORATION / ORGANIZATION:	SOUTH CAROLINA Profit

REGISTERED AGENT INFORMATION

REGISTERED AGENT NAME:	STANLEY W SHELBY
ADDRESS:	1306 LARK LN
CITY:	HANAHAN
STATE:	SC
ZIP:	29406
SECOND ADDRESS:	

FILE DATE:	11/13/2001
EFFECTIVE DATE:	11/13/2001
DISOLVED DATE:	01/01/2050

Corporation History Records

CODE	FILE DATE	COMMENT	Document
Domestic LLC	11/13/2001	DOMESTIC LIMITED LIABILITY CO(1/1/2050)	Image

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Postal Address // P.O. Box 11350 Columbia, SC 29211

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
Civil Action No.: 2006-CP-10-4773

5 Star, Inc.,
Plaintiff,

v.

Ford Motor Company,
Defendant.

**PLAINTIFF'S RETURN TO
DEFENDANT'S REQUEST
FOR NEW TRIAL**

FILED
2008 SEP 17 PM 4:21
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

The defendant's motion for new trial is based essentially on two points: an *ad hominem* argument directed at plaintiff's counsel, and an argument that the totality of the circumstances deprived Ford Motor Company of a fair trial.

I *Ad Hominem* Argument

In its motion, Ford continues its *ad hominem* argument it pursued at trial. For example on page 4 of its motion, Ford writes:

**Finally, a mistrial should have been granted, and Ford now is entitled to a new trial, based on the overall conduct of Plaintiff's counsel asking questions that any first year lawyer would know were improper that caused Ford to object an inordinate number of times and frequently on the same issues previously ruled upon by the Court.
(Motion pages 4-5)**

Aside from being an entirely *ad hominem* argument, and aside from being the same *ad hominem* argument that characterized Ford's entire line of defense in the case, is the irrefutable fact that such personal attacks do not advance Ford's legal theory. As the famous Roman lawyer, Cicero, noted in his defense of a tax collector charged with theft: "*In hominem dicendum est igitur quum oratio argumentationem non habet.*" Pro Flacco 23 This pronouncement is variously translated as "When you have no basis for an argument, abuse the

plaintiff" or "We must make a personal attack when there is no argumentative basis for our speech."¹ In law school, various professors referred to this stratagem as the "abuse the plaintiff" technique, and taught it thus: "When you have the facts, argue the facts, when you have the law, argue the law; when you have neither, abuse the plaintiff." See Jenkins v. Vaughn, 146 Ga. App. 801, 247 S.E.2d 485 (1978): "This motion brings to mind the apparently timeless advice of the Roman orator, Marcus Cicero: 'When you have no basis for an argument, abuse the plaintiff.' Pro Flacco, 59 B.C."

In South Carolina, the Supreme Court requires that all lawyers abide by the so-called "Civility Oath," which states in applicable part:

To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.

South Carolina Lawyer's Oath

Having filed with the court what appears to be a violation of the civility rule, it is incumbent upon this Court to speak to the matter. Either the defense is right, and the disparaging characterization of plaintiff's counsel is an acceptable expression of advocacy, in which case plaintiff's counsel apologizes in advance and will adjust future filings accordingly, or it is not, in which case Ford's counsel should apologize and be sanctioned in whatever way the Court finds appropriate under the circumstances. Either way, it is for this Court, in passing on the defendant's motion, to say whether Ford's learned counsel has or has not breached the duty of civility imposed on every lawyer.

Prior to filing a written response, as required by the South Carolina Rule 11 duty to consult, I telephoned defendant's counsel to inquire as to whether he thought such a filing is

¹ That's not how I would translate it. I would translate it as: Attack the man when you have no basis for your argument. Cicero employs a type of grammatical emphasis, which allows the writer to convey emphasis on "hominem" by word order. English does not permit this except in highly artificial construction.

proper with the idea that a revised motion for new trial, deleting the personal attack would make a response to the *ad hominem* argument unnecessary. Defense counsel, however, reassures me that he stands by every word and that the written attack is entirely justified because I am “sneaky.” If the Court finds that “sneaky” is a proper ground for such a filing and that the defendant’s filings are therefore appropriate, then the plaintiff stands admonished and will modify future filings so as to be in conformity with the license to attack opposing counsel personally. On the other hand, if the Court finds such a filing is improper, then the Court should say so and impose such a sanction as the Court finds just under the circumstances.

II Fair Trial

The rest of Ford’s argument is that it was denied a fair trial. Ford asks this Court to reverse its decision and direct a verdict, or, in the alternative, grant a new trial. In his argument that Ford Motor Company is denied a fair trial, the defense adopts mutually exclusive positions. On the one hand, the defense argues that the Court sustained virtually every objection the defense made. On the other hand, the defense argues that by having to make so many objections, it was denied a fair trial. Such a mutually exclusive argument suggests the defense’s word, “disingenuous,” which is the word the defense used in its closing argument as part of its attack on plaintiff’s counsel. It was an odd choice because, despite pleading 24 separate defenses, some of which are unsupported by any facts or law, Ford Motor Company elected to go to trial on a general denial. Despite having practically unlimited scientific resources at its disposal, Ford chose not to offer an explanation of the fire. Instead, it premised its entire defense on 2 related assertions: (1) attacking the plaintiff and his counsel, and (2) the spoliation of evidence rule. Ford gambled that a jury—after all Ford

requested a jury trial—would not return a verdict where the plaintiff failed to recover and maintain a charred, plastic switch that may or may not have survived the fire. Ford's entire defense was premised on these related theories, and Ford asked this Court to rewrite the well-developed body of South Carolina law on spoliation of evidence and circumstantial evidence and dismiss the plaintiff's claim outright. The problem with Ford's trial strategy is that it overlooks the overwhelming evidence that proves that the plaintiff suffered a loss as the result of Ford's negligently designed, negligently manufactured, and negligently installed switch.

Ford gambled further on relying on an in-house expert and Ford's lawyer extensively questioned him about his qualifications and training in investigating speed control deactivation switch fires, and in particular what he did to investigate the plaintiff's fire. According to my trial notes, which are not infallible, Mr. Ott began cross-examining Jon Olson at approximately 11:15 on September 3rd. Approximately 37 questions in to the examination, Mr. Ott asked his expert if he had investigated other vehicle fires. Accordingly to my notes, Mr. Olson answered that he had investigated some 200-300 vehicles and reviewed "available information" on the fires. Because the Court previously ruled that testimony about Ford's recall of the switch was relevant as to an expert's qualification and basis of his opinion, the Court allowed cross examination of the expert on the recall information, which information is extremely relevant as Ford's expert is a Ford employee and testified that consulting the recall literature is one of the first places he would look in investigating a suspicious fire. Thereafter, Ford's counsel asked the plaintiff on cross-examination a question about notice to which the plaintiff replied he received a recall notice. Under these facts, it is difficult to find what Ford is now complaining about other than it does not like the result.

Ford's emphasis on the mention of the recall notice is a red herring issue for two reasons. First, as discussed above, its own expert testified he consulted the recall notice in forming his opinion. Second, Ford Motor Company tells this Court that Ford defends each and every speed control deactivation switch fire as a separate and distinct fire and that the fires have no common characteristics. However, Ford asserted the exact opposite argument to the United States District Court Panel on Multi-District Litigation, and Ford successfully convinced the Panel, based on its argument that all the fires involve similar characteristics, to consolidate all of the pending federal speed control deactivation switch fires in the Eastern District of Michigan. See Order of Judicial Panel on Multidistrict Litigation, dated February 19, 2008, incorporated herein:

Ford contends all of the seventy-seven cases involve Ford's speed control deactivation switches in various motor vehicles. The switches are alleged to be defective and allegedly caused the specific fire and attendant damages in each case. **Ford asserts each case shares "common questions of fact in that they are all premised on the same alleged defect."** (emphasis added, quotations in original)

Based on its representations to this Court, Ford will have to explain the disparity in these statements and how Ford can claim prejudice because its expert mentioned the recall notice that he relied on in forming his opinion, a recall that Ford indisputably issued and which their expert undisputedly relied upon in forming his opinion. Since Ford asserts to the federal courts that all these fires share similar characteristics, it is astonishing that it would claim in South Carolina state court that the exact opposite is true.

Distilled to its essence, Ford argues that it did not receive a fair trial because a jury found for the plaintiff. Ford asks this Court to give it another shot under the thirteenth juror rule. The purpose of the thirteenth juror rule is to permit trial judges to grant new trials where there is no evidence to support the verdict. See Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d

265 (1990): "The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute **when he finds that the evidence does not justify the verdict.** This ruling has also been termed granting a new trial upon the facts." (emphasis added) This doctrine has no applicability in the present case because Ford presented no evidence to controvert the plaintiff's case, and the evidence in this case may be circumstantial, but it is overwhelming. Instead of mounting a defense, Ford relied entirely upon cross-examination and the spoliation of evidence rule to make its case, which it now regrets. Ford asks this court to rewrite the spoliation of evidence rule, rewrite the circumstantial evidence rule, and essentially adopt a no-touch rule for Ford Motor Company. To do this, Ford relies upon Silvestri v. General Motors, 271 F.3d 583 (4th Cir. 2001), which it claims requires this Court to grant a new trial because the plaintiff failed to protect the switch that may or may not have survived the fire. Under the defendant's theory, Silvestri requires that the plaintiff be denied the right to a trial.² In other words, because Ford cannot overcome the overwhelming evidence against it, it asserts that the plaintiff does not get a trial. Under Ford's logic, the Court is required to grant the defense a directed verdict based on the spoliation of evidence rule. The defect in Ford's argument is that it requires this Court to: (1) rewrite the spoliation of evidence rule, and (2) rewrite the circumstantial evidence rule—neither of which this Court is authorized to do.

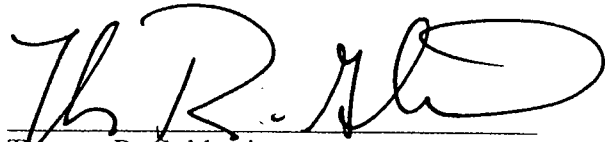
² Silvestri does not help Ford. First of all, it is a federal case applying and construing New York law. Second, this is what the case says: "In addition, a court must find some degree of fault to impose sanctions. We have recognized that when imposing spoliation sanctions, 'the trial court has discretion to pursue a wide range of responses both for the purpose of leveling the evidentiary playing field and for the purpose of sanctioning the improper conduct.'" Third and most importantly, Silvestri involved an alleged air bag control module, which survived the crash. Here, the unchallenged evidence is that the speed control deactivation switch is made up of materials that are 80% combustible, and it is not likely the switch survived the fire. All of the experts testified that the Ford switch usually does not survive the fire, and as the photos in this case demonstrate, not only the switch, but also the master cylinder itself were consumed in the fire. Ford's spoliation argument is either speculation or a red herring. Unlike Silvestri, the plaintiff testified that he did preserve the truck and contacted the insurance adjuster exactly as Chief Norris instructed him to do. Ford made no attempt to contact or interview the adjuster; instead it chose to stand on its attacks rather than make an effort to gather the evidence that is available to it. Lastly, Silvestri was a drunk driver who injured himself and then blamed G. M. for his injuries. Under the facts of that case, the trial court may have been less inclined to assist Silvestri in making a claim.

Conclusion

In its take-no-prisoners zeal, Ford is prepared to attack personally everyone who opposes it. The plaintiff is a liar; his counsel is "sneaky"; the North Charleston Fire Chief is biased, and Leonard Greene is so incompetent that he should not be allowed to testify. The purpose of the 13th juror standard is to set aside a verdict when the record demonstrates that there is no evidence to support a finding. It is not applicable to the present case.

Respectfully submitted,

September 17, 2008



Thomas R. Goldstein
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 71121
N. Charleston, S. C. 29415-1121
(843) 554-4291
tgoldstein@cobblaw.net
Attorneys for Plaintiff

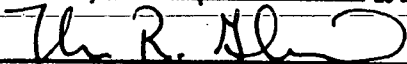
CERTIFICATE OF SERVICE

This is to certify that I have served counsel for all parties in the foregoing matter with a copy of this pleading by:

- ☒ depositing in the U. S. Mail a copy of same in a properly addressed envelope with adequate postage thereon
☐ handing counsel a copy thereof
☐ by facsimile and depositing in the U. S. Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 17th day of September 20 08

BY



**IN RE FORD MOTOR COMPANY
SPEED CONTROL DEACTIVATION SWITCH LITIGATION**

ON REVIEW BY THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

JUSTICE LANG delivered the opinion of the Multidistrict Litigation Panel.

Before this Multidistrict Litigation Panel is Ford Motor Co.'s motion to transfer, requesting the transfer of seventy-seven pending cases in twenty-eight counties to a pretrial judge for consolidated and coordinated pretrial proceedings. For the following reasons, Ford's motion to transfer is granted.

I. FACTUAL CONTEXT AND CONTENTIONS

On November 14, 2007, Ford filed its motion to transfer before this panel.¹ Tracking the language of Texas Rule of Judicial Administration 13.3(a)(2), Ford alleges that seventy-seven cases pending against it in twenty-eight different counties involve common issues of fact and the transfer of those cases for consolidated or coordinated pretrial proceedings would be for the convenience of the parties and witnesses, and would promote the just and efficient conduct of the cases. *See* TEX. R. JUD. ADMIN. 13.3(a)(2).

Ford contends all of the seventy-seven cases involve Ford's speed control deactivation switches (switch(es)) in various motor vehicles. The switches are alleged to be defective and allegedly caused the specific fire and attendant damages in each case. Ford asserts each case shares "common questions of fact in that they are all premised on the same alleged defect." According to

Ford, each case seeks to determine whether the "cause and origin of the vehicle fires was at the [switches] and the extent of damage caused by the fire." Ford lists several factual questions, which it says will "overlap" in the cases. These questions concern the design, manufacture, testing, installation, advertising, and performance of the switches. Additionally, Ford says plaintiffs "are likely to seek information concerning the timing and motivation behind Ford's 05S28 recall [of the switches]." Ford asserts its position will be "identical" as to all of "these underlying causation issues." Finally, Ford advises us that the Federal Judicial Panel on Multidistrict Litigation has determined that "more than 50" cases in federal court involving the switches are appropriate for consolidation and has transferred them to the United States District Court for the Eastern District of Michigan. *In re Ford Motor Co. Speed Control Deactivation Switch Prods. Liab. Litig.*, 398 F. Supp. 2d 1365 (J.P.M.L. 2005).

Plaintiffs generally oppose the transfer of the cases, arguing there is no common issue of fact in the cases.² Rather, there is only "a common ultimate question: whether a defect present in the [switches] of the specific Ford vehicle at issue caused the specific fire and damages being complained of in each separate action." Plaintiffs assert that the switches "are defective and . . . fail in exactly the same manner." Further, they argue many issues exist which are "peculiar and unique to each case," including maintenance, repair history, after-market add-ons, warranty considerations, and other potential causes for the fire and damages, and make consolidation improper. They argue generally that "[t]he issues in each of these cases have less to do with the nature of the defect . . . than with the ultimate causation issue—the particularly unique factual considerations of each individual case." In fact, plaintiffs state in their objections to discovery, which was filed prior to the

¹ Rule 13.3(j) provides in part, "The MDL Panel will accept as true facts stated in a motion, response, or reply unless another party contradicts them." TEX. R. JUD. ADMIN. 13.3(j), *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. F app. (Vernon 2005).

been filed against Ford for damages allegedly caused by a defective switch in each case.³ In their motion to consolidate, which was filed in the 68th Judicial District Court in Dallas County, the "Houssiere Plaintiffs" assert the cases involve the "same questions of law or fact" because they involve Ford vehicles that contain the switches and consolidation would "facilitate the orderly and efficient" resolution of the cases. According to Ford, the plaintiffs state the "vast majority" of the witnesses in the cases will be Ford employees, corporate representatives, design experts, and engineers. Also, the plaintiffs state the "main issue will be the defectiveness of the switches, making evidence in such other cases equally applicable" This motion to consolidate in the trial court was made pursuant to Texas Rule of Civil Procedure 174, which, according to Ford, if granted, would have the effect of consolidating the cases for all purposes, including trial on the merits, in contrast with consolidation for pretrial only, if the motion before us is granted. *See* TEX. R. CIV. P. 174. Further, as to the claim by plaintiffs that transfer will necessitate inconvenient travel to distant venues, Ford points out that the local discovery will continue to be local because parties and non-party witnesses can be deposed under the rules, normally in the county of suit for a party plaintiff or within 150 miles of where a non-party resides or is served. TEX. R. CIV. P. 199.2. Ford also suggests that on transfer, the pretrial judge can organize the taking of depositions such as Ford employees and suppliers and their respective current or former employees. Finally, Ford notes for us that the central point of plaintiffs' argument is that the issues are not common because they are not identical and are unique. Ford argues that is not the test. Rather, the test for transfer is whether the cases are "related."

II. DISCUSSION AND APPLICATION OF AUTHORITIES

With these contentions in mind, we turn to the authorities and their application. Texas Rule

³ The "Houssiere Plaintiffs" number twenty-eight actual plaintiffs and forty-eight intervenors in eleven actions filed in

of Judicial Administration 13 provides a framework for a pretrial process that will allow cases to proceed efficiently toward trial. See TEX. R. JUD. ADMIN. 13; *In re Vanderbilt Mortgage and Fin., Inc.*, 166 S.W.3d 12, 14 (Tex. M.D.L. Panel 2005). Rule 13 authorizes us "to transfer 'related' cases from different trial courts to a single pretrial judge 'if transfer will (1) serve the convenience of the parties and witnesses and (2) promote the just and efficient conduct of the litigation.' " See TEX. R. JUD. ADMIN. 13.2(f), 13.3(a), 13.3(l); *In re Ad Valorem Tax Litig.*, 216 S.W.3d 83, 84 (Tex. M.D.L. Panel 2006). Relatedness of the cases is critical to whether we may grant a motion to transfer. In order for us to conclude that cases are "related," there must be common issues, but the cases need not be identical. We have previously determined:

There may indeed be differences. But every case is different. No two cases are alike. A rule 13 transfer of cases does not require that the cases be congruent or anything close to it. It requires only that cases are "related"—i.e. that they involve one or more common questions of fact—and that transfer will serve the convenience of the parties and the witnesses and promote the just and efficient conduct of the litigation.

In re Hurricane Rita Evacuation Bus Fire, 216 S.W.3d 70, 72 (Tex. M.D.L. Panel 2006).

We have noted before that "[rule 13] does not require proof that witnesses have already been inconvenienced; it looks ahead and focuses on whether transferring cases to a pretrial judge would serve the convenience of parties and witnesses by preventing inconvenience in the future." *In re Silica Prod. Liab. Litig.*, 166 S.W.3d 3, 5 (Tex. M.D.L. Panel 2004); *In re Cano Petroleum*, No. 07-0593, slip op. at 5-6 (Tex. M.D.L. Panel Jan. 2, 2008). Additionally, we have observed:

One virtue of transferring related cases to a single pretrial judge is that issues, once raised, will be decided the same way. A consistent and steady judicial hand at the helm should in fact promote agreements because lawyers will know where the court stands on recurring issues. As contested issues arise, the pretrial judge will make consistent rulings, which then can be reviewed by the appellate courts as appropriate. This, we think, serves Rule 13's goal that our system give related cases consistent and efficient treatment.

filing their motion to transfer, that Ford has steadfastly denied the claims involving the recalled switches "are similar, relevant or admissible," because in the words of the plaintiffs, "different switches mean different manufacturing processes and different failure modes."

Plaintiffs assert the uniqueness of the cases is clear from the following examples: (1) the "Glander" case demonstrates there are different switches manufactured by different companies, one type manufactured for Ford by Texas Instruments and another manufactured for Ford by Hi-Stat; (2) the "Bourque subrogation" case involves not only property damage, but mental anguish of several plaintiffs who are joined in one case; (3) the "Radio Shack" case involves a claim against the owner of the vehicle, the repair shop where it was located at the time of the fire, and Ford; and (4) the "Scott" case is a wrongful death case involving cause, manner of death, degree of pain and suffering, survivors' loss of consortium, economic value of decedent's life and any preexisting medical condition. Finally, plaintiffs assert Ford merely seeks consolidation for delay. We are told discovery has been conducted in several cases and they are ready for trial. At least one case is set for trial in each of the months of January, March, April, and May 2008. There are no problems with discovery or pretrial procedures, and transfer would be inefficient and uneconomical "given discovery is underway in many of these cases and there are multiple parties involved in many of the suits." According to plaintiffs, should transfer be ordered, plaintiffs and witnesses will be required to travel to a distant venue for discovery and hearings.

In reply to the plaintiffs' assertions, Ford advises us that a significant number of the plaintiffs have acknowledged there are common issues as to the switches. Ford cites us to actions taken by the so-called "Houssiere Plaintiffs" to seek consolidation of eleven Dallas County suits where suit has

² We refer to both the plaintiffs and the intervenors who are aligned with them as "plaintiffs."

In re Silica, 166 S.W.3d at 6.

a. Common Questions of Fact

It appears from the briefing that Ford, as well as many plaintiffs, have previously taken positions regarding the existence of common issues in these cases that are contrary to the positions taken before us. This allows us to make a careful and sharp analysis of the parties' conflicting positions. Nevertheless, the description of the cases involving the switches provided to us by all participants in this proceeding reveals that, in many ways, the cases do involve different and even somewhat unique issues and twists. However, the question for us is not whether the issues in each case are identical. Rather, we must determine, first, whether the cases involve one or more common questions of fact.

Some plaintiffs contend the switches' product defect is not an issue because Ford has admitted the switch is defective, unreasonably dangerous, and several safer alternative designs exist. These "admissions" referred to by plaintiffs are attributed to at least one "recall" notice sent out by Ford which warned "[t]he [switches] may . . . overheat, smoke, or burn." Based on that premise, plaintiffs assert the only common issues are "ultimate" issues of causation and damages, which plaintiffs say are unique and individual in each case, and cannot form the basis for transfer. *See In re Kone, Inc.*, 216 S.W.3d 68, 70 (Tex. M.D.L. Panel 2005). Accordingly, plaintiffs argue the "ultimate" issue is "whether a defect present in the [switches] of the specific Ford vehicle at issue caused the specific fire and damages being complained of in each separate action."

Ford counters the plaintiffs' assertion that the product defect in each case is "admitted" by saying that

[t]he fact that the [switch] was the subject of a product recall does not give rise to a presumption of defect. Under Texas law, plaintiffs must still show that the vehicles contained a defective component. (citation omitted). Plaintiffs, of course, know this aspect of Texas law and they seek information from Ford to prove each case.

Ford identifies such discovery requests and deposition notices served on them in cases involving at least the "Houssiere Plaintiffs" and the suits involving the "Cozen O'Connor" clients.⁴ Those discovery requests seek information and documentation regarding the design and manufacture, and the recall history of the switches. As noted above, at least the "Houssiere Plaintiffs" have sought consolidation for all purposes pursuant to rule 174 of eleven Dallas County cases, have advised the trial court the cases involve "the same questions of law and fact," and have further advised the trial court that consolidation would "facilitate the orderly and efficient " resolution of the cases.

While we are not authorized to weigh the facts on the merits of the lawsuits which are the subject of a motion to transfer, we must conclude whether the cases share one or more common issues of fact. We conclude, on this record and at this time, the question of whether the switch was defective in each vehicle, in each case, is a common issue of fact in these cases.

Plaintiffs claim Ford's "recall" notices admit the switch is defective in each vehicle. The "recall" notice cited to us says the switches "may . . . overheat, smoke, or burn." (emphasis added). The word "may" used in the "recall" notice does not unequivocally state that all of the switches are defective. At this point in time, and on this record only, that remains an issue over which the plaintiffs and Ford will have not only disagreement, but litigation. At least that essential issue is common in each case.

We agree with the statement made by the "Houssiere Plaintiffs" in their motion to consolidate eleven cases in Dallas County, that ". . . the main issue will be the defectiveness of the [switches], making evidence obtained in such other cases equally applicable to the cases at bar." The fact that there may be issues in each case that are specific as to each case, including alterations of the

switches and damages, among others, does not prohibit consolidation. There may be differences, but every case is different. No two cases are alike. *In re Hurricane Rita*, 216 S.W.3d at 72; *In re Silica*, 166 S.W.3d at 6. We are confident the pretrial judge will give individual consideration to the case-specific issues, while giving consistent, uniform treatment to the common and recurring issues. *In re Hurricane Rita*, 216 S.W.3d at 72; *In re Silica*, 166 S.W.3d at 6.

b. Delay

Plaintiffs raise concerns that Ford seeks delay by this motion because there are imminent trial settings where the plaintiffs will be ready and no discovery problems exist. However, the appointment of a pretrial judge has no direct effect on existing settings. Our transfer order simply puts in place a pretrial judge to rule on pretrial matters, including whether to remand cases for trial or whether the current trial setting should be postponed. Also, the granting of an MDL motion does not require all cases to proceed apace with the slowest developing cases. The pretrial judge, in his discretion, will determine when a particular case should be remanded for trial on the merits. *In re Cano Petroleum*, No. 07-0593, slip op. at 5-6; see TEX. R. JUD. ADMIN. 13.7 (addressing remand of cases). Also, in order for a movant to satisfy its burden, it need not be shown that there currently exists disagreement or difficulties in discovery. One virtue of transferring related cases to a pretrial judge is that issues, once raised, will be decided the same way in the future. In fact, a consistent and steady judicial hand at the helm should promote agreements because the lawyers will know where the pretrial judge stands on recurring issues. As contested issues arise, the pretrial judge will make consistent rulings which can be reviewed by the appellate court as appropriate. *In re Silica*, 166 S.W.3d at 6.

⁴ The "Cozen, O'Connor" clients include the plaintiffs and intervenors in at least four cases; three in Dallas County and one in Harris County. The precise number of plaintiffs and intervenors has not been described by plaintiffs and we cannot make that determination on this record on our own.

**c. Will Transfer Further the Convenience of the Parties and Witnesses
and Promote the Just and Efficient Conduct of the Actions?**

Plaintiffs raise the additional concern that, if Ford's motion is granted, they must attend hearings and depositions away from the chosen venue on matters of minimal importance to them. They argue this would cause inconvenience and increased expenses to attend such events. Having addressed similar concerns before, we apply the same reasoning here.

We are confident that the pretrial judge, upon request, will address these concerns. The pretrial judge might, for example, ensure that parties with property damage cases need not participate in damages-only discovery in injury and death cases and visa versa And the court could allow any lawyer who thinks his client will not be interested in a deposition to e-mail the lawyer who noticed the deposition and seek assurances about the scope of the questioning; the court could grant the right to re-depose the witness if the assurances were not accurate or something unexpected occurred. These suggestions are illustrative only; lawyers should be creative in asking for efficiency-seeking relief that is tailored to the situation. The pretrial judge has ample discretion to fashion such relief.

In re Cano Petroleum, No. 07-0593, slip op. at 5-6.

Further, this panel has considered similar motions to transfer where each individual case in the group of cases sought to be transferred unquestionably arose from separate events giving rise to the claim.⁵ In those cases, almost identical arguments were made in opposition to transfer. Many plaintiffs argued movants had not met their burden of proof to demonstrate how transfer would serve the convenience of parties and witnesses because there had been no showing that there were existing problems in discovery or administration of the cases. Also, many plaintiffs argued movants had not met their burden to show that transfer would promote the just and efficient handling of the cases because the cases were being handled efficiently and without significant disagreement. However,

⁵ See *In re Silica*, 166 S.W.3d at 4 (addressed seventy-one suits, involving 158 defendants, pending in fifty-one district courts in twenty counties respecting use of silica in various building materials); *In re Firestone/Ford Litig.*, 166 S.W.3d 2 (Tex. M.D.L. Panel 2004) (damages resulting from incidents involving tire tread separation alleged to be product defect); *In re Vioxx*, No. 05-0436 (Tex. M.D.L. Panel, order of Aug. 25, 2005) (suits respecting claims for use of prescription drug); *In re Bridgestone/Firestone Inc.*, 106 S.W.3d 730 (Tex. 2003) (orig. proceeding) (Mandamus conditionally issued by Texas Supreme Court regarding pretrial judge's order allowing discovery of Firestone's trade secret in 150 cases involving alleged tread separation and Ford Explorer vehicle roll-overs. Pretrial judge assigned pursuant to Texas Rule

we made it clear that, as to the convenience issue, rule 13 “does not require proof that witnesses have already been inconvenienced; it looks ahead and focuses on whether transferring cases to a pretrial judge would serve the convenience of parties and witnesses by preventing inconvenience in the future.” *In re Silica*, 166 S.W.3d at 5.

As we said in *In re Silica*, and we now reaffirm here for purposes of this matter, “[w]e think it is undeniable that it is more convenient for witnesses and parties who find themselves involved in several related cases to litigate in one pretrial court instead of several.” *Id.* There is at least one common issue of fact in these cases. We are confident that were these seventy-seven cases to proceed on their own, without consolidation, there would be duplicative discovery as to the design, manufacture, testing, installation, recall, and performance of the switches, regardless of whether the discovery is of documents, current or former employees, or experts. It will convenience the witnesses and parties to be subject to one consistent set of orders instead of many from numerous trial courts.

Additionally, as to the issue of just and efficient handling, we have said, “[b]ut even if these cases are currently moving smoothly because the lawyers have been agreeing on pretrial issues, we see no reason why such agreeableness would cease when the pretrial phase if the case is handled by one judge instead of fifty-five.” *In re Silica*, 166 S.W.3d at 6. In this case we have been advised there has been repetitive written discovery propounded and some disputes appear to exist. Upon transfer, that type of discovery, along with other discovery and any disputes, can be addressed by orders, agreed or not, of one pretrial judge in one court rather than judges presiding in twenty-eight counties over seventy-seven cases. Transfer will effect “uniform and consistent treatment.” TEX. R. JUD. ADMIN. 13.

of Judicial Procedure 11, prior to effective date of state-wide transfer authorized by Rule 13.).

d. Federal Multidistrict Litigation Proceedings

Finally, although plaintiffs seek to discount its importance, a federal multidistrict litigation panel transferred "more than 50" cases for pretrial. *In re Ford Motor Co.*, 398 F.Supp. 2d 1365. We have not been advised that the decision of the federal court is in error, or that there is a specific reason we should not consider that panel's reasoning. The federal panel determined the putative class actions pending in federal court "share factual questions regarding whether certain Ford vehicles were equipped with defective or defectively-installed speed control deactivation devices. Centralization under section 1407 is necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings . . . and conserve the resources of the parties, their counsel and the judiciary." *Id.* at 1366-67. That court concluded the plaintiffs' arguments about the unique nature of each case was unavailing: "These arguments are unpersuasive because the presence of differing theories or remedies is outweighed when the underlying actions still arise from a common factual core, as the actions do here." *Id.* at 1367. Although we do not address class actions, we do address cases which share similar common fact issues respecting the switches. The reasoning of the federal panel is consistent with ours. *In re Ocwen Loan Servicing, L.L.C., Mortgage Servicing Litig.*, No. 07-0037, slip op. at 4 (Tex. M.D.L. Panel Mar. 26, 2007).

III. CONCLUSION

We conclude Ford has met its burden under rule 13. We conclude the transfer of these related cases will serve the convenience of the parties and the witnesses, and will promote just and efficient conduct.

Ford's motion to transfer is granted.

Douglas S. Lang, Justice

PRESIDING JUDGE PEEPLES, and JUSTICES HANKS, STONE, and McCLURE join.

Opinion Delivered: February 19, 2008.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

5 Star, Inc.,

Plaintiff,

vs.

Ford Motor Company,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2006-CP-10-4773

**FORD MOTOR COMPANY
MOTION TO ALTER OR AMEND
THE COURT'S ORDER DENYING
FORD'S POST-TRIAL MOTIONS**

2008 OCT -9 AM 9:20
JULIE J. ARS
CLERK OF COURT

FILED

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendant Ford Motor Company ("Ford") hereby moves the Court to reconsider the denial of Ford's post-trial motions for judgment notwithstanding the verdict and new trial. Ford bases this motion on the following grounds:

1. Ford notes that counsel for Plaintiff has now filed and served a separate lawsuit against Ford in the name of Mr. Shelby individually for the same damages arising from the same incident at issue in this case: the fire of September 24-26, 2005. Ford submits that the filing of Mr. Shelby's Complaint, which is attached hereto as Exhibit A, proves that Ford's position was correct regarding the damages recovered in this case, i.e., that 5 Star, Inc. was improperly allowed to recover damages for which it did not sustain and was not legally entitled to recover. Ford specifically asks the Court to reconsider the relevant portions of its motion for judgment notwithstanding the verdict and motion for new trial given the filing of Mr. Shelby's Complaint, which will subject Ford to double jeopardy.

2. Ford moves the Court to alter or amend the judgment entered in this case to reflect the stipulated set off of \$3,000.00. Therefore, no matter whether the Court refuses to

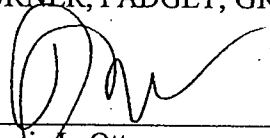
grant Ford judgment notwithstanding the verdict or new trial, the jury's verdict should be reduced from \$41,000.00 to \$38,000.00 as stipulated by the parties.

3. Ford seeks to preserve all appellate grounds regarding the trial of this action and therefore asks the Court to reconsider its rulings denying Ford's motion for judgment notwithstanding the verdict and motion for new trial for all the reasons set forth therein. Additionally, to the extent required by South Carolina law, Ford seeks an explicit ruling on each of the grounds asserted in both of Ford's post-trial motions in accordance with the applicable legal standard for each. *See Doe v. Roe*, 369 S.C. 351, 376, 631 S.E.2d 317 (Ct. App. 2006) ("An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment.").

For these reasons, Ford moves the Court to reconsider the denial of Ford's post-trial motions for judgment notwithstanding the verdict and new trial, and to enter an Order granting Ford judgment notwithstanding the verdict, or in the alternative, a new trial absolute, or in the alternative, a new trial *nisi remittitur*.

October 7, 2008

TURNER, PADGET, GRAHAM & LANEY, P.A.

By: 

Curtis L. Ott
David C. Marshall
Post Office Box 1473
Columbia, SC 29202
Phone: (803)-254-2200
Fax: (803) 799-3957

ATTORNEYS FOR FORD MOTOR
COMPANY

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

STAN SHELBY,

Plaintiffs,

v.

FORD MOTOR COMPANY,
Defendant.

) IN THE COURT OF COMMON PLEAS

)

)

CASE NO. 2008-CP-10-549

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SUMMONS

2008 SEP 24 PM 2:47
JULIE J. ARMSTRONG
CLERK OF COURT

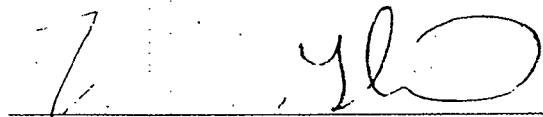
FILED

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you; and to serve a copy of your Answer to the said Complaint upon the subscribers at their offices at 2344 Cosgrove Avenue, Post Office Box 71121, Charleston, South Carolina, 29415-1121 within thirty (30) days after the service hereof, exclusive of the day of such service.

YOU ARE HEREBY GIVEN FURTHER NOTICE that if you fail to appear and defend and fail to answer the Complaint as required by this Summons within thirty (30) days after the service hereof, exclusive of the day of such service, judgment by default will be entered against you for the relief demanded in the Complaint.

September 24, 2008



Thomas R. Goldstein
BELK, COBB, INFINGER & GOLDSTEIN, P.A.
P. O. Box 71121
Charleston, SC 29415-1121
(843) 554-4291

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

STAN SHELBY,)
)
Plaintiffs,)
)
v.)
)
FORD MOTOR COMPANY,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
CASE NO. 08-CP-10-

COMPLAINT

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JULIE J. ARMSTRONG
CLERK OF COURT

FILED

The plaintiff above-named, complaining of the defendant above-named, respectfully alleges and shows unto this Honorable Court as follows:

1. That the plaintiff is a citizen and resident of Berkeley County, South Carolina.
2. That the defendant, Ford Motor Company, is a corporate citizen and resident of Michigan, but maintains agents and transacts business in Charleston County.
3. The court has jurisdiction over the parties hereto and matters herein.
4. The plaintiff owned a 1996 Ford Truck, model F-250, as show by the certificate of title, dated February 7, 2005, a copy of which is attached hereto and incorporated by this reference.
5. On Friday, September 24, 2005, an employee parked the Ford F-250 truck inside 5 Star Inc.'s warehouse located on 2340 Midland Park Road.
6. That on Monday, September 26, 2005, the plaintiff entered the warehouse on 2340 Midland Park Road, and found the warehouse full of smoke. The plaintiff called the fire department, which responded shortly after the call, and discovered the fire caused by the defective module designed and built by the defendant. A copy of the fire report is attached hereto, and incorporated by this reference.

7. That the defendant, Ford Motor Credit, is obligated to reimburse the plaintiffs for the 1996 Ford F-250 truck, along with other property destroyed by the fire caused by the defect with the cruise control on the 1996 Ford F-250 truck.

8. The defendant, Ford Motor Company, was negligent, careless, willful and wanton in the following particulars.

9. As a direct and proximate result of the defendant's, Ford Motor Company's, negligence and grossly negligent denial of compensation for all damages done due to the above referenced claim.

WHEREFORE, the Plaintiff demands that he be given a jury trial and prays that he be awarded a judgment for both actual damages, and punitive damages, which may be trebled by a proper finding of an act constituting an Unfair Trade Practice, for such consequential and special damages as allowed by law, pre-judgment interest, and punitive damages in an amount to be determined by the triers of fact, plus costs and such other and further relief as this Honorable Court deems just and proper. The Plaintiff stipulates that it will limit its damages to not more than \$74,999.00.

September 24, 2008



Thomas R. Goldstein
BELK, COBB, INFINGER & GOLDSTEIN, P.A.
Post Office Box 71121
Charleston, SC 29415-1121
(843) 554-4291
(843) 554-5566 (fax)
tgoldstein@cobblaw.net
ATTORNEYS FOR PLAINTIFF

1 Counsel?

2 MR. MARSHALL: Your Honor, we'll start
3 with the motion for partial summary judgment on
4 the plaintiff's claim for punitive damages.

5 THE COURT: All right. Mr. Marshall,
6 I'll be happy to hear from you.

7 MR. MARSHALL: Your Honor is aware of
8 what this case is about. Plaintiff alleges that
9 a '96 F-250 truck was defective in design and
10 manufacture. He brought a products liability
11 lawsuit as a result of that, seeking damages.

12 The law for punitive damages is very
13 clear in South Carolina and on the -- in the
14 federal and Supreme Court level that punitive
15 damages must be proven by clear and convincing
16 evidence, but above all, it can only -- punitive
17 damages is only appropriate when the conduct
18 raises to a level of recklessness, willfulness,
19 wantonness.

20 And, Your Honor, in this case there's
21 been no evidence that Ford was reckless, willful,
22 wanton at the time it manufactured this vehicle
23 in 1995.

24 Specifically, the law requires there to
25 be a consciousness of wrongdoing for punitive

1 damages to be proper and that Ford had some
2 knowledge at the time it manufactured this
3 vehicle and therefore should have known this
4 vehicle was defective when it was manufactured
5 and sold.

6 You know, this is the law that's in
7 South Carolina, just as it is on the federal
8 level, *State Farm vs. Campbell* and *BMW vs. Ford*,
9 most recently in the *Exxon Valdez* case and the
10 *Philip Morris vs. USA* case; the last few.

11 But it's really as simple as, you know,
12 this case involves a fire, they've got a fire
13 cause and origin expert, but there's no evidence
14 of Ford's conduct that meets the standard of
15 proof required of punitive damages, and we'd ask
16 that the plaintiff's claim for punitive damages
17 be stricken from the Complaint.

18 THE COURT: Thank you.

19 Mr. Goldstein.

20 MR. GOLDSTEIN: Your Honor, I'm not
21 really quite sure how to respond. I thought
22 Judge Jefferson had resolved all the motions for
23 summary judgment. I realize that there were
24 motions in limine that she didn't address, but I
25 thought she had addressed all the motions for

1 summary judgment.

2 As for the punitive damages, I've got
3 several cases here as to what the purpose of
4 punitive damages are. And as Your Honor well
5 knows, punitive damages are to vindicate a
6 private -- a private right suffered by an
7 individual where an individual has suffered by
8 gross negligence or recklessness.

9 At this juncture, I don't know how you
10 move for summary judgment. I don't know what
11 affidavit they would be relying upon to prove
12 that there is no recklessness. That is something
13 that is derived by the evidence in the case.

14 The evidence in the case as borne out
15 by all the depositions taken in the case are that
16 Ford installed a speed deactivation control
17 switch in about 750,000 vehicles that's designed
18 to carry a two amp -- a two amp energized load,
19 and all the testimony will be that the defect is
20 twofold.

21 First, Ford wired the speed
22 deactivation control switch into a 15-amp
23 circuit. For some reason, they hooked it up to
24 the brake light circuit. I'm not quite sure why
25 they did that, but that's what they elected to

1 do. So now you have a 2-amp switch carrying 15
2 amps.

3 There is a long, exhaustive explanation
4 of that in the plaintiff's exhibit, I want to say
5 two, which is also an exhibit being offered by
6 the defendant.

7 That alone is evidence of recklessness
8 as to why you would -- and the switch was
9 manufactured at Ford's specifications. And this
10 will all come out in the testimony.

11 So the other thing that's peculiar
12 about it, and I've never understood this, the
13 switch remains energized at all times, which is
14 peculiar. So even when the ignition is off and
15 the key is removed from the ignition, the switch
16 remains energized, which explains why you see
17 these fires in garages and parking garages and so
18 forth.

19 And when the car is being operated, it
20 doesn't burst into flame because the car is
21 moving down the road and the ambient air is
22 cooled by the momentum of the car through the
23 air. However, when the car is stationary and you
24 walk away from it and leave it, as this plaintiff
25 did, locked up in a garage, that's when it burns,

1 causing the damage he complained of.

2 So, I mean, we've got recklessness all
3 over the place. We've got it on the design of
4 the switch itself, on the manner in which it's
5 wired in the car, on it remaining energized at
6 all times which makes absolutely no sense.

7 The evidence will show that Ford was
8 aware of this problem for many months prior to
9 this particular incident. And the evidence will
10 also show that they had quite a number of these
11 speed deactivation control switch fires, which is
12 why they're trying so hard to keep all that out
13 of evidence.

14 So, Judge, at the end of the case,
15 maybe you'll decide there wasn't enough evidence
16 to go on punitive damages, but at the beginning
17 of the case, I don't know how anybody can
18 seriously assert to this Court that there's not
19 at least a genuine issue of material fact and at
20 least deriving the reasonable inferences
21 deducible therefrom.

22 So, you know, they can renew their
23 motion at the end of the case. I just think it's
24 the wrong time to be raising it.

25 MR. MARSHALL: If I may, Your Honor.

1 The courts, in essence everything
2 Mr. Goldstein talked about, talk about the
3 defect, and there's two requirements for a
4 products liability claim. You have to prove
5 defect and then you have to prove negligence in
6 adopting an unsafe design. Then on top of that,
7 to get punitive damages you have to prove
8 recklessness in the manufacturer's conduct.

9 And, again, this goes strictly at the
10 time of manufacture of this vehicle. Any conduct
11 after that is not considered. And there is case
12 law on point.

13 For instance, the *Jiminez vs.*
14 *DaimlerCrysler* case, which is a Fourth Circuit
15 case that originated in South Carolina, that
16 originally was a 260 million dollar punitive
17 damages case for the plaintiff that was reversed
18 based on the fact that the conduct has to be
19 before manufacture/at the time of manufacture.

20 Now, and there's other case law in
21 South Carolina that says the mere fact that a
22 part malfunctions does not infer damages. And,
23 you know, even assuming there was a defect, which
24 we contest, it doesn't go to show that there was
25 recklessness in the design. Those are two

1 different elements that both require proof, and
2 it's so much more proof for punitive damages.
3 There has to be recklessness, and it has to be
4 clear and convincing rather than a preponderance
5 of the evidence.

6 And at the time that this vehicle was
7 manufactured, Ford had no knowledge of any fires
8 in any vehicle regarding this alleged defect.
9 And if the plaintiff has evidence of that, then
10 he is required to show that. And, you know, if
11 there is no evidence of that in the record, then
12 we're entitled to summary judgment now.

13 This is a motion that was filed after
14 Judge Jefferson heard our motion. That was just
15 a motion for summary judgment. This is a
16 separate motion for partial summary judgment on
17 their claim for punitive damages.

18 And, Your Honor, we just -- we go back
19 to the fact that plaintiff has the burden of
20 showing that Ford was aware of this problem,
21 aware of vehicle fires occurring in these

22 vehicles, at the time of manufacture of this
23 vehicle in 1995. There is absolutely no evidence
24 that Ford is aware of that, there's no witnesses
25 that can testify that Ford knew, and therefore we

1 filed for summary judgment at this time, Your
2 Honor.

3 I'll be glad to pass up the case law
4 that I cited, the *Jiminez* case, for instance.
5 There's also the other cases that talk about, you
6 know, the mere fact that a part malfunctions
7 doesn't show negligence, you know, therefore
8 doesn't show recklessness either.

9 And at that same time, you know, you
10 can't impose punitive damages for mere negligence
11 or even gross negligence. It requires
12 recklessness, willful, wanton, a conscious
13 disregard for the safety of others. You know,
14 some courts will call it a wicked mind. And
15 there's no evidence in this case and there will
16 be none, and that's why we're moving for it right
17 now.

18 THE COURT: Just for the record, I've
19 looked at the docket, and this particular issue
20 was not addressed during your motions in front of
21 Judge Jefferson. I do agree with plaintiff's
22 counsel, and I do believe that this motion is a
23 bit premature. At this time I'm declining to
24 grant your motion for summary judgment on the
25 claim for punitive damages, based upon the fact

1 that I believe that there are genuine issues of
2 material fact regarding the plaintiff's claim for
3 punitive damages.

4 Next motion.

5 MR. OTT: Thank you, Your Honor. May
6 it please the Court, and if we can, address the
7 motion in limine to exclude the testimony of
8 plaintiff's expert, Leonard Greene.

9 THE COURT: This motion was filed April
10 2nd, 2008.

11 MR. OTT: Yes, Your Honor. Originally
12 we filed it as part of our motion for summary
13 judgment. As I understand Judge Jefferson's
14 ruling, at that motions hearing she deferred
15 ruling on this motion in particular to the trial
16 court judge even when she had denied our motion
17 for summary judgement.

18 THE COURT: Is that your understanding
19 of the procedural posture?

20 MR. GOLDSTEIN: That is correct, Your
21 Honor.

22 THE COURT: All right. Thank you.
23 You may proceed.

24 MR. OTT: Your Honor, this is a motion
25 under Rule 702 and 703 of the South Carolina

1 Rules of Evidence.

2 And there's been a lot of scholarly
3 debate, a lot of discussion, and even a lot of
4 activity in the South Carolina Supreme Court
5 about exactly what are the evidentiary standards
6 for admitting expert testimony in state court and
7 how, if any, is this different from what we have
8 in federal court under *Daubert* and subsequently
9 *Kumho Tire*.

10 Judge Young, Roger Young, who, of
11 course, qualified the jury this morning, wrote a
12 great article back in 2003, stating that South
13 Carolina's rule for admitting expert testimony in
14 reality is exactly the same as it is in federal
15 court.

16 We are constantly saying we're not a
17 *Daubert* state. However, when you analyze the
18 procedural and evidentiary framework for
19 analyzing the admissibility of expert testimony,
20 it reveals that they're one and the same.

21 The wording of the rules are virtually
22 identical, and more importantly, the steps to
23 follow in analyzing what it means to be reliable
24 expert testimony under *Daubert* is the same as the
25 test under *State vs. Council* and further

1 enunciated in *State vs. Jones*.

2 As Judge Young states, judges are
3 required to make a threshold determination of the
4 relevance and reliability of expert testimony and
5 evidence. To accomplish this, they must acquire
6 tools to perform the gatekeeping function of
7 deciding what evidence can be considered by a
8 jury or, stated in more familiar terms, bad
9 scientific or technical evidence is irrelevant
10 evidence and therefore not admissible as
11 evidence.

12 The three stages in analyzing an
13 expert's proffered testimony and whether it's
14 admissible under *State vs. Jones* and *State vs.*
15 *Council* and applicable rules is whether the
16 expert is qualified; number two, whether the
17 evidence will assist the trier of facts; and
18 number three, whether the underlying evidence is
19 reliable.

20 For purposes of this motion, Your
21 Honor, with Mr. Greene we are not here to contest
22 his qualifications as a proffered expert in the
23 origin and cause of fires. Our motion goes to
24 the heart of his opinions, however, and attacks
25 the basis for trying to say that this fire was

1 caused by a speed control deactivation switch;
2 and, therefore, really, Your Honor, it's a matter
3 of what it means to be relevant and what it means
4 to be scientifically reliable.

5 As stated in *Jones*, the standard is the
6 degree to which the trier of fact must accept on
7 faith scientific hypotheses not capable of proof
8 or disproof in court and not even generally
9 accepted outside the courtroom.

10 The *Jones* factors for assessing the
11 reliability of a given expert's opinions include
12 the publications of peer review of the technique,
13 prior applications of the methods to the type of
14 evidence involved in the case, the quality
15 control procedures used to ensure reliability,
16 and the consistency of the method with recognized
17 scientific laws and procedures.

18 Under that analytical framework, Your
19 Honor, I'd like to draw attention to exactly how
20 Mr. Greene became involved and exactly what --
21 what he did, and I think the evidence and the
22 testimony will show what he did not do in this
23 case.

24 He was retained in January -- or either
25 December of 2007 or January of 2008. I deposed

1 him in February of 2008, and excerpts from his
2 deposition are attached to our motion, indeed
3 quoted heavily therein.

4 Your Honor, he had no idea when I
5 deposed him that the plaintiff had spoliated the
6 evidence, that they had destroyed not only the
7 truck that they claim was defective but the
8 specific component part that they allege was
9 defective.

10 So I said, well, let's start and take a
11 look and analyze exactly what your opinions are
12 in this case. He said he was only being
13 proffered as a cause and origin expert.

14 I got him to admit that he could not
15 and indeed did not have an opinion to a
16 reasonable degree of scientific certainty what
17 the cause of this fire is. And he's admitted
18 that. I'm sorry. The origin. I jumped ahead of
19 myself. What the origin of this fire is.
20 However -- and it seems illogical to me, but
21 we'll analyze it even giving him the benefit of
22 the doubt.

23 He said: "Even though I don't know
24 where this fire started, I'm going to tell you
25 what the cause of the fire is."

1 And I asked him: "Well, ordinarily, is
2 that possible?"

3 And he said: "Ordinarily, it's not."

4 And I said: "Well, what is your
5 opinion about the cause of the fire?"

6 And he says that this particular fire
7 was caused by a defect in the speed control
8 deactivation switch that was recalled by Ford.

9 I said: "Okay. Well, let's take a
10 look at that, Mr. Greene. How did you arrive at
11 your opinion? Did you interview any witnesses?"

12 "No."

13 "Have you taken any measurements?"

14 "No."

15 "Have you performed any tests?"

16 "No."

17 "Have you even talked with Mr. Shelby
18 who, of course, is the sole shareholder of
19 5 Star?"

20 "No."

21 "And you have not reviewed either of
22 the deposition transcripts that had been taken at
23 that point in the case?"

24 "Correct."

25 "Taken no photographs?"

1 "Correct."

2 "Never inspected the vehicle?"

3 "Right."

4 "Never inspected the component parts of
5 the vehicle?"

6 "Correct. Not available."

7 "Have you ever seen any service,
8 maintenance, or repair records to the vehicle?"

9 "No."

10 "Do you have an understanding of its
11 maintenance and service history?"

12 "No."

13 "Do you think that's important in your
14 investigation of this case?" Bearing in mind,
15 Your Honor, that this is a 1996 vehicle, ten
16 years old at the time of this fire, with over
17 227,000 miles on it. "Don't you think that's
18 important in your investigation of this case?"

19 "To me it would be -- more important
20 would be after-market modifications that may have
21 been made to the vehicle."

22 "Okay. Are you aware of any
23 after-market modifications to the vehicle?"

24 "No."

25 "Are you aware of whether there were

1 any or not?"

2 "No."

3 "You simply don't know?"

4 "Don't know."

5 "Do you know whether this vehicle was
6 ever involved in an accident before the fire?"

7 "No."

8 "Did Mr. Shelby ever report any
9 problems with brake fluid leak before this fire?"

10 "I don't know. I only asked the
11 questions if he reported any problems with speed
12 control."

13 "And the answer to that was no?"

14 "Correct."

15 Those are in some of these switch cases
16 prior indications that there may be a switch fire
17 if there's evidence of speed control failure or
18 brake fluid leakage before the fire. There is
19 none here.

20 Your Honor, so we get down to where the
21 rubber hits the road when it comes to his
22 opinions. He's done nothing scientific to come
23 up with his opinion other than to say there's a
24 recall and there's a fire.

25 Now, let's go to the type of test under

1 Jones that we're supposed to look at. Is this
2 expert's opinion capable of objective scientific
3 verification, is this expert's testimony capable
4 of being peer reviewed, is this expert's
5 testimony capable of being measured for its
6 potential error rate, went through all those
7 questions, Your Honor.

8 "Do you agree with me to arrive at an
9 objective and reliable opinion your opinion must
10 be firmly grounded in science?"

11 "Well, science and engineering
12 principles, and that would also include
13 probability."

14 "And to be firmly grounded in science,
15 would you agree that your opinion must be capable
16 of being proven or disproven by scientific
17 testing?"

18 "Yes."

19 "What physical evidence do you have of
20 this particular fire?"

21 His answer: "Asked and answered. I
22 don't have any physical evidence of this
23 particular fire."

24 "Then how can you arrive at an
25 objective opinion grounded in science, capable of

1 being tested, that this switch caused the fire in
2 this case vehicle?"

3 "I can give you an engineering opinion
4 to a reasonable degree of certainty that if it
5 looks like a duck, sounds like a duck, it's
6 probably a duck. I've seen a lot of these fires
7 in this particular vehicle, the recall recalled
8 close to a million vehicles, and I've also seen a
9 lot of other fires involving electrical
10 appliances."

11 "Well, how could anyone make a
12 determination of the cause of a vehicle fire if
13 you cannot inspect the scene?"

14 "In general, you can't."

15 "How can you make a determination of
16 the cause of a vehicle fire if you cannot inspect
17 the vehicle or its component parts?"

18 "In general, you cannot."

19 "All right. Well, then let's get
20 specific to the case, to this case. How can you
21 as an objective forensic engineer offer an
22 opinion to a reasonable degree of certainty what
23 was the cause of a vehicle fire, this vehicle
24 fire, when you could not investigate the scene,
25 the vehicle, or its component parts?"

1 "The circumstantial evidence is very
2 strong."

3 I said: "How would the circumstantial
4 evidence of this fire be any different than if
5 somebody had deliberately set the fire -- fire to
6 this vehicle?"

7 And after going around and about with
8 me, he finally said: "The physical evidence
9 would probably not be any different."

10 "All right. Let's go to testing then.
11 Is there any way to objectively test your opinion
12 based on physical evidence to determine its
13 validity?"

14 "In this case specifically, no."

15 "Okay. And would you agree that there
16 is no way to test your scientific methodology, to
17 subject it to peer review?"

18 He said: "It is simply not capable of
19 being tested. Because I don't have an object to
20 test the laws of gravity, but -- that the laws of
21 gravity don't exist and can't be tested."

22 "But we can't peer review your opinion,
23 can we?"

24 "No. Because we don't have the object.
25 The object is missing."

1 "Right. And the object is missing
2 because the plaintiff destroyed it without giving
3 notice to my client?"

4 "I don't know why, but it is missing."

5 "And thus Ford Motor Company does not
6 have an opportunity to test your opinion nor
7 would any scientist, correct?"

8 "That's correct."

9 "And because your opinion is not
10 capable of being tested objectively or subjected
11 to peer review, then there is no way for us to
12 determine the error rate of your opinion, is
13 there?"

14 "Because of the damage to the vehicle,
15 there would in my opinion not be a way to test it
16 anyway because the evidence would be destroyed."

17 "Well, if we had the switch we could
18 test it?"

19 "You would have remains of the switch."

20 "They could be X-rayed?" And these
21 were potential tests that he said he could do to
22 conclusively establish whether this particular
23 part was indeed related to this fire or not.

24 "They could be X-rayed?"

25 "Correct."

1 "And that could be subjected to the
2 magnification test you mentioned?"

3 "Correct."

4 "And that could be subjected to the
5 electrical continuity test you mentioned?"

6 "Correct."

7 "All of which would be objective ways
8 to test your theory or opinion?"

9 "Correct."

10 "But we can't do that?"

11 "Correct."

12 "And thus we are all left with your
13 opinion with no way to test it, no way to subject
14 it to peer review, and no way to know the error
15 rate inherent in your opinion?"

16 "Correct."

17 Your Honor, when it walks like a duck
18 and quacks like a duck and you say it's a duck,
19 that is exactly the type of testimony that is
20 unreliable under the *Daubert* standard and also
21 under the *State vs. Jones* standard.

22 What he is asking us to do is to
23 "accept my opinion because I say so." And it's
24 impossible, as he's admitted, to be tested. It's
25 impossible to be peer reviewed. It's impossible

1 for us to determine the error rate inherent in
2 his opinions. It fails every one of the four
3 *Jones* methodology factors to determine
4 reliability, and that is the basis of our motion
5 to exclude his testimony. Thank you.

6 THE COURT: Mr. Goldstein.

7 MR. GOLDSTEIN: May it please the
8 Court.

9 Where to begin? Well, where to begin
10 is, I'm not sure what we're doing. I really and
11 truly do not know what we're doing. This sounds
12 like a renewed motion for summary judgment is
13 what it sounds like.

14 Under South Carolina law, a motion in
15 limine, even if granted, does not remove the need
16 for a contemporaneous objection at trial.
17 Motions in limine are not final determinations of
18 whether evidence will be admitted at trial. If a
19 motion in limine as to exclude evidence is
20 denied, the party must renew its objection when
21 the evidence is presented during the trial.

22 So I'm not sure what we're doing. Even
23 if you grant the motion in limine, I've still got
24 to put the guy up on the stand, I've still got to
25 ask him the question, I still have to make the

1 record, and he's got to renew his objection.

2 Now, two other points. One, with all
3 due respect to The Honorable Roger Young who I
4 admire greatly, as Judge Jefferson told us at the
5 summary judgment hearing, South Carolina law is
6 quite different than federal law. It really is.

7 We do not follow the *Daubert* rule. In
8 *Vortex Sports vs. Ware*, 662 S.E.2d 444, that's a
9 2008 case -- and Your Honor will remember that
10 case as soon as I start talking about it. That
11 was the Professor Freeman affidavit case, and I
12 bet you're going, oh, yeah, I remember that one.
13 That was a big topic of conversation.

14 The Supreme Court said -- I'm sorry.
15 The Court of Appeals said: "If scientific,
16 technical, or other specialized knowledge will
17 assist the trier of fact to understand the
18 evidence and to determine a fact in issue, a
19 witness qualified as an expert by knowledge,
20 skill, experience, training, or education may
21 testify thereto in the form of an opinion or
22 otherwise. When expert testimony is based upon
23 facts sufficient to form the basis of an opinion,
24 the trier of fact determines its probative
25 value."

1 Now, let me cite one more case, and
2 that is the *Council* case. Where did I put the
3 *Council* case? Here it is.

4 The *Council* case is a 1999 case, and it
5 is 515 S.E.2d 518. And in the *Council* case, the
6 Supreme Court -- let me make sure here -- yes.
7 The Supreme Court was a little even more emphatic
8 about rejecting the *Daubert* rule. In the *Council*
9 case, the Supreme Court said:

10 "Appellate is attempting to apply the
11 standard set out in *Frye vs. United States*. In
12 *Frye*, the court held that something in evidence
13 only became reliable and therefore admissible
14 when it attained a general acceptance in the
15 scientific community as a whole. However, this
16 court has never adopted that standard. Instead,
17 prior to 1990, the standard for admitting
18 scientific evidence in South Carolina was the
19 degree to which the trier of fact must accept on
20 faith scientific hypotheses not capable of proof
21 or disproof in court and not even generally
22 accepted outside of the courtroom. This standard
23 is more liberal than the *Frye* standard."

24 On the next page they go further and
25 they say: "While this court does not adopt

1 *Daubert*, we find the proper analysis for
2 determining admissibility of scientific evidence
3 is now under the South Carolina Rules of
4 Evidence. When admitting scientific evidence
5 under Rule 702 South Carolina Rules of Evidence,
6 the trial judge must find the evidence will
7 assist the trier of fact, the expert witness is
8 qualified, and the underlying science is
9 reliable. The trial judge should apply the *Jones*
10 factors to determine reliability. Further, if
11 the evidence is admissible under 702, the trial
12 judge should determine if its probative value is
13 outweighed by its prejudicial effect."

14 Now, what Mr. Ott is doing is very
15 skillfully weaving opinion evidence with
16 scientific evidence. The two are not the same.
17 Mr. Greene is entitled to have an opinion, state
18 what his opinion is and the basis on which he
19 holds it..

20 And what Mr. Ott forgets to tell you is
21 that at the time Mr. Greene gave his deposition
22 in February 2008 we haven't deposed Ben Norris
23 who is the fire investigator for the City of
24 North Charleston who, unlike Mr. Greene, was on
25 the scene.

1 Mr. Ott makes a big deal that Lennie
2 wasn't on the scene, which is true. He wasn't.
3 Ben Norris was. Therefore, you have to look at
4 their testimony together. Their testimony is
5 like a hand in a glove. And Lennie Greene is
6 entitled to rely on the evidence he gets from Ben
7 Norris, which is why these motions in limine are
8 so silly because I don't know how you can -- and
9 I don't mean silly. That sounded flippant. I
10 don't mean that. Let me retract that. I
11 shouldn't have said that.

12 That's why these motions in limine are
13 usually ineffective, because they are premised
14 upon things that you, Your Honor, in judging them
15 don't know because you haven't heard the evidence
16 yet.

17 Now, you can go back in chambers, and
18 you can read Lennie Greene's deposition in its
19 entirety, and you can read Ben Norris's
20 deposition in its entirety, and I think you'll
21 have a different view of the way that Mr. Ott
22 characterized it.

23 Here's what Lennie says on page 65:

24 "Are you able to determine the fire
25 began in the vicinity of the truck based on the

1 burn patterns?"

2 Answer: "Yes."

3 And by the way, Ben Norris will testify
4 that burn patterns are the definitive way of
5 ascertaining the origin of a fire. They're like
6 a fingerprint.

7 It's typed O-W-E-N-S, Ohm's law which
8 says that heat is proportional to the current in
9 the resistance.

10 "Are some materials more resistant to
11 the conduction of electricity than others?"

12 "Yes."

13 "What happens if the material through
14 which electricity is being conducted creates a
15 higher degree of resistance?"

16 He says: "Let me see if I understand
17 the question. We have a conduction material, and
18 as conduction occurs resistance increases?"

19 "Yes. What happens? What happens as
20 the resistance increases?"

21 "Okay. It's a thermal runaway effect.

22 What happens is, as the temperature increases the
23 resistance increases, and if the current stays
24 the same as the resistance increases, the heat
25 generated increases. So we start a runaway

1 phenomena which we have more heat which creates
2 more resistance to the same current, and that
3 creates even more heat, and we get more and more
4 heat."

5 Both Mr. Greene and Mr. Norris, both
6 testified that the cause of this fire within a
7 reasonable degree of, in one case engineering
8 certainty, in the other one fire investigative
9 certainty, was a speed deactivation control
10 malfunction.

11 Now, let me anticipate an argument that
12 Mr. Ott hasn't yet made, but he's going to. He's
13 going to say but you don't have any evidence that
14 that switch was defective.

15 Well, actually, up there, marked as a
16 plaintiff's exhibit, is a recall. And the South
17 Carolina Supreme Court has in fact spoken about
18 whether or not a recall is or is not admissible.

19 In *Reiland* -- and it's R-E-I-L-A-N-D,
20 *Reiland*, I guess, vs. *Southland Equipment*
21 *Service*. It's 500 S.E.2d 145. It's a Court of
22 Appeals 1998:

23 "Although no South Carolina case has
24 directly ruled on this point, one opinion has
25 addressed in a footnote a closely related issue,

1 see *Seaside Resorts vs. Club Car*. The Court of
2 Appeals held that portions of the service
3 bulletin were properly admitted as an admission
4 against interest."

5 So, now, let's back up. What do we
6 have in this case? You know, a trial, after all,
7 is a search for the truth. It really is. And I
8 understand it's an adversarial system, and I'm
9 supposed to advocate as zealously as I can for my
10 client, and Mr. Ott and Mr. Marshall are supposed
11 to advocate as zealously as they can for their
12 client. We're all professionals, and we all
13 understand that, but the overarching principle is
14 that it is a search for the truth.

15 Here's what happened. Here's what we
16 know. This truck erupted in flames, unattended,
17 in a garage, sometime during the weekend of
18 September 26th, 2005. The fire department
19 responded. The fire department put it out.

20 The fire department fire investigator,
21 Ben Norris, who will be a witness in this case,
22 who has been deposed, told Stan Shelby or his
23 employee -- he couldn't remember who he told. He
24 told one of them hold on to this truck, don't let
25 this truck get away, you need to notify your

1 insurance company.

2 Mr. Shelby did that, notified his
3 insurance company. I then notified who I thought
4 was the lawyer for Ford. This is while Mr. Ott
5 was still there.

6 So now Ford says because you didn't
7 hold on to that charred part that fell underneath
8 the truck -- and by the way, Judge, if I may
9 approach the court reporter, the offending part
10 that brings us to this courtroom today in this
11 very interesting case was consumed in the fire.
12 As you may see in the photograph, it no longer
13 existed.

14 I mean, that's what fires do. They
15 consume. It's the nature of the physical heat
16 exchange process of a flame that it consumes
17 whatever is feeding it.

18 So whether there even was or was not a
19 part, I don't know. And maybe Your Honor says he
20 gets a spoliation of evidence charge, maybe you
21 don't, I don't know, but the South Carolina
22 Supreme Court says that you give a spoliation of
23 evidence charge not when a case is dismissed.
24 That's what they're arguing, that the case ought
25 to be dismissed.

1 THE COURT: Okay. Right now we're on
2 the motion to exclude Leonard Grant.

3 MR. GOLDSTEIN: Right. And Lennie,
4 Lennie's curriculum vitae was attached to his
5 deposition. I'll be glad to hand it up.
6 Benjamin Norris's curriculum was attached as
7 exhibit one to his deposition. I'll be glad to
8 hand it up. They are both eminently qualified to
9 have an opinion.

10 While Mr. Ott may do an excellent job
11 at cross-examining them, everything that he has
12 told you, Judge, goes to the weight of their
13 evidence, not its admissibility. He wants you to
14 throw me out of court. He wants you to say,
15 Goldstein, you didn't save the little piece that
16 fell underneath the truck, you're out of court.

17 THE COURT: Well, right now he just
18 wants me to not let you call Mr. Greene.

19 MR. GOLDSTEIN: Right. And, again, I'd
20 say that I'm really confused about what we're
21 doing. This is a motion in limine. Even if you
22 grant his motion, I've still got to put him up,
23 and we've got to go through all this again, and
24 you've got to listen to his testimony and ---

25 THE COURT: Well, the point of doing

1 the motions now is so that when we call the
2 jury ---

3 MR. GOLDSTEIN: Yes, ma'am.

4 THE COURT: --- tomorrow that we all
5 know what rules and guidelines we are going --
6 proceeding under beginning at 9:30. And while I
7 understand what you are saying, Mr. Goldstein,
8 this is a benefit to both you and to the
9 defendant.

10 MR. GOLDSTEIN: It absolutely is. But
11 that's why I say about motions in limine. I
12 don't know how you're going to -- how you're
13 going to decide if he's qualified or not until
14 you've heard his testimony unless you want to go
15 read his entire deposition and look at his
16 curriculum vitae, but he is -- under the *Council*
17 standard, he is clearly -- he is clearly, as the
18 Supreme Court said in *Council* -- well, rather
19 than look for the case which is somewhere on my
20 desk, let me just read 702:

21 "If scientific, technical, or other
22 specialized knowledge will assist the trier of
23 fact in understanding the evidence or determine a
24 fact in issue, a witness qualified as an expert
25 by knowledge, skill, experience, training, or

1 education may testify thereto in the form of an
2 opinion or otherwise."

3 Where in that rule, where in that rule
4 does it say he can't testify because he didn't
5 have the actual part that was consumed in the
6 fire, which is what Mr. Ott's argument distilled
7 down to its essence is.

8 That's all I have to say, Your Honor.

9 THE COURT: Mr. Goldstein, I don't
10 think that that is his argument. What I
11 understand his argument to be is that because you
12 don't have the part that his testimony is not
13 reliable because it then cannot be repeated.

14 MR. GOLDSTEIN: Right. And that's not
15 -- that's his argument, but that is not what is
16 in Rule 702. That's not what's in *Council*.
17 That's not what's in the *Reiland* case. He's
18 still allowed to give an opinion, and it's up to
19 the jury to decide what weight if any -- as a
20 matter of fact, I'm sure Your Honor has a
21 standard jury instruction you give in every civil
22 case that says, you know, when an expert witness
23 testifies you can give as much weight to his
24 testimony as you want. You can believe some of
25 what he said, none of what he said, or all of

1 what he said. But he doesn't get excluded out of
2 the case just because we don't have a part. It
3 goes to the weight, not the admissibility.

4 THE COURT: Your response.

5 MR. OTT: Your Honor, I'm not really
6 sure what I'm supposed to respond to because I
7 don't think Mr. Goldstein understood a word I
8 said. So I want to make sure the Court
9 understands.

10 As I said at the outset, *Council*
11 requires the Court to essentially perform the
12 gatekeeping function before evidence is given to
13 the jury for its consideration, because once that
14 goes out and it's, quote, in an expert's robe,
15 that horse is out of the barn.

16 And the Court as a gatekeeper function,
17 before the evidence of an opinion by an expert is
18 given to the jury, has to make sure it meets the
19 three requirements enunciated in *Council*. When
20 admitting scientific evidence under Rule 702, the
21 trial judge must find the evidence will assist
22 the trier of fact, the expert witness is
23 qualified, and the underlying science is
24 reliable. That's exactly where we are.

25 I have argued to the Court that we are

1 not here challenging Mr. Greene's qualifications.
2 However, we are challenging the relevance of his
3 opinions, given the absolute unreliable
4 methodology by which he arrived at an opinion
5 that is wholly not subject to being tested, not
6 subject to being peer reviewed, and not subject
7 to determining an error rate, and, thus, it's
8 inherently unreliable.

9 And, Your Honor, I did leave out a
10 portion of this argument, I don't want to beat a
11 dead horse, but the methodology found in the two
12 analytical frameworks that have been recognized
13 in the fire investigation field, that of the
14 National Fire Protection Association 921 standard
15 and a particular analytical framework by NHTSA.
16 That's the National Highway Traffic Safety
17 Administration, the federal governmental body in
18 charge of all governmental manufacturers. They
19 set out what's called a Go/No-Go approach to
20 determine this exact issue whether a particular
21 switch is in fact related to this fire.

22 There are three factors that an opinion
23 -- before somebody can opine that, yes, it would
24 be, it is related. Mr. Greene's approach met
25 none of those. That was: You have to have an

1 opinion as to the cause -- or, excuse me, the
2 origin of the fire, he had none; you have to have
3 eyewitness accounts of the area of the origin, he
4 had none; or you have to have post-fire forensic
5 examination showing that the switch failed, he
6 cannot in this case, he didn't have that.

7 Moreover, he agreed that the NFPA 921
8 was the authoritative approach, but he could not
9 follow that in this case, and that under NFPA he
10 would have to arrive at a cause of undetermined,
11 at best, for this case.

12 And so it's the methodology, it's the
13 opinion, and it's the lack of being subjected to
14 "let's look at this scientifically and determine
15 whether your opinion is reliable." That is the
16 basis of our motion.

17 And if he keeps interjecting
18 Mr. Norris's testimony, we'll address Mr. Norris
19 in a moment. But Mr. Greene can't bootstrap
20 inadmissible testimony onto Mr. Norris.

21 MR. GOLDSTEIN: Your Honor.

22 THE COURT: Mr. Goldstein, what is it
23 exactly that you want Mr. Greene to testify to?

24 MR. GOLDSTEIN: He's going to testify
25 as to cause and origin of the fire, as is

1 Mr. Norris, and he's also going to testify that
2 the fire most probably, based within a reasonable
3 degree of engineering certainty, was caused by
4 the runaway thermal effect of the speed
5 deactivation control switch. That's what he's
6 going to testify to.

7 And he's going to also testify, as will
8 Mr. Norris, that there are no other possible
9 causes for the fire.

10 In other words, Mr. Norris will testify
11 that he ruled -- that his investigation at the
12 scene ruled out every other possible cause or
13 origin of fire. That's what he will testify to.

14 He will testify that he ruled out
15 arson, he ruled out an electrical malfunction
16 from a surrounding appliance such as a coffee
17 maker or electrical outlet, and that he ruled out
18 a malfunction of a surrounding lawnmower or weed
19 eater or lawnmower, because the garage had --
20 it's a landscaping business. It had gasoline --
21 it had gasoline-powered equipment in it.

22 Now, can I reply as to the gatekeeper
23 thing a minute? He said you're the gatekeeper to
24 decide what evidence comes in and what evidence
25 comes out.

1 THE COURT: Sure.

2 MR. GOLDSTEIN: Well, that's the
3 *Daubert* standard, not the South Carolina state
4 standard.

5 However, it's interesting, in thinking
6 about this, and I don't know if you know this,
7 but the people who write the South Carolina Rules
8 of Civil Procedure, they're considering changing
9 the rules right now.

10 There is a proposal to change the rule
11 right now to require -- to bring us up to the
12 federal standard and to require expert witnesses
13 and their testimony be disclosed at a Rule 16
14 pretrial conference, but that's not the rule now.
15 That's a proposed new rule. I thought it was
16 kind of interesting that that's under
17 consideration right now.

18 Mr. Ott says that he -- there are three
19 factors Your Honor has to consider: whether or
20 not the expert's testimony will assist the jury,
21 whether or not he's qualified, and whether or not
22 the science is reliable.

23 I think he's conceded that if it's
24 admitted that it will assist the fact finder,
25 he's also told us that he admits that Greene and

1 Norris are qualified, and where he's challenging
2 it is whether or not the science is reliable.

3 I kind of anticipated that, so I
4 brought my high school physics book with me. And
5 I can assure you that Ohm's law is comparing --
6 it's a tenth grade physics textbook, and it talks
7 about how resistance is caused and how resistance
8 is increased based on the amount of material that
9 it's flowing through and all these other factors.

10 So if it's not reliable science,
11 somebody better let the tenth grade physics
12 teachers know, because there it is right there.
13 It's about as reliable as it gets.

14 The only scientific principles
15 Mr. Greene is relying on is Ohm's law and, to
16 some extent, to his experience on investigating
17 fires, as is Mr. Norris.

18 And you've got to remember, they don't
19 like to admit it, but, you know, Ford did issue a
20 recall for this truck, saying bring it in, your
21 speed deactivation control switch can -- can I go
22 up there and read you the paragraph? Can I just
23 -- what it says it'll do? It says it'll smolder
24 or burn ---

25 THE COURT: And it does, Mr. Goldstein.

1 MR. GOLDSTEIN: Okay.

2 THE COURT: We're dealing with
3 Mr. Greene.

4 MR. GOLDSTEIN: All right. Well, his
5 testimony is certainly capable of assisting the
6 finder of fact, the jury in this case. He's
7 certainly qualified in the science on which he is
8 relying. It is no different than the most
9 fundamental tenth grade physics textbook on Ohm's
10 law.

11 THE COURT: Based upon counsels'
12 argument and my review of the cases that you've
13 cited, as well as the limited excerpts of
14 Mr. Greene's deposition that you provided, I'm
15 declining your -- declining to exclude
16 Mr. Greene's testimony at this time, assuming
17 that the proper foundation is laid.

18 Next motion.

19 MR. OTT: Your Honor, the next motion
20 is very similar, and given the Court's ruling ---

21 THE COURT: Is that the testimony of
22 Mr. Norris?

23 MR. OTT: That's correct, Your Honor.

24 THE COURT: Would that be the same,
25 basically the same argument?

1 MR. OTT: It has to do a lot with the
2 same argument, Your Honor. Admittedly,
3 Mr. Norris has a greater wealth of knowledge. He
4 actually did see the fire scene, and he does have
5 an opinion as to the origin.

6 Our motion as to Chief Norris has to do
7 with the methodology. And particularly what I
8 was getting to in my reply and what I should have
9 discussed in the opening as to the motion for
10 Mr. Greene concerning methodology followed, there
11 are standards that govern and are authoritative
12 in the fire investigation field. They are the
13 NFPA 921, and there is even something even more
14 specific that NHTSA came out with, the Go/No-Go
15 that I've already gone over.

16 Mr. Norris admits that he did not
17 follow the authoritative standard of 921, that
18 that was not the purpose of his investigation on
19 this particular day.

20 Back then he was simply the fire chief,
21 and he came out there and spent 30 minutes, then
22 went on his way after telling the plaintiff to
23 preserve the vehicle, but he did not do a full
24 blown fire investigation analysis into its origin
25 and/or cause under NFPA 921 or under the NHTSA

1 Go/No-Go framework.

2 He said that simply was not my role, I
3 was there to make sure the fire was extinguished,
4 that there was no criminal activity, and from
5 there my job was done and I went on my way.

6 Now, subsequent to this fire, he had
7 become a fire investigator, and he detailed for
8 us in his deposition about the different approach
9 you would have as a fire investigator to
10 determine cause and what he did on this
11 particular day.

12 On this particular day of the fire,
13 Your Honor, he didn't even see the switch. He
14 can't tell us what its condition was, much less
15 do any test on it.

16 So he arrives at an opinion that,
17 again, is not based on the applicable
18 methodologies recognized as authoritative in the
19 fire investigation field, both NFPA 921 and the
20 NHTSA Go/No-Go analysis.

21 And his ultimate opinion is subject to
22 the same criticism of Mr. Greene's; and that is,
23 because of their spoliation of the evidence, both
24 the truck and the part, there is no way to test
25 his opinion, and because there's no way to test

1 his opinion, there's no way to subject it to peer
2 review, and because there's no way to subject it
3 to peer review, there's no way to determine the
4 potential error rate inherent in his opinion.

5 And the remaining aspects of spoliation
6 just come in as evidence of fairness, but I will
7 concede that that likely goes to its
8 admissibility -- or excuse me -- it's weight, not
9 its admissibility.

10 But, ultimately, when you break it
11 down, based on the very simplistic methodology,
12 not as a strike against Chief Norris, that just
13 wasn't his role at the scene, but he did not
14 follow the detailed fire investigation
15 methodology when he approached this fire, and
16 essentially his opinions after the fire are
17 subjected to the same criticisms as we have
18 regarding Greene, that it does not meet any of
19 the *Jones* factors to make it a reliable and thus
20 admissible expert opinion.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 Mr. Goldstein.

24 MR. GOLDSTEIN: Your Honor, I would
25 just make the same argument. I would think -- I

1 don't want to -- Mr. Norris -- their criticism of
2 Mr. Greene was that he wasn't on the scene, he
3 just relied on photographs to make his opinion,
4 but Mr. Norris was actually there and actually
5 made an investigation on the scene and arrived at
6 an opinion even on the scene as to what caused
7 the fire. So if Mr. Greene is sufficient at
8 least at this stage to give testimony, Mr. Norris
9 is a far stronger candidate to give testimony.

10 And I was going to read you portions of
11 his testimony, because I asked him, if he had the
12 part, what percent certainty would he be, and I
13 think he said a hundred percent. And I said,
14 well, without the part, how certain are you, and
15 I think he said ninety percent. But this
16 deposition doesn't have a word index, which makes
17 it a little harder.

18 THE COURT: Anything additional,
19 Mr. Ott?

20 MR. OTT: No, Your Honor. Thank you.

21 THE COURT: Based upon my review, it
22 appears that Mr. Norris was with the North
23 Charleston Fire Department approximately 32
24 years. Based upon my cursory reading of the
25 deposition, as well as the testimony presented by

1 counsel, I am declining to grant your motion to
2 exclude the causation opinion of Benjamin Norris
3 provided that a proper foundation is laid during
4 the trial.

5 Next motion.

6 MR. OTT: The next one, Your Honor, is
7 a general motion to exclude evidence of other
8 incidents. I believe it's titled Motion in
9 Limine to Exclude Evidence of Other Accidents,
10 Incidents, Lawsuits and/or Settlements Involving
11 Ford Vehicles.

12 THE COURT: Okay. Was that filed this
13 morning?

14 MR. OTT: I'm sorry?

15 THE COURT: Was that filed this
16 morning?

17 MR. OTT: Yes, ma'am. Your Honor, this
18 is just a cursory motion that we file in these
19 cases to make sure that there is no testimony of
20 other fires that were not -- with no foundation
21 being laid.

22 Whaley vs. CSX, which is a 2005 Supreme
23 Court case, talks about substantial similarity
24 requirements for other incidents or evidence of
25 other accidents to come into evidence. And they

1 set forth that in order for other accidents or
2 other incidents or other lawsuits to come into
3 evidence there has to be a foundation of
4 substantial similarity laid which in effect
5 requires a mini trial of the other incident as it
6 relates to the trial we're here about today.

7 I don't think Mr. Goldstein identified
8 any witnesses to talk about other incidents, but
9 we just wanted to make the Court aware of that
10 and have that excluded for the reasons set forth
11 in our motion.

12 THE COURT: Mr. Goldstein, are you
13 planning on calling any other accidents,
14 incidents, or lawsuits involving a similar Ford
15 vehicle?

16 MR. GOLDSTEIN: Yes and no. Maybe it's
17 really no and yes. No, I'm not calling any to
18 prove my case. The only way that they will come
19 in or be mentioned is that both witnesses will
20 testify that they have acquired experience in
21 switch control deactivation switch cases by
22 investigating other Ford speed -- so I'm not
23 going to offer those cases for their merits and
24 try to prove my case through those cases.

25 But at the same time, I don't know that

1 I -- what they're arguing is kind of circular. I
2 don't want to have my experts' expertise stripped
3 away by not being able to say, well, yeah, I've
4 seen this before, it's not uncommon.

5 And after all, to be fair to them, I
6 mean, Ford recalled over 700,000 of these cars.
7 So it's not like they're not aware, but -- so
8 that's why I said no and yes. I'm not going to
9 try to prove -- I'm not going to try to prove my
10 case through other similar fires, but both of my
11 experts are going to say that they have
12 investigated other speed control deactivation
13 switch fires and that's how they know what the
14 problems are.

15 So, you know, I don't want to sandbag
16 him and say it ain't going to come up and then
17 you send me to jail for a night because it came
18 up, but I'm not going to make it a focus of my
19 case. I'm not going to offer it as evidence that
20 there was a speed control deactivation switch
21 fire in this case. I'm going to prove this case
22 on its own merits.

23 Does that make -- I'm not making sense.
24 I can tell from the look on your face.

25 THE COURT: You are making sense.

1 MR. GOLDSTEIN: Very good.

2 THE COURT: Mr. Ott, your response.

3 MR. OTT: Your Honor, you know, if
4 that's the case, then it turns into a Rule 403
5 argument that the prejudice outweighs the
6 probative value. And the same thing, the other
7 accidents or other incidents that these people
8 might have investigated, they're required to be
9 proven to be substantially similar.

10 And, I mean, this is a unique case to
11 where the fire occurred over a weekend apparently
12 when the vehicle was in a warehouse full of lawn
13 equipment, and there are other circumstances
14 surrounding the fire that are different in every
15 case, and I think every -- every expert on cause
16 and origin will say that every fire is different.

17 There are multiple causes of fire, and
18 without a foundation that the other incidents are
19 substantially similar, then they're not, and they
20 should be excluded because they're prejudicial
21 and they outweigh the probative value. And then
22 again ---

23 THE COURT: But Mr. Goldstein is not
24 going to use it. All he's going to do is allow
25 the jury to understand how his two experts

1 received their expertise and their ability to
2 articulate to the fact finders that they have had
3 similar cases and why and where they've had
4 similar cases through the investigation of Ford
5 vehicles.

6 MR. OTT: And that's when, I guess, the
7 element to my Rule 403 argument that, you know,
8 that may be the purpose to do it, but the
9 prejudice there outweighs the probative value, in
10 that, you know, the jury hears, oh, well, this
11 has happened in other vehicles and this and that,
12 and it's going to tend to -- it may tend to prove
13 that this fire was caused by the vehicle, and
14 that's certainly the contested issue in this case
15 because the vehicle is no longer here to be
16 tested.

17 And so without being able to test that
18 vehicle and confirm this, you know, we don't want
19 the jury to just say -- to be misled or confused,
20 under Rule 403, that, you know, if this has
21 happened to other vehicles, then it probably
22 happened here too. And I think that's the
23 danger, and that's what we're concerned about.

24 MR. GOLDSTEIN: Your Honor, can I
25 respond very briefly?

1 THE COURT: Briefly.

2 MR. GOLDSTEIN: Okay. This will be
3 really brief. Ford Motor Company thinks that
4 these cases are so similar that in 2007 the
5 United States Judicial Panel on Multi-District
6 Litigation issued an order consolidating all Ford
7 deactivation control switch fire cases filed in
8 federal court anywhere in the United States, all
9 in the Eastern District of Michigan. There are
10 literally hundreds.

11 This is a published order by the -- so,
12 you know, Ford comes into federal court on the
13 one hand and they say, look, all these fires are
14 the same, we don't want to have to defend them
15 all over the country, we want them all in
16 Detroit. So they get their wish in a published
17 order, and now they want to come in here and say
18 that they're not similar. I mean, come on.

19 But I'm not going to prove my case
20 through these other fires. The only way it's
21 going to come up is both of these experts are
22 going to say that they have investigated other
23 Ford deactivation -- speed control deactivation
24 switch fires. That's the only thing. I'm not
25 going to get into the merits of what happened in

1 those cases.

2 THE COURT: I'm going to take a minute
3 on that, on that ruling. What's your next
4 motion?

5 MR. GOLDSTEIN: Your Honor, while
6 you're going -- do you want a copy of the order?

7 THE COURT: No. No.

8 MR. MARSHALL: Your Honor, the next
9 motion, if you're ready...

10 THE COURT: Ready.

11 MR. MARSHALL: --- involves the recall
12 in this case. I think we have two motions, one
13 specifically for a recall notice that apparently
14 was mailed to Mr. Shelby for a different vehicle
15 to Mr. Shelby's home and a broader motion to
16 exclude this recall in general.

17 The motion to exclude the recall in
18 general is based primarily on three parts. First
19 is a South Carolina Court of Appeals case, *Bragg*
20 *vs. Hi-Ranger* which is a 1995 case that provides
21 a substantial amount of products liability law in
22 this state. And I'll be glad to pass this case
23 up to Your Honor if you don't have a copy.

24 THE COURT: If you have an extra copy.

25 MR. MARSHALL: Sure.

1 (Mr. Marshall tenders document to the
2 Court.)

3 MR. MARSHALL: Under the *Bragg* case,
4 Your Honor, it becomes clear that the products
5 liability law in this state requires that a
6 product be judged at the time it is manufactured
7 and sold.

8 Like I said earlier, with punitive
9 damages, that's the date there has to be some
10 negligent conduct. That's the date the defect
11 has to exist. And some language from that case
12 says:

13 "A product must be measured against the
14 standard existing at the time of sale or against
15 customer expectation held at the time of sale.
16 Hindsight opinions by experts suggesting that
17 more should have been done are insufficient to
18 discredit the conclusion that the manufacturer
19 met the standard of care."

20 And so it goes to the fact that the
21 product is to be judged when it's manufactured
22 and when it's sold. In this case, that was in
23 November of 1995. Anything after that date,
24 including this recall, is after that date.
25 Therefore, it should be excluded from evidence

1 under this *Bragg* case.

2 And *Bragg* goes further and it talks
3 about the reason behind this rule, and it talks
4 about other cases and other states that have
5 adopted this similar thing, and it cites a Tenth
6 Circuit case and affirms a jury charge saying
7 that there is no post-sale duty to warn in South
8 Carolina.

9 And, specifically, it says: "A
10 manufacturer has no duty to notify previous
11 purchasers of its products about later developed
12 safety devices or to retrofit those products if
13 the products were not defective under the
14 standards existing at the time of manufacture or
15 sale."

16 So the first part of our motion: to
17 exclude this to all post-manufacture evidence,
18 including any design changes to the vehicle or to
19 the switch, and additionally this recall that
20 came out in 2006 after the date of this fire.

21 And that leads into the second reason
22 that we're arguing to exclude this recall as
23 post-manufacture evidence. It's Rule 407 of the
24 South Carolina Rules of Evidence which prohibits
25 the introduction of subsequent remedial measures.

1 And this follows the same line as the
2 *Bragg* case, and it says that when after an event
3 measures are taken which would make an event less
4 likely to occur, subsequent measures are not
5 admissible to prove negligence or culpable
6 conduct in connection with the event.

7 And that's the general sense that, you
8 know, post-manufacture evidence is not admissible
9 to show negligence, and that's what plaintiffs
10 allege in this case.

11 And the policy reasons behind that are
12 the fact that we want manufacturers to issue
13 recalls. If they find something wrong with a
14 vehicle, they want to -- they want to issue
15 recalls to protect the public and not be held
16 accountable for doing what they should do, or if
17 they need to recall vehicles, fix them to where
18 they do, and therefore they shouldn't be held
19 accountable for plaintiffs to call into evidence
20 and saying, you know, you should have known
21 better.

22 Under Rule 407, it does say that
23 evidence of subsequent remedial measures can be
24 admissible to prove other parts such as
25 ownership, control -- I think feasibility is a

1 precautionary measure -- and those kind of
2 things, and I don't think that the purpose of
3 introducing a recall in this case satisfies one
4 of those.

5 I think that plaintiff wants to use
6 this recall to show (a) there was a defect in the
7 vehicle, (b) the defect caused this fire, and (c)
8 that the recall shows negligence. And that's
9 just not proper under the rule.

10 In *Whaley vs. CSX*, which is a 2005
11 Supreme Court case, the Supreme Court affirmed or
12 granted a new trial in part based on the
13 erroneous admission of such remedial measures.
14 It held that Rule 407 bars the introduction of
15 any change, repair, or caution under the
16 plaintiff's theory that would have made the
17 accident less likely to happen, unless it's
18 offered for another purpose.

19 And it further finds and it focuses on
20 the literal language of the rule to affirm -- or
21 to reverse the introduction of such remedial
22 measures.

23 In that case, it was a site line case
24 of where the railroad company had cut a clear --
25 clear way to add a new site, and they wanted to

1 introduce that into evidence. And it has the
2 same purpose. You don't want to hold the
3 railroad liable for doing what they should have
4 done, and that's what the case was.

5 And under *Bragg*, post-manufacture
6 evidence is not admissible through defect through
7 negligence. A product is to be judged at the
8 time of its manufacture and sale, in this case
9 1995.

10 Under Rule 407, this recall in this
11 case is a subsequent remedial measure, and that's
12 where the second motion in limine regarding the
13 recall notice in this case comes in.

14 Mr. Shelby received a recall notice for
15 a 2001 Ford Expedition, and that was a different
16 vehicle. It's not this vehicle. Plaintiff is
17 going to try to use that recall and introduce it
18 into evidence and say there was a recall of this
19 Expedition. It says that there were -- that it's
20 also a recall for certain 1994 to 2002 Ford F-250
21 trucks with a gross vehicle weight of less than
22 8500 pounds; and, therefore, he's saying that
23 that sentence in the recall notice for a
24 different vehicle shows that there was a recall
25 for this vehicle, it shows there's a defect in

1 this vehicle, it shows that Ford was negligent in
2 designing this vehicle.

3 And that's just -- that's not proper
4 for -- first of all, the vehicle that we're here
5 about today has a gross vehicle weight of over
6 8500 pounds, and we have an affidavit from
7 Mr. Olson who indicates that.

8 Therefore, the recall notice that the
9 plaintiff is going to attempt to introduce into
10 evidence and rely on is dated September of '05
11 which applies to the Expedition that his wife
12 owns, or his former wife owned or owns now or
13 owned at one point, and also F-250s with a
14 different gross vehicle weight.

15 So we would ask to exclude the recall
16 in general and then specifically this recall
17 notice because the recall notice isn't probative
18 to any evidence in this case. It doesn't say
19 that there's a defect in the subject vehicle. It
20 doesn't even apply to the subject vehicle.

21 The fact is that the recall was
22 extended after the date of this fire, in August
23 of 2006. The fire happened in September '05.
24 And, therefore, since the recall was extended for
25 this vehicle after the fire, it becomes a

1 subsequent remedial measure under Rule 407 and
2 should be excluded.

3 The recall notice for the Expedition is
4 dated September 2005 which is the same month as
5 the fire, but then again, it doesn't relate
6 specifically to the vehicle that we're here about
7 today.

8 And so we're asking that it be excluded
9 under the *Bragg* case, under Rule 407, and then
10 additionally under Rule 403 that even if this
11 recall is allowed to come into evidence to prove
12 some other factor under Rule 407, we would prove
13 that, you know, that creates unfair prejudice,
14 undue prejudice against Ford, and has the
15 possibility of misleading and confusing the jury
16 in the distinction as to its being offered to
17 show this, but you can't use it to show this.
18 And there's that distinction that we're concerned
19 about under Rule 403, and we ask that it be
20 excluded.

21 THE COURT: Mr. Marshall, can you
22 distinguish the *Club Car* case which allowed the
23 subsequent remedial measure to be introduced as a
24 statement against interest?

25 MR. MARSHALL: I'm not familiar -- I

1 haven't seen that case. I haven't reviewed that
2 in preparation for this. If it's an admission --
3 I think that in this case you'd be showing the
4 recall notice that the plaintiff is trying to use
5 as an admission.

6 THE COURT: Uh-huh.

7 MR. MARSHALL: I think that would be an
8 admission for the 2001 Expedition, that it ought
9 to be shown, but it doesn't say anything about
10 this case. And by its own terms, it does not
11 apply to this vehicle because it says with a
12 gross vehicle weight less than 8500 pounds. This
13 vehicle has a gross vehicle weight of over 8500
14 pounds. Therefore, it's not included in the
15 recall population as stated in the recall notice.

16 THE COURT: When did the recall notice
17 go out for this particular vehicle?

18 MR. MARSHALL: For this vehicle you
19 mean?

20 THE COURT: For the '96 truck.

21 MR. MARSHALL: The F-250 was included
22 -- what happened was Ford opened an investigation
23 in late 2004 with the National Highway Traffic
24 Safety Administration, NHTSA, in 2004. It issued
25 a recall in January of 2005 for certain vehicles,

1 and they extended that recall in September of
2 2005 for additional vehicles, including the
3 Expedition that the recall notice references, and
4 then again in August of '06 they expanded that
5 recall to include this vehicle.

6 And so if a recall notice was mailed,
7 it would have been mailed in August of 2006 which
8 is eight to ten months after the date of this
9 fire or eleven months after this fire, and
10 therefore it is a subsequent remedial measure.

11 You know, the 2001 Expedition is not
12 the issue in this case. So, therefore, if it's
13 going to show an admission that Ford has a defect
14 in that vehicle, it's not probative to anything
15 regarding this vehicle.

16 THE COURT: But the recall notice that
17 was sent out in August of '06 would be, could be.
18 It has to do with the subject vehicle and could
19 be construed as a statement against interest
20 under *Club Car*.

21 MR. MARSHALL: I mean, I don't have a
22 copy of that, and we haven't seen a copy of that
23 recall notice, and so that's not being made an
24 exhibit in this case. It's just a notice of
25 another vehicle. I think that's another issue

1 whether that recall notice that we don't have a
2 copy of says something, but this vehicle was not
3 under the recall notice that was provided. Am I
4 making sense?

5 THE COURT: I hear what you're saying.

6 Mr. Goldstein, there's only one recall
7 notice that you're going to provide?

8 MR. GOLDSTEIN: Two. Plaintiff's
9 exhibit -- and the court reporter has them.
10 Plaintiff's exhibit three is the notice of recall
11 that was actually mailed to Stan Shelby that he
12 got about three weeks after the fire that
13 includes in the population of cars being recalled
14 his '96 truck.

15 And then also you have up there with
16 the court reporter plaintiff's exhibit 17 which
17 is the actual NHTSA recall dated September 12th,
18 2005, for this particular truck. The court
19 reporter has it, and it's marked plaintiff's
20 exhibit 17. And I got that document from their
21 expert's affidavit. So I'm not -- I'm not quite
22 sure.

23 But I promise you that plaintiff's
24 exhibit four was mailed to Stan Shelby at his
25 Park Lane address, or addressed to his wife, at

1 the Park Lane address on the 2001 Expedition.
2 But if you look down in the next paragraph it
3 says this recall includes the following vehicles,
4 and there is his '96 F-250.

5 And if you look at plaintiff's exhibit
6 17, that's the actual official NHTSA, National
7 Highway Traffic Safety Administration, that's the
8 official NHTSA recall dated September 12th, 2005,
9 which is marked plaintiff's exhibit 17.

10 So, and the *Reiland* case says, and I
11 quote:

12 "While not admissible to prove damages,
13 evidence of subsequent remedial measures is
14 admissible for other purposes such as to rebut or
15 impeach a witness, to explain measurements, maps,
16 photographs, and the like, to show the conditions
17 existing at the time of the accident, to prove
18 the cause of the injury, to establish the
19 defendant's control of the premises of the
20 instrumentality involved, to demonstrate the
21 feasibility of taking certain precaution."

22 The reason it's important in this case
23 is one that we haven't even talked about. As
24 Your Honor well knows, the standard jury charge
25 on products liability is that the first element

1 that the plaintiff must prove is that the alleged
2 defective item was in the same condition as it
3 was when it left the manufacturer. How else can
4 you prove that other than through that recall
5 notice? So that's yet another reason why the
6 recall notice is admissible.

7 THE COURT: Mr. Goldstein, how is the
8 2001 Expedition -- that recall notice relevant?

9 MR. GOLDSTEIN: If you look down in the
10 next paragraph, it said that the -- let me see if
11 I have a copy in front of me so I can direct Your
12 Honor to it. It says in the next paragraph "the
13 following vehicles are affected by this recall,"
14 and Mr. Shelby's 2006 Ford F-250 is included in
15 that population listed there.

16 So even though it was mailed to him
17 with regard specifically to the 2001 Expedition,
18 it also contains within it a notation that the
19 recall population includes his pickup truck, as
20 well.

21 I don't have an extra copy in front of
22 me or I'd take you right to the paragraph. So,
23 but the second or third paragraph contains the
24 population of affected vehicles.

25 THE COURT: Mr. Marshall indicates that

1 that would not be in that population because the
2 incident vehicle is over 8500.

3 MR. GOLDSTEIN: If you read that
4 affidavit supplied by their expert, the original
5 affidavit was in March, and then thereafter in
6 August he filed a supplemental affidavit
7 correcting that admission and saying that it was
8 contained within the population. August of 2008.
9 I'm sorry.

10 There are two affidavits filed by their
11 expert. The first affidavit says that it wasn't
12 included in the population. The second affidavit
13 says, oh, I made a mistake, it was included in
14 the population.

15 THE COURT: All right.

16 MR. MARSHALL: Your Honor, if I may, I
17 think that that's backwards. Mr. Olson here
18 submitted an affidavit in support of our motion
19 for summary judgment in talking about this, and
20 really it was geared toward other issues in our
21 motion for summary judgment.

22 Now, in the affidavit we had a
23 paragraph that said that the recall was expanded
24 in September of '05 to this vehicle. I think
25 that getting ready for trial Mr. Olson noticed,

1 you know, hey, the gross vehicle weight is more
2 than 8500 pounds, I was wrong, I need to correct
3 that.

4 And so we -- Mr. Olson submitted a
5 supplemental affidavit, asking that his original
6 one be corrected regarding that date. And it was
7 just a simple, you know, I didn't pay close
8 enough attention or I didn't see that, the 8500
9 gross vehicle weight distinction.

10 I think it's undisputed that this
11 vehicle was over 8500 pounds, the gross vehicle
12 weight. It's a F-250 Super Duty truck, and
13 therefore by its own terms -- and Mr. Goldstein's
14 characterization of the language in the recall
15 notice is the exact concern that we have.
16 Because rather than reading from it, he says --
17 he misstates it and says that it applies to this
18 vehicle. And that's not the case. By its own
19 terms, it does not apply to this vehicle.

20 The September 2005 recall only applied
21 to vehicles with a gross vehicle weight of less
22 than 8500 pounds, and it does not say -- this
23 notice does not say plaintiff's vehicle was
24 included or not included. It applies to the 2001
25 Expedition that has a vehicle identification

1 number there. That's why he received this
2 notice.

3 Then going back to Your Honor's
4 question about the admission, I think that the
5 crux of that is that would be an exception if we
6 were arguing that it should be out on hearsay,
7 but this is more of a substantive evidentiary
8 issue. It shouldn't come in under the law. And
9 therefore if it is an admission, it doesn't go --
10 it may be subject to hearsay, but under the --
11 you know, it's not relevant, it doesn't show
12 anything about this vehicle, and under *Bragg* and
13 407 it should be excluded.

14 So going back, I think that it's clear
15 that this vehicle was included in the August of
16 '06 recall. Therefore, this recall notice by its
17 own terms does not apply and therefore should not
18 be shown to the jury or allowed into evidence in
19 this case.

20 THE COURT: Well, plaintiff's exhibit
21 17 references the letter of September 2005 in
22 which it says: "By letter dated September 12,
23 2005, owners were instructed to return their
24 vehicles to their dealers to have the speed
25 control deactivation switch disconnected."

1 MR. MARSHALL: I have not seen a copy
2 of that exhibit.

3 (Mr. Marshall reviews exhibit.)

4 MR. MARSHALL: Your Honor, I believe
5 this is a print-off from the internet, the NHTSA
6 Office of Defect Investigation website.

7 And I think how this website works is
8 you type in a vehicle type, a 1996 Ford F-250,
9 and you don't distinguish between the gross
10 vehicle weight or any other characteristics, and
11 then it pulls up all of the recalls that may be
12 applicable to that vehicle.

13 And in this case -- and it says this is
14 a 1996 F-250, and there's no distinction between
15 what the gross vehicle weight is.

16 It has a speed control recall September
17 of '05, an exterior lighting recall in May of
18 2006. This is just a list of recalls that may be
19 applicable to this vehicle. I don't think this
20 list is specific to this particular vehicle.

21 And I think that's the -- and that goes
22 back to the point, yes, some vehicles were
23 recalled in September of 2005, the F-250s with a
24 gross vehicle weight of less than 8500 pounds.

25 This document also has the August of

1 '06, I believe -- it has a July 27, 2006, which
2 is a speed control. And this is -- so under this
3 document, there's two or three speed control
4 recalls, and it doesn't say which one of those
5 applies to which vehicles.

6 So, therefore, we would object to this
7 exhibit, as well, because it doesn't show
8 specifically which one of these applies to the
9 subject vehicle.

10 And it's uncontradicted that this
11 vehicle has a gross vehicle weight of over 8500
12 pounds. Therefore, it's included in the August
13 2006 recall.

14 MR. GOLDSTEIN: Your Honor, the vehicle
15 actually weighs considerably less, 8,850
16 pounds ---

17 MR. MARSHALL: And, Your Honor, if I
18 may, my client just reminded me the gross vehicle
19 weight doesn't apply to the weight of the
20 vehicle. It applies to the total capacity of
21 that vehicle to carry occupants and to tow. So I
22 apologize for that.

23 THE COURT: Anything additional,
24 Mr. Goldstein?

25 MR. GOLDSTEIN: No, ma'am. I think

1 we've pretty much covered it.

2 THE COURT: Your client received a
3 letter specifically dealing with the truck?

4 MR. GOLDSTEIN: I don't think so. No,
5 ma'am.

6 THE COURT: Plaintiff's exhibit 17 you
7 printed off the internet yesterday, is that
8 correct, if it's dated September 1st?

9 MR. GOLDSTEIN: Yes. Because -- yes.
10 I had to stop and think about that a second.

11 THE COURT: I'm going to re-read the
12 *Bragg* case and make a ruling.

13 Your next motion?

14 MR. MARSHALL: I think the last two --
15 and that was two motions we had together there,
16 the recall in general and the recall notice for
17 the Expedition. The last two motions are
18 similar, as well. They both relate to damages in
19 this case.

20 The first one is, this case the
21 plaintiffs allege various items of property
22 damage, including the vehicle itself: the
23 vehicle itself, the lawn equipment, office
24 equipment, repair to the building, rental
25 equipment, and then business interruption.

1 This motion is to exclude the plaintiff
2 from recovering the value of the vehicle itself.
3 So it relates only to that, to the -- and an
4 affidavit submitted by the plaintiff for
5 Mr. Shelby, he estimates the value of the vehicle
6 as \$8,000. And so we're moving to exclude the
7 plaintiff from litigating -- from recovering the
8 value of the vehicle solely based on the loss
9 doctrine.

10 This is an issue that we talked about
11 earlier this morning, and the economic loss
12 doctrine in South Carolina has several
13 exceptions, and it's got some specific ones for
14 the residential home building where a special
15 relationship exists between the parties and
16 asbestos contamination in buildings, and none of
17 those exceptions apply.

18 Now, there is an exception for other
19 property. And so when there's other property
20 damage, there's an exception in the economic loss
21 doctrine that allows a person who buys a product
22 that ends up not working or -- and loses the
23 value of that product. The economic loss
24 doctrine says that his recovery is limited to
25 contract law warranty.

1 The Supreme Court at this point has not
2 addressed the other property exceptions to the
3 economic loss doctrine to regard to when there is
4 some -- that the product itself is destroyed and
5 there is some amount of other property. Other
6 courts have done that. The Supreme Court of the
7 United States has.

8 And in most of these cases, it is a
9 small amount of other property that a plaintiff
10 tries to avoid application of the economic loss
11 doctrine based on the fact that there were a few
12 items of personal property in the vehicle; and,
13 therefore, so if the vehicle catches fire and
14 burns and he left his coat in the -- or his
15 jacket in the vehicle, then he can recover both
16 the jacket and the vehicle in tort.

17 And that's what we're arguing against.
18 Just the fact that there was other property or
19 that jacket in there doesn't mean he can recover
20 for the value of the vehicle in tort. He can
21 still pursue any contract claim he's ever held, a
22 breach of warranty and things of that nature, but
23 he can't recover in tort.

24 I heard a very good analogy yesterday
25 actually on this topic regarding a refrigerator.

1 A refrigerator breaks. The food goes bad inside.
2 If I buy a refrigerator and the refrigerator
3 breaks and the food goes bad, I can't sue the
4 refrigerator manufacturer for my damages for this
5 food because that -- that's still a warranty. If
6 the refrigerator broke, then that's the damage.
7 You know, without that distinction, there
8 basically is no economic loss doctrine.

9 Now, I feel like I do need to talk
10 about the case that was decided last week by the
11 Supreme Court. And I don't think that it
12 addresses the other property exception. However,
13 we don't have it at issue in this case. But it
14 does say that you can recover -- a plaintiff can
15 recover if there's a substantial threat of harm.
16 And in this case, we would submit that that's not
17 the case in this case.

18 This fire, there was nobody in the
19 vehicle. There was nobody in the building. And
20 the nature of this alleged defect is such that a
21 fire in certain vehicles, no one in the -- they
22 don't occur when somebody's inside the vehicle.

23 And so the substantial threat, I think
24 the court -- the language the court used, you
25 know, stressed that it has to be significant,

1 substantial, imminent, and it again had several
2 cautions that it did not want to make the
3 manufacturer the insurer of the products it
4 sells.

5 And that's just the basic underpinning
6 of the rule, that when I buy something I can
7 negotiate the price of that product and negotiate
8 any warranty that I receive. If that product
9 goes bad, I've got the warranty remedies.

10 Now, if there's other property damage,
11 as well, I shouldn't be allowed to recover those,
12 the other property and the value of the product.

13 As I said, the *Circuit Benning*
14 (phonetics) case, that's a United States Supreme
15 Court case that interprets the federal version of
16 the economic loss doctrine which is similar to
17 South Carolina.

18 And, in addition, we've cited a Texas
19 case that holds that just because there's other
20 property damage it does not transform a warranty
21 ~~cause of action into a tort cause of action, in~~
22 that the plaintiff's recovery for other property
23 is in tort, but the recovery for the vehicle or
24 the product itself remains in warranty.

25 So that's why we're asking to limit the

1 plaintiff from recovery. That's certainly an
2 amount, whatever number that is, for the value of
3 the vehicle itself in this case.

4 THE COURT: Mr. Goldstein.

5 MR. GOLDSTEIN: Judge, I'll be less
6 than 30 seconds. All I can tell you is the
7 *Colleton Preparatory Academy* case that we already
8 discussed in chambers says that:

9 "The purpose of the economic loss rule
10 is to define the line between tort and contract
11 recovery. This rule exists to assist in
12 determining whether contract or tort theories are
13 applicable in a given case. The economic loss
14 rule generally applies. There is no tort
15 liability for a defective product if the product
16 damages only itself. Where a purchaser's
17 expectations of a sale are frustrated because the
18 product he bought is not working properly, his
19 remedy is said to be in contract alone where he
20 suffered only economic losses.

21 "However" -- and here it is, this is
22 the key -- "where a defective product harms other
23 property or causes physical injury, the losses
24 are more than merely economic. The economic loss
25 rule is inapplicable and a remedy lies in either

1 tort or contract."

2 That says it all.

3 THE COURT: Your response,
4 Mr. Marshall.

5 MR. MARSHALL: In *Preparatory Academy*,
6 the court is interpreting and largely citing the
7 *Kennedy* case which is a prior case that was the
8 standard before the economic loss doctrine in
9 this state.

10 The quote that used to be or at least
11 still is says that tort liability only lies where
12 the damage done is to other property or personal
13 injury. And so that -- that might -- remains
14 unchanged from *Kennedy* that says you can only
15 have tort recovery when there is damage to other
16 property. And in that case, you can only recover
17 for the value of the property.

18 But under the economic loss doctrine,
19 you still can't recover for the value of the
20 product. You still have to -- contractually at
21 least. Now, if there was some other contractual
22 or some duty outside the contractual duty, then
23 they could, but there is none in this case.

24 So we would submit that the economic
25 loss doctrine should prohibit the plaintiff from

1 recovering the value of the vehicle no matter if
2 it's the same -- other property in addition to
3 the vehicle.

4 THE COURT: All right. Are those all
5 your motions?

6 MR. MARSHALL: I think we have one more
7 after that. This is just the damages in general,
8 regarding the amount of damages or the measure of
9 damages.

10 As I said, the plaintiff is alleging
11 damage to personal property, office, and lawn
12 equipment. The law of this state is very clear
13 that the plaintiff cannot receive more than the
14 fair market value of the property at the time of
15 the fire or at the time of the loss.

16 As a general rule, the measure of
17 damages for injury to personal property is the
18 difference between the market value of the
19 property immediately before and its value
20 immediately after the injury.

21 Therefore, the proper measure of
22 damages is, first, the cost to repair that
23 property. If you can't repair it, then you get
24 the value of that property at the time of the
25 loss. Only if there is no market for such value

1 can you use the replacement cost of that value,
2 and any advanced -- any sentimental value
3 attributed by the plaintiff has to -- it has to
4 be excluded under the law.

5 And in this case, there is damages to
6 office equipment and lawn equipment, and we would
7 ask the plaintiff be required to prove and only
8 recover the damages that represent the actual
9 cash value of the property at the time of the
10 fire, you know, and not the replacement cost.

11 I mean, it's clear that a
12 three-year-old weed eater is worth less than a
13 brand new weed eater. And so you can't recover
14 -- allowing replacement cost to govern the amount
15 of damages would put the plaintiff in a better
16 position. And so at that point -- and that's why
17 the law requires proof of the actual cash value
18 at the time.

19 Now, the plaintiff then produced some
20 inventory lists of personal property that were
21 damaged in this fire, and there were some that
22 were handwritten and some that were produced by
23 his insurance company or created by him in
24 conjunction with his insurance company.

25 And they have amounts. And, for

1 instance, the amount for the office equipment,
2 the replacement cost is \$4,320, and that's the
3 amount that the plaintiff included in his
4 affidavit regarding the amount of damages.

5 However, that inventory list breaks down -- it
6 depreciates the replacement cost to represent the
7 actual cash value at the time of the fire, and
8 that value is \$3465.

9 And so we ask that if any of those
10 numbers are accurate or representative of the
11 damages, then it is the actual cash value of the
12 loss rather than the replacement cost.

13 The same for the lawn equipment and the
14 pressure equipment. Plaintiff's affidavit asks
15 for \$8,525. The inventory lists \$6,525. That
16 equals a replacement cost. And then that is
17 depreciated even further to \$4,893, and that
18 represents the value of the lawn equipment as of
19 the date of the fire.

20 Then, Your Honor, that under the law is
21 the proper measure of damages. That's what we're
22 asking to hold the plaintiff to.

23 Regarding the business interruption, we
24 want to make sure that the plaintiff proves any
25 lost profits, and that's the measure of damages.

1 The plaintiff is a corporation. It's
2 not Mr. Shelby individually. It is his company
3 5 Star, Incorporated.

4 Therefore, any business interruption or
5 loss of profits have to be proven (a) I missed
6 this many jobs, I couldn't go out and perform
7 this many jobs, I lost this much money as a
8 result of those jobs, and then subtract from that
9 my expenses, the wages, the overhead, and that's
10 -- this is how much profit I lost. Those are all
11 requirements under the law.

12 Allowing the plaintiff to use his prior
13 year's tax return as gross income divided by a
14 certain number of days and multiplied by the days
15 he says he was out of work does not show the
16 amount of damage for lost profits, if any, in
17 this case.

18 In fact, the testimony from
19 Mr. Shelby's deposition was that he didn't make
20 the routine calls. He had employees that would
21 make the lawn maintenance calls and the pressure
22 washing calls, and they would -- he was the one
23 back at the office controlling everything and his
24 employees went out.

25 After the fire, Mr. Shelby testified

1 that he rented equipment and that he bought
2 equipment to keep the business running and that
3 the business was not shut down.

4 So, therefore, it's inconsistent to
5 say, you know, the business shut down and I'm
6 entitled to this much, without having to prove,
7 hey, I couldn't make ten calls, I couldn't make
8 these two calls because I couldn't get them
9 rescheduled, I couldn't -- I didn't have the time
10 to make it up, and therefore I lost -- you know,
11 each call cost me this much money. Not only
12 that, I had to pay three employees eight dollars
13 an hour. Not only that, I had overhead, this and
14 that, and this is what the bottom line of the
15 lost profits is.

16 And so, again, this motion, we'd ask to
17 hold the plaintiff to proving the proper measure
18 of damages regarding any lost profits.

19 And in that same regard, we would ask
20 to exclude any alleged damages of Mr. Shelby
21 personally as a result of this fire. He is not a
22 plaintiff in this case. It is 5 Star,
23 Incorporated. Therefore, it is 5 Star,
24 Incorporated, damages that are recoverable, if
25 any.

1 Mr. Shelby's -- any inconvenience or
2 damage that he may allege is not -- is not proper
3 under the law, as are any emotional injuries that
4 he -- they have not been alleged in this case,
5 but we just want to make sure that we don't allow
6 that to come into evidence because, you know,
7 5 Star is the plaintiff, not Mr. Shelby.

8 They haven't alleged any emotional or
9 mental injuries, the law does not allow emotional
10 damages as a property damage only, and so we're
11 moving to keep all that out of evidence.

12 THE COURT: Mr. Goldstein.

13 MR. GOLDSTEIN: Judge, if they'll
14 settle the case with us, they can make the check
15 out to whoever they want to. I mean, 5 Star is
16 Stan Shelby. I think it's a Subchapter S
17 corporation, but everything flows through to him.
18 It doesn't matter to us that it's 5 Star or Stan
19 Shelby.

20 Our biggest falling out, if somebody
21 broke into your place then tries to tell you you
22 didn't suffer any damages, I mean, the damages
23 are -- actually, there's a damage summary that's
24 exhibit 21, Your Honor. You can look at it and
25 see if you think there's anything out of line.

1 I mean, the measure of damages are --
2 I'm sure you've got jury charges on them.
3 They're actual, actual losses suffered, and it's
4 up to the jury to decide if they want to
5 depreciate for some of this stuff.

6 The exhibits will show that Mr. Shelby
7 immediately following the fire had to rent
8 equipment to keep his business going. He didn't
9 have the money to go out and buy anything. And
10 when he did go out and buy something, he bought a
11 used pressure washer. It's exhibit 18 -- it
12 should be exhibit 19 -- exhibit 18. He also had
13 to pay \$5,000 to repair his building.

14 I mean, the damages in this case are
15 modest, and I'm not even sure -- I'm not even
16 sure what the real objection is to them. And
17 I'll be happy to answer any questions Your Honor
18 has, but, I mean, damages are a matter of proof.
19 You've got to put up your evidence, and after
20 you've heard the evidence, then you direct a
21 verdict on some of the damages, but I don't know
22 how you can asses what damages are recoverable
23 and what aren't when you haven't heard the
24 evidence. It seems like we've got the cart
25 before the horse.

1 MR. MARSHALL: Your Honor, I haven't
2 seen the exhibit, again, so I'm not sure what the
3 values are that he's asking for. But to the
4 extent that they represent replacement costs,
5 that's what we're objecting to.

6 We're objecting to plaintiff being
7 allowed to recover replacement costs when the law
8 is clear that the recoverable damages are the
9 value, the fair market value at the time of the
10 loss, and that requires depreciation. That's not
11 a jury issue, whether the jury wants to
12 depreciate the damages.

13 That is the proper measure of damages
14 under the case law of South Carolina, primarily
15 *Duke Power vs. Goldman* (phonetic) which is a
16 Court of Appeals case from 1991, *Nelson vs.*
17 *Coleman Company* which is a 1967 case. And we
18 cite these, and I may have copies of these if
19 Your Honor wants me to pass them up, but these
20 all talk about the proper measure of damages in
21 property damage cases.

22 And it's clear that the replacement
23 cost is not the proper measure of damage. It is
24 the fair market value at the time of loss, and
25 that requires the plaintiff to prove this is what

1 I had at the time of the loss.

2 You know, if he had a brand new -- a
3 new weed eater, then maybe a replacement cost
4 represents that. But if he has used equipment or
5 equipment, that he had for some time; you know,
6 replacement cost does not represent the value of
7 that equipment at the time of the loss.

8 And so that's what we're seeking to
9 exclude, any evidence of the replacement cost to
10 the extent that's what Mr. Goldstein seeks to
11 recover for.

12 MR. GOLDSTEIN: And I'll repeat, I
13 don't know how you prove the damages until you
14 put the witness on the stand and ask him the
15 question.

16 MR. MARSHALL: But you're asking us to
17 admit exhibits.

18 MR. GOLDSTEIN: You admit them after
19 you've laid a foundation for them.

20 THE COURT: Clearly, Mr. Goldstein,
21 you're not asking for any sort of mental anguish?

22 MR. GOLDSTEIN: Well, you know, I
23 struggled with that. I mean, he's going to
24 testify he was upset and that it was quite a
25 blow, but we certainly didn't seek any medical

1 attention or have any doctors' bills to support.
2 But I was planning on asking him some questions
3 to elicit testimony that it was upsetting. He
4 testified in his deposition it was upsetting, and
5 I'm sure it would be to anybody.

6 But, no, we're not asking for damages
7 for mental anguish or doctors' visits or
8 counseling or any of that stuff.

9 THE COURT: All right. Thank you.

10 I'm going to hold my ruling on your
11 motion in limine to limit the plaintiff to the
12 proper measure of damages until there is
13 testimony presented as to what he's actually
14 requesting, what the plaintiff is requesting.
15 Plaintiff's exhibit 17 just is an aggregate
16 breakdown of building repair and rental
17 replacement. So I will withhold my ruling until
18 that time based on the case law.

19 Anything additional?

20 MR. MARSHALL: No, Your Honor. We plan
21 to meet with Mr. Goldstein after we're finished
22 today and go over what exhibits we can and cannot
23 agree to and stipulate to. Other than that, we
24 should be ready in the morning.

25 THE COURT: All right. I've got a

1 matter I need to take up in chambers unrelated to
2 this case, and then I'm going to read up on the
3 case. So why don't you take this time to see
4 which ones you can go ahead and agree to. I'll
5 be back in in about 15 minutes.

6 MR. GOLDSTEIN: Thank you, Your Honor.

7 THE COURT: Thank you.

8 (A break is taken.)

9 (The trial reconvenes at approximately
10 4:30 p.m., and the following proceedings were
11 had:)

12 THE COURT: Thank you. Please be
13 seated.

14 Your motion in limine concerning the
15 economic loss doctrine and the limiting the
16 plaintiff to the proper measure of damages, I'm
17 going to, again, hold those two till the
18 appropriate time.

19 With respect to Ford Motor Company's
20 motion in limine to exclude all post-manufacture
21 evidence, including the recall 05-S-28, I'm going
22 to grant that motion.

23 Ford Motor Company's motion in limine
24 to exclude from evidence the Ford recall notice
25 referring to a separate vehicle, I'm going to

1 grant that motion.

2 Ford Motor Company's motion in limine
3 to exclude evidence of other accidents,
4 incidents, lawsuits, and/or settlements involving
5 Ford vehicles, I'm going to grant that motion
6 with the exception to narrowly allow the expert
7 or experts to testify as to experience, skill, or
8 education as it relates to the speed control
9 deactivation switches which are the subject
10 matter of this lawsuit.

11 Any questions concerning my rulings as
12 far as those motions? From the plaintiff?

13 MR. GOLDSTEIN: None, Your Honor. They
14 are, of course, motions in limine. And so as I
15 understand the rules, during the course of the
16 trial I still have to try to get it in or
17 otherwise I lose my right on appeal to raise it.

18 In other words, I'm required to assert
19 it contemporaneously with the witness being on
20 the stand. So I just don't want you to send me
21 to jail because I am disobeying a ruling of the
22 Court.

23 I mean, I understand your ruling, but I
24 also understand it's a motion in limine, and so
25 therefore it's not final until the appropriate

1 time, but I understand your ruling.

2 THE COURT: Okay. Counsel.

3 MR. OTT: I would disagree with the
4 procedural -- as I understand the Court's ruling,
5 he's not allowed to try to get that evidence
6 introduced in front of this jury. He'd have to
7 make a proffer outside of the presence of the
8 jury as to these issues. But he's not allowed to
9 ask these questions and make me object to
10 something we've already been through and
11 Your Honor has ruled is not admissible.

12 THE COURT: Is that your understanding,
13 Mr. Goldstein?

14 MR. GOLDSTEIN: Yes. As I understand,
15 what happens is I bring it up, you send the jury
16 out, I make my proffer, it goes on the record,
17 and then I'm preserved on appeal. I think that's
18 how it works.

19 THE COURT: Well, since we've had
20 extensive argument on most of these motions, how
21 I would prefer for you to do it is when -- when
22 an objection comes up, at the appropriate time
23 you can make the objection and just approach, and
24 we will then put it on the record at the next
25 appropriate break time, so that we do -- and I

1 will allow you -- and I will note your objection
2 for the record on the motion and the motions in
3 limine.

4 But the concern -- and this is why
5 we've had the hearing -- is that if you inquire
6 of a witness, knowing that it's going to elicit a
7 response that I've previously ruled on, I believe
8 that's why Mr. Ott is standing, so that --
9 because once the door is opened, we cannot shut
10 it. We cannot unring the bell, so to speak.

11 MR. GOLDSTEIN: That's true. But
12 that -- again, my understanding of motions in
13 limine is that that's why they're -- that's why
14 they've got to be renewed at the appropriate
15 time.

16 In other words, if I don't renew it at
17 the appropriate time and then, say, he gets a
18 defense verdict and I appeal it, then the Appeals
19 Court will say, well, she ruled against you in
20 the motion in limine, but you didn't bring it up
21 during the course of the trial and make a
22 proffer, and therefore it's too late for you to
23 get -- in other words, I couldn't get a review of
24 Your Honor's decision unless I put it on the
25 record at the appropriate time.

1 And I understand what Your Honor is
2 saying. Your Honor doesn't want me to blurt
3 something out in front of the jury when you've
4 already indicated via a motion in limine that
5 you're not inclined.

6 But, you know, I ask the Court to be
7 mindful of the fact that a ruling on a motion in
8 limine is not final. In other words, you may
9 hear something during the testimony that changes
10 your mind.

11 THE COURT: And that is correct,
12 Counsel, but I also want to be careful that you
13 do not intentionally elicit testimony that you
14 know that we have already gone over, without
15 laying a proper foundation.

16 MR. GOLDSTEIN: Yes, ma'am. I
17 understand.

18 MR. OTT: I just want to make sure
19 we're clear. He can't ask a question of
20 Mr. Greene or whoever is on the stand "Isn't it
21 true that Ford recalled this vehicle?" He can't
22 ask that under the Court's ruling. You've
23 already made that ruling clear that that is not
24 admissible.

25 If he asks that question, I have to

1 object. And the whole point of us going through
2 this exercise is, you know, the bell's been rung
3 and can't be unrung, as Your Honor said.

4 The proper method is for him outside
5 the presence of the jury to proffer the type of
6 evidence he wishes to elicit from these witnesses
7 regarding if it's O.S.I. or a recall or what have
8 you, and that is how you preserve it for
9 appellate review.

10 But it is not -- and, I mean,
11 otherwise, what we just did was futile. It is
12 not for him to be able to ask those questions or
13 such in front of the jury and ring a bell that
14 can't be unrung.

15 If he thinks something comes up, that
16 something opened the door or what have you and
17 the circumstance have changed since the Court's
18 hearing this afternoon, then even at that point I
19 think the proper method is to approach the bench
20 and say I think they opened the door and I'm
21 going to ask this question or I think I'm now
22 allowed to ask this question. Then Your Honor
23 would at that point say, no, you're not, you need
24 to proffer it, or I agree they did open the door
25 and you can now ask that question.

1 But I just want to make sure, you
2 know, the word "recall" should not come out of
3 Mr. Goldstein's mouth and it shouldn't come out
4 of any witness's mouth except outside of the
5 jury's presence.

6 THE COURT: Mr. Goldstein.

7 MR. GOLDSTEIN: Yes, ma'am.

8 THE COURT: Is that your understanding?

9 MR. GOLDSTEIN: I don't know. Not
10 exactly, but there's just no point in going over
11 it anymore. I've been in enough trials to know
12 that you can't ever predict what's going -- let
13 me tell you -- I'll tell you a worse story. I
14 tried a case with Judge Thomas up in Conway, and
15 she made a ruling very similar to Your Honor, and
16 something came out during the course of the
17 trial, and she completely totally reversed
18 herself because of what had transpired during the
19 trial.

20 So I understand your -- I understand
21 the Court's ruling, and I'm very respectful of
22 the Court and I always will be, and I'm not going
23 to do anything to try to incur the Court's
24 displeasure by intentionally doing something that
25 may be improper.

1 But by the same token, I'm a zealous
2 advocate for my client, and if the door gets
3 opened one way or another -- he may open the
4 door. If he does, I'm going to try and go
5 through it. That's what I'm supposed to do.

6 So, I mean, I understand Your Honor's
7 ruling. I understand it, I understand the
8 reasoning, I understand the Court's ruling; but,
9 you know, I can't agree in advance to hamstring
10 my client in front of the Court of Appeals
11 either.

12 THE COURT: No one is asking you to do
13 that.

14 MR. GOLDSTEIN: I understand, Judge. I
15 understand your ruling, and I ---

16 THE COURT: Please recall when you had
17 your pretrial conference with my law clerk that
18 there is no speaking objections.

19 MR. GOLDSTEIN: Yes, ma'am.

20 THE COURT: You know, just state your
21 objection, and then we will address it. And that
22 is for both counsel.

23 And, again, just to review some stuff,
24 there's two counsel on Ford's side. One
25 attorney, one objection.

1 All right. The jury will be back at
2 9:15. We will begin promptly at 9:30. Counsel
3 is aware I have two matters to begin at 9:00.
4 I'll try to end both of those matters so that we
5 can begin promptly at 9:30 with opening
6 statements, and we will break as close to noon as
7 practical.

8 Any questions or anything further from
9 the plaintiff before we break for the evening?

10 MR. GOLDSTEIN: Nothing, Your Honor.

11 MR. OTT: No, Your Honor.

12 THE COURT: Thank you. We'll be in
13 recess in this matter until 9:30.

14 MR. GOLDSTEIN: Thank you, Your Honor.

15 THE COURT: Thank you.

16 MR. OTT: Thank you.

17 (Whereupon, at approximately 4:40 p.m.,
18 the trial is recessed to the following day,
19 Wednesday, September 3, 2008, at 9:30 a.m.)
20
21
22
23
24
25

State of South Carolina)

County of Charleston)

5 Star, Incorporated,)

Plaintiff,)

vs.)

Ford Motor Corporation,)

Defendant.)

Court of Common Pleas

Ninth Judicial Circuit

Case No. 06-CP-10-4773

VOLUME II of III

TRANSCRIPT OF RECORD

September 3, 2008

Charleston, South Carolina

B E F O R E:

The Hon. Kristi Harrington, Judge, and a Jury

A P P E A R A N C E S:

Thomas R. Goldstein, Esq.
Attorney for the Plaintiff

Curtis L. Ott, Esq.
David C. Marshall, Esq.
Attorney for the Defendant

Pages 153-498

Brenda Cooley
Circuit Court Reporter

1 S-A-N-D-E-R-S.

2 DIRECT EXAMINATION

3 MR. GOLDSTEIN:

4 Q. Captain Sanders, your occupation, please?

5 A. I'm a captain with the City of North
6 Charleston Fire Department.

7 Q. Okay. Could you tell us a little bit about
8 your background and training?

9 A. Well, I've got 26 years experience. I'm
10 currently serving in my 26th year as a
11 firefighter with the City of North Charleston,
12 and I have extensive experience accumulated over
13 that time.

14 Q. You told us your current position is as a
15 captain?

16 A. Yes, sir.

17 Q. What other positions have you held within
18 the fire department?

19 A. I started out with rank of a probationary
20 firefighter and rose up through the ranks which
21 would include backup driver and engineer or
22 apparatus driver/operator, and then proceeded to
23 be promoted to captain.

24 Q. In September of 2005, what was your
25 position?

1 A. I was captain at Stall Road Fire Station.

2 Q. And the location of this fire is already in
3 evidence without objection. Do you know where
4 2340 Midland Park Road is?

5 A. Yes, sir.

6 Q. Looking at this tax map, do you think you
7 can identify the location on the tax map?

8 A. (The witness reviews exhibit.) Yes, sir.

9 Q. Okay. Is that the location of the fire?

10 A. Yes, sir.

11 Q. Okay. Do you also have what's been marked
12 as plaintiff's exhibit two in front of you?

13 A. Yes, sir.

14 Q. Okay. What is that? What is plaintiff's
15 exhibit two?

16 A. This is a hard copy of a computer-generated
17 fire report.

18 Q. Who fills out the fire report?

19 A. It's a compilation. The captain or acting
20 captain in a station will supply basic
21 information as to the nature of the call, the

22 location, so forth, so on. The dispatch center
23 provides some information, as well as other
24 chiefs who may review the information within the
25 report.

1 Q. Is it the policy of the North Charleston
2 Fire Department to fill out such a fire report at
3 every incident?

4 A. Yes, we do.

5 Q. Is it routinely kept as a record of the
6 North Charleston Fire Department?

7 A. Yes, it is.

8 Q. Was the document prepared specifically for
9 this trial, or is it something that is routinely
10 maintained?

11 A. It's done on a basis of every incident that
12 we respond to.

13 Q. Okay. Have you ever testified in a fire
14 case before?

15 A. I've never had to actually attend court and
16 testify in court. I have given depositions
17 regarding other fires.

18 Q. Do you recall the fire on September 26,
19 2005?

20 A. Yes, sir, I do.

21 Q. And when you say you recall it, do you mean
22 you recall it because you have the fire report to
23 refresh your recollection, or do you have an
24 independent recollection?

25 A. I have an independent recollection.

1 Q. Okay. Then let me show you -- well,
2 actually, they're already in evidence. I don't
3 have to ask you to identify them. These
4 photographs, are these the scene of the fire you
5 responded to on September 26th?

6 THE COURT: Mr. Goldstein, so the
7 record is clear, please call out the numbers.

8 MR. GOLDSTEIN: Oh, I'm sorry. Let me
9 call out the numbers to you.

10 THE COURT: The evidence that you just
11 presented to him.

12 MR. GOLDSTEIN: Sorry.

13 BY MR. GOLDSTEIN:

14 Q. Captain Sanders, these exhibits are already
15 in evidence. I'm just going to call out the
16 numbers to you, the little stickers. Plaintiff's
17 exhibit 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16.
18 Is that the fire that you responded to on
19 September 26, 2005?

20 A. (The witness reviews exhibits.) Yes, sir.

21 Q. When you arrived, what was the status of
22 the fire?

23 A. On my arrival, the front door had been
24 opened. A battalion chief with our department
25 had been on his way to our duty headquarters, his

1 station for the day, and he was the first to
2 arrive on location. I was the second fire
3 officer to arrive on location.

4 I saw some light smoke in the area,
5 vicinity of the building, and I was attempting to
6 place my safety gear on, which would be my
7 breathing apparatus and so forth.

8 Because of the proximity of the fire
9 station to this location, it's very difficult for
10 me as the officer to perform all of my duties and
11 be completely prepared within the short amount of
12 distance that was there as I normally would be
13 before I enter a structure. So upon my arrival,
14 I did not immediately personally enter the
15 structure. I was placing my safety gear on.

16 And so the firefighters were performing
17 their duties, advancing hoses and so forth. And
18 as soon as I got my gear into a sufficient
19 manner, then I did enter the structure, and what
20 I saw at that time was smoke and water damage.

21 Q. Okay. Now, and the short version of what
22 you just said is, y'all got there so fast you
23 didn't have time to get all your gear on?

24 A. Yes, sir. Absolutely.

25 Q. All right. And does the fire report

1 reflect what time the alarm came in to y'all?

2 A. I believe there is a stated time here of
3 seven -- 7:22. And we, I believe it says,
4 arrived 7:25.

5 Q. Okay. So you got there in three minutes?

6 A. Yes, sir.

7 Q. Okay. And it takes longer than three
8 minutes to get your gear on?

9 A. Well, it's -- it's difficult. You're in a
10 moving vehicle and -- and there are many -- many
11 things that I have to consider, safety of my
12 personnel, safety of the public while we're in
13 route. So, I mean, it's just difficult.

14 Q. Right. When you got there, were you
15 surprised that the building had not been
16 consumed?

17 A. Yes, sir. I didn't see a lot of exterior
18 damage to the building.

19 Q. Okay. When you were on the scene -- how
20 many years did you say you had? 26?

21 A. I'm currently serving my 26th year.

22 Q. Based on your 26 years' experience as a
23 fire captain and the other ranks you've told us
24 you held, could you tell where the fire
25 originated?

1 A. Everything that I saw indicated the
2 fire ---

3 MR. MARSHALL: Objection, Your Honor.

4 THE COURT: Sir, hold on one second.

5 There's an objection.

6 MR. MARSHALL: We object to the form.
7 The witness has not been qualified as an expert
8 regarding this, and there's a lack of foundation.

9 THE COURT: Sustained.

10 BY MR. GOLDSTEIN:

11 Q. As part of your training as a fire captain
12 and the previous ranks you told us about, are you
13 required to go through certain training?

14 A. We do go through quite a lot of training.

15 Q. Okay. Is some of that training related to
16 teaching you how to determine the origin of a
17 fire?

18 A. Yes, we -- we do.

19 Q. And the methods that you use to determine
20 the origin of a fire, are they standard across
21 all the entire North Charleston Fire Department?

22 A. Yes.

23 Q. How many fires would you say you've
24 responded to in 26 years?

25 A. I could not begin to give you an

1 approximate number, but quite -- quite many.

2 Q. All right. Well, let's -- for the sake of
3 this next question, let's pretend that you've
4 responded to a thousand fires. Is that a fair
5 number?

6 A. I would certainly say that's a fair number.

7 Q. All right. If you have responded to a
8 thousand fires in your 26-year career, of those
9 thousand fires, how many of them would you say
10 you were and how many would you say you were not
11 able to determine the origin of fire?

12 A. I probably would say that a good very large
13 percentage is determinable upon obvious sight.

14 Q. And why is that?

15 A. Well, generally, just in the daily
16 activities that -- that people engage in and
17 normal circumstances.

18 Q. Well, let me ask you this. When you
19 responded to this fire, where was the center of
20 the fire located?

21 ~~MR. MARSHALL: Objection, Your Honor.~~

22 THE COURT: Basis?

23 MR. MARSHALL: It's opinion testimony.
24 It's a lack of foundation. This witness is not
25 an expert in cause and origin.

1 THE COURT: Overruled.

2 BY MR. GOLDSTEIN:

3 Q. Where was the center of the fire?

4 A. What I saw and what indicated to me was the
5 area of heaviest damage and was in my mind
6 possibly the origin of the fire was in the engine
7 compartment.

8 Q. Okay. Did that surprise you at all?

9 A. No.

10 Q. Have you ever seen that before?

11 A. Many, many times.

12 Q. Was the truck destroyed?

13 A. Yes.

14 Q. And did the photographs reflect that ---

15 A. Yes, sir.

16 Q. --- the truck was destroyed? Okay. And
17 what part of the building was damaged?

18 A. The area just above the engine compartment
19 received some charring to some of the roof
20 timbers.

21 Q. And the roof timbers that were charred,
22 where were they located in relationship to the
23 truck?

24 A. Directly above the engine compartment.

25 Q. Does that lead you to ---

1 A. Yes. That would indicate to me that that
2 was the area of origin and that was where the
3 fire was most intense.

4 Q. What kind of equipment was in the building
5 when you responded?

6 A. There was some -- a utility trailer behind
7 the vehicle. There was lawn maintenance
8 equipment and so forth, supplies that you would
9 normally use in a lawn maintenance type of
10 business or your hobby, what have you.

11 Q. Did you see any evidence that any of the
12 lawn equipment had started the fire?

13 A. No. No, I did not.

14 MR. MARSHALL: Your Honor, we renew our
15 objection regarding the foundation of this
16 evidence. He's not proffered as an expert in
17 cause and origin. He's not been qualified per
18 the statute as an expert.

19 THE COURT: He's testifying as to what
20 he saw. Overruled.

21 BY MR. GOLDSTEIN:

22 Q. Did you see any electrical -- let me back
23 up. Was there an office located inside this ---

24 A. Yes, there was.

25 Q. All right. And did the office have

1 electrical equipment in it?

2 A. Yes, it did.

3 Q. A computer, monitor screen?

4 A. Yes, sir.

5 Q. And are they depicted in the photos?

6 A. Yes, sir.

7 Q. Did you see any evidence that they had been
8 the source of ignition?

9 A. No, sir. Part of -- part of my job as an
10 officer is to evaluate the safe condition of the
11 building and as to whether or not I will turn it
12 over back to the public and the property owner or
13 person in charge, and I saw no indication of
14 anything other than the fire in the vehicle
15 itself.

16 Q. Do you ---

17 A. There was -- I'm sorry. There was smoke
18 and water damage throughout the building, but I
19 saw no other indication of fire.

20 Q. Do you do fire cause and origin work?

21 A. I do, but I don't consider myself to be the
22 final authority on that. My duties as a company
23 officer would be to initially evaluate what I
24 encounter and determine whether or not I feel
25 that it is necessary for an investigator to be

1 called to the scene.

2 Q. In your department, who do you regard as
3 the expert in ---

4 A. At the time of this incident, Chief
5 Benjamin Norris was our fire investigator, and I
6 consider his credentials to be extremely
7 extensive.

8 Q. Okay. Would you yield to his expertise?

9 A. Absolutely.

10 Q. Okay. Did y'all put out the fire?

11 A. Yes, sir. What -- what there was there.

12 Q. Do you treat scenes differently when you're
13 responding as a captain if you suspect arson? Do
14 you do something different?

15 A. If I suspected anything is questionable in
16 nature, I will stop immediately and try to
17 protect and preserve evidence for the chain of
18 evidence.

19 Q. Did you do that in this case?

20 A. Yes, sir.

21 Q. Okay. Did you suspect arson in this case?

22 A. No, sir, I did not.

23 Q. Okay. I think you already answered this
24 question. Have you responded to other vehicle
25 fires?

1 A. Yes. Many.

2 Q. And do they fall into a general pattern, or
3 is every one different?

4 A. Well, I really don't know how to answer
5 that with the exception of the fact that the
6 circumstances can be different.

7 Anything that is what I would consider to
8 be normal use, proceeding down the roadway, in
9 operation and so forth, so on, generally you can
10 evaluate the situation based on what the
11 activities were at the moment of the vehicle
12 involved.

13 Q. Okay. Next to the last question. The fire
14 report, plaintiff's exhibit two, I think I
15 already asked you this, but in an abundance of
16 caution, is that a document that is maintained as
17 a regular, ordinary business record by the North
18 Charleston Fire Department?

19 A. Yes, sir.

20 MR. GOLDSTEIN: Okay. Your Honor, I
21 offer plaintiff's exhibit two.

22 MR. MARSHALL: Your Honor, we would
23 object to that exhibit. It is hearsay, and it
24 includes opinion testimony inside that.

25 THE COURT: Counsel approach.

1 (There was an off-the-record bench
2 conference in the presence of the jury but out of
3 the hearing of the jury.)

4 (Said bench conference being concluded,
5 the following proceedings were had:)

6 BY MR. GOLDSTEIN:

7 Q. Mr. Sanders, back to plaintiff's exhibit
8 two, let me direct your attention to the bottom
9 of page -- well, the pages aren't numbered, but
10 it's the second page. Whose name is that at the
11 bottom of the page?

12 A. My name, Sanders, and Timothy Howard
13 who would have been my engineer or apparatus
14 driver.

15 Q. Okay. And did you participate -- did you
16 supply the information that is used in the
17 preparation of that fire report?

18 A. Yes, sir.

19 Q. Is that something you routinely do?

20 A. Yes, sir.

21 Q. And is the report then reviewed by someone
22 higher up?

23 A. Yes, sir.

24 Q. For accuracy?

25 A. Yes, sir.

1 Q. In this case, who reviewed your report?

2 A. Chief Norris would have normally reviewed
3 this report.

4 MR. GOLDSTEIN: Your Honor, I
5 respectfully ask that plaintiff's exhibit two be
6 introduced in evidence.

7 MR. MARSHALL: Your Honor, we maintain
8 our objection that it's hearsay and contains
9 opinion testimony.

10 THE COURT: Overruled under 803(6).
11 I note your objection.

12 (Plaintiff's Exhibit No. 2, previously
13 marked for identification, is received in
14 evidence.)

15 BY MR. GOLDSTEIN:

16 Q. Last question. You don't have any inside
17 information on the storm track, do you?

18 A. No, sir. No, sir, I don't.

19 MR. GOLDSTEIN: Thank you. I'm
20 sure one of these lawyers will want to ask you
21 some questions. I ask that you answer them,
22 please.

23 THE COURT: Mr. Marshall.

24 MR. MARSHALL: If it please the Court,
25 Your Honor.

1 CROSS-EXAMINATION

2 BY MR. MARSHALL:

3 Q. Mr. Sanders, when you responded to this
4 fire scene, you weren't in charge of the fire
5 scene; is that right?

6 A. As the company officer, I'm in charge of my
7 personnel, and in normal circumstances I would
8 have been in charge of the scene until a superior
9 officer arrived on the scene. As Chief Munn,
10 Battalion Chief Joseph Munn was there, I would
11 defer that authority. Although I do not have to,
12 I did defer that authority to him.

13 Q. So you weren't the officer in charge at the
14 scene?

15 A. In -- in my respect of his position and
16 authority, I did not assume that role. I limited
17 myself. But, technically, I am in charge of the
18 scene. He -- it is his option to relieve me of
19 that responsibility or to accept it himself, what
20 have you.

21 Q. ~~And he accepted it in this case? You~~
22 weren't ---

23 A. Well, I didn't -- it really was not a
24 matter of discourse or discussion.

25 Q. The fire was already out upon your arrival

1 at the scene; is that right?

2 A. Well, at the time that I walked into the
3 front door of the building, the fire was out, but
4 that does not mean that it was not in progression
5 at my arrival on the property.

6 Q. You didn't see any flames?

7 A. Well, I personally did not, but that's not
8 unusual because the firefighter applies the
9 water, and as I stated, I was putting my safety
10 gear on. And so it's -- you know, it's just not
11 always a fact that it's going to be continuing to
12 burn while I'm doing that. That does not mean
13 that the fire was not in progression and there
14 was not a fire.

15 Q. And your duties at this scene was not to
16 fight the fire itself? It was your duty to ---

17 A. My duties include fighting the fire, but my
18 duties also include preparing myself to enter
19 that structure. And as I stated, in the close
20 proximity of the fire station to this call, it
21 was impossible for me to be fully prepared to
22 enter that building. My safety is paramount as
23 well as that of my personnel.

24 Q. And isn't your primary duty the supervision
25 of your subordinate firefighters?

1 A. Absolutely. And I feel that I'm capable of
2 doing that and did that in this instance.

3 Q. When you entered the structure, you saw
4 various items of lawn equipment; is that right?

5 A. Yes, I did.

6 Q. Mowers?

7 A. Mowers, weed eaters, things of that nature.

8 Q. Gas cans?

9 A. Yes, I did see some gas cans.

10 Q. Oil cans?

11 A. (There was no response.)

12 Q. Did you see any oil cans?

13 A. Yes. I'm sorry.

14 Q. You don't consider yourself an expert in
15 fire cause and origin, do you?

16 A. I don't consider myself an expert in
17 anything.

18 Q. And you did not make a determination as to
19 cause and origin of this fire?

20 A. Chief Norris had been requested to respond
21 ~~to the scene, the incident scene, and at that~~
22 point in time -- Chief Norris is also my superior
23 officer. Chief Norris has quite extensive
24 capabilities and training as well as experience
25 in that area. That, to me, was a relief that he

1 was responding; and therefore, I did not
2 interfere with anything as far as the evidence or
3 what have you, because I knew at his arrival
4 everything would be handled in the proper
5 procedure.

6 Q. And so you did not make a determination; is
7 that correct?

8 A. No, I did not make an official
9 determination.

10 Q. You didn't take any photographs of this
11 fire?

12 A. No, sir.

13 Q. You didn't remove any parts of the vehicle?

14 A. No, sir.

15 Q. The photographs that Mr. Goldstein showed
16 you, they depict the vehicle outside of the --
17 outside of the structure; is that right?

18 A. Yes, they do.

19 Q. And you only saw the vehicle when it's
20 inside the structure?

21 A. That is correct. That is true.

22 Q. At anytime you were there, was the vehicle
23 moved?

24 A. No.

25 Q. So the whole time you saw it, it was inside

1 the structure?

2 A. Yes.

3 Q. You didn't create the fire report for this
4 incident, did you?

5 A. My engineer, which is my immediate
6 subordinate, actually entered the information for
7 me.

8 Q. Did you assist in preparing that report?

9 A. Did I what?

10 Q. Assist in preparing that report?

11 A. Yes. It would be my job to review it for
12 as much accuracy as possible.

13 MR. MARSHALL: Thank you, Mr. Sanders.

14 THE COURT: Mr. Goldstein.

15 MR. GOLDSTEIN: One moment, Your Honor.

16 Nothing further, Your Honor. Thank
17 you. I did subpoena him, and I ask that he be
18 excused if there's no objection.

19 THE COURT: May he be excused from the
20 courthouse, Mr. Goldstein?

21 MR. GOLDSTEIN: Yes, ma'am.

22 THE COURT: Any objection?

23 MR. MARSHALL: No objection.

24 THE COURT: Thank you, sir. You may
25 step down, and you may be excused from the

1 courthouse.

2 THE WITNESS: Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. GOLDSTEIN: Thank you, Captain.

5 (The witness is excused from the
6 witness stand and leaves the courtroom.)

7 MR. GOLDSTEIN: May it please the
8 Court. We call John Olson next.

9 THE COURT: All right. Mr. Olson.

10 JOHN S. OLSON,
11 being first duly sworn by the clerk, is examined
12 and testifies as follows:

13 THE CLERK: Please be seated. For the
14 record, would you please state your name,
15 spelling your last name.

16 THE WITNESS: My name is John S. Olson,
17 O-L-S-O-N.

18 DIRECT EXAMINATION

19 BY MR. GOLDSTEIN:

20 Q. Mr. Olson, you are the Ford Motor Company
21 representative in this case, correct?

22 A. Yes.

23 Q. And you've come to visit us all the way
24 from Detroit, Michigan, correct?

25 A. That's right.

1 Q. Okay. You picked a bad week it looks like.
2 I hope your flight doesn't get canceled.

3 Tell us what your position is with Ford
4 Motor Company.

5 A. I am an engineer. More specifically, I'm a
6 design analysis engineer.

7 Q. Okay. And in connection with the design
8 analysis, you have reviewed the pleadings and
9 reviewed everything in this case related to the
10 claim being brought today, correct?

11 A. Well, I've reviewed a fair amount. I'm not
12 sure if I've reviewed everything, but a fair
13 amount of it.

14 Q. Okay. In connection with two affidavits
15 you signed, you were kind enough to furnish to us
16 your very distinguished resume, and I'd like to
17 go over that with you a little bit. You are a
18 professional engineer?

19 A. Yes, that's correct.

20 Q. Correct? And you're licensed by the State
21 of Wisconsin?

22 A. Yes.

23 Q. And you also are a certified arson
24 investigator?

25 A. No. I'm not certified.

1 Q. Okay. You're a member of the International
2 Association of Arson Investigators?

3 A. That's correct.

4 Q. But you're not qualified to do an arson
5 investigation?

6 A. I'm sorry?

7 Q. You're not qualified to do an arson
8 investigation?

9 A. I've been qualified to investigate fires in
10 vehicles in particular...

11 Q. Okay. And you do that quite a bit for
12 Ford, don't you?

13 A. I'd say that's fair, yeah.

14 Q. You travel all over the country and do
15 that?

16 A. Yes.

17 Q. Okay. As a matter of fact, didn't you
18 bring with you a bunch of files of -- based on
19 your investigation into these type of incidents?

20 A. No, I didn't.

21 Q. Oh, you didn't bring anything with you?
22 All right.

23 A. I did bring my NFPA 921 manuals if that's
24 what you mean.

25 Q. Okay. Now, according to your resume,

1 you've been a design analysis engineer since
2 2002, correct?

3 A. Yes. That's true.

4 Q. From '98 to 2002, you were a design and
5 release engineer. Correct?

6 A. That's correct, yes.

7 Q. And '94 to '98, manufacturing process
8 engineer, correct?

9 A. That's correct, yes.

10 Q. And '91 to '94, a project engineer with
11 Ford, correct?

12 A. Actually it wasn't at Ford.

13 Q. I'm sorry. Riken Tool Manufacturing. I
14 stand corrected.

15 A. Yeah. There were actually two different
16 companies I worked for in that period of time.

17 Q. Okay. So you've been with Ford since --
18 steadily uninterrupted since 1994?

19 A. Yes, I have.

20 Q. All right. And, of course, I'm not trying
21 to embarrass you, but you are a paid employee of
22 Ford?

23 A. Yes.

24 Q. And you get paid a salary?

25 A. Yes.

1 Q. How much is that?

2 A. You know, I don't know exactly. It's -- I
3 make about \$50 an hour or so. It's in that
4 frame.

5 Q. Okay. So you're paid a salary, but your
6 testimony here today in front of this jury is you
7 don't know what your annual salary is?

8 A. Well, it's -- it's \$900,000 a year.

9 Q. Okay. And I'm not trying to embarrass you,
10 but, I mean, you're entitled to be paid for your
11 work, correct?

12 A. Yes.

13 Q. All right. And in addition to that, you
14 qualify for the Ford pension benefits?

15 A. Yes.

16 Q. Stock purchase plan?

17 A. Yeah. That's done at my option.

18 Q. Correct. You have that option?

19 A. I have the -- I have the ability to
20 contribute, yes.

21 Q. Okay. And, again, I'm not trying to
22 embarrass you. The point I'm trying to make is,
23 is that you have an interest in a successful
24 outcome for Ford in this case?

25 A. My interest is to -- in this particular

1 instance is try to figure out what happened and
2 try to make sure that that kind of information is
3 brought back to Ford Motor Company.

4 Q. All right. And you have testified how many
5 times for Ford? A hundred?

6 A. No.

7 Q. Fifty?

8 A. When you mean testify, do you mean in
9 court?

10 Q. Well, let's break it down. That's a fair
11 -- that's a fair question. How about
12 depositions, how many times have you testified?

13 A. Fifteen times maybe.

14 Q. Fifteen?

15 A. Fifteen to 20, in that range.

16 Q. Okay. And how many times in court?

17 A. Just twice. And this would be the third
18 time.

19 Q. All right. And of those -- so that's, if
20 my math is correct, that's 18 times?

21 A. It's right at ---

22 Q. Those 18 times, how many of those times
23 were related to the switch control deactivation
24 switch -- speed control deactivation switch. I
25 told you I was going to mess up.

1 A. Yeah. And did you say in court?

2 Q. Well, any time, deposition or in court.

3 A. I don't believe any time.

4 Q. Okay. Now, you would agree with me as a
5 loyal career employee of Ford that Ford's
6 obligation, its duty is to build safe
7 automobiles?

8 A. I believe that's true, and I believe we do.

9 Q. Okay. And that duty to build a safe
10 automobile includes even as the car ages,
11 correct?

12 A. Well, I'm not sure exactly what you mean by
13 aging. But, certainly, yes, we hope -- we hope
14 and expect that our vehicles have long lives,
15 that customers drive them for many years and
16 they're happy with their experiences.

17 Q. Okay. And so if a person is driving a
18 ten-year-old Ford vehicle, that person has the
19 same -- has the same right to expect to have a
20 safe vehicle at his or her disposal, correct?

21 MR. OTT: Your Honor, I object to that.
22 That's irrelevant, and I don't think that's a
23 properly laid foundation as to what the legal
24 duty was. That's for Your Honors's...

25 THE COURT: I sustain.

1 BY MR. GOLDSTEIN:

2 Q. Does Ford expect its cars to burst into
3 flame while parked unattended?

4 A. No.

5 Q. Are they designed to do that?

6 A. No.

7 Q. Now, in this case you filed two affidavits;
8 is that correct?

9 A. Yes, that is.

10 Q. One is dated February 27th -- oh, I'm
11 sorry. I'm looking at the Answer. I apologize.
12 Let me get the correct date. One is dated August
13 28th, 2008, correct?

14 A. Right. That was the second one.

15 Q. Okay. And then before then was March; is
16 that right?

17 A. Yes.

18 Q. Okay. And in those affidavits, you made
19 certain assertions about the vehicle that's
20 involved in this case, correct?

21 A. I don't remember everything that was in it.
22 If you'd show it to me, I can, you know ---

23 Q. Sure.

24 A. --- take a look at it.

25 Q. Perfectly fair. Okay. Is that the

1 affidavit that you signed?

2 A. Yeah. This is the second one.

3 Q. Okay. And your first one is there, as
4 well?

5 A. Yes.

6 Q. Okay. And attached to those affidavits is
7 the actual -- and I don't know what the term of
8 art is used at Ford, but what do you call that?
9 Is it a specification sheet?

10 A. Do you mean the vehicle invoice?

11 Q. The vehicle invoice.

12 A. Right.

13 Q. Is that what it's called?

14 A. Yes.

15 Q. And it tells the purchaser what equipment
16 is located on the vehicle?

17 A. Among other things, yes.

18 Q. Okay. And as that invoice demonstrates,
19 this vehicle did come equipped with a speed
20 control deactivation switch ---

21 A. Yes.

22 Q. --- correct?

23 A. Yes, it did.

24 Q. Okay. And what I'd like to do is I'd like
25 to take that from you, just that last page. I'm

1 going to ask the court reporter to put a sticker
2 on it.

3 (Plaintiff's Exhibit No. 22, last page
4 of affidavit of Mr. Olson, vehicle invoice, is
5 marked for identification.)

6 BY MR. GOLDSTEIN:

7 Q. Okay. It now bears the number 22 so that
8 we can make reference to the same document. Is
9 that the vehicle invoice that you attached to
10 your affidavit?

11 A. Yes, it is.

12 Q. And it reflects, as you've already told us,
13 that the truck did come with a speed deactivation
14 control switch, correct?

15 A. Yes.

16 Q. Okay. And that speed deactivation control
17 switch is built for Ford on Ford's
18 specifications; is it not?

19 A. That's correct, yes.

20 Q. It's built by Texas Instruments; is that
21 correct?

22 A. Yes, it is.

23 Q. And that switch is designed to handle two
24 amperes; is that correct?

25 A. Well, I'm not familiar with all the details

1 of the specification. I don't have that handy,
2 but that wouldn't surprise me if it was in that
3 range.

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

8 A. I believe that's true, yeah.

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

11 A. I believe that's true.

12 Q. Okay. So you've got 15 amperes of
13 electricity running through a two-amp switch; is
14 that correct?

15 A. No, that's not true.

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

19 A. Yes, that is true.

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

22 A. That's correct.

23 Q. In other words, if you're sitting in the
24 driver's seat of your automobile and the key's
25 not in the ignition, you can push the brakes and

1 the brake lights will illuminate, correct?

2 A. That's correct. That's a requirement.

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

5 A. Yes, it is.

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

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

12 Q. Okay. And the purpose of the speed
13 deactivation control switch is to disengage the
14 speed control while the vehicle is in motion?

15 A. Yes. It serves as a redundant feature for
16 that, for that function.

17 Q. I stand corrected. That's correct. The
18 primary switch is under the dashboard, correct?

19 A. That's correct.

20 Q. And if that malfunctions, then there's a
21 ~~redundant switch which is the speed control~~
22 deactivation switch, correct?

23 A. That's correct.

24 Q. And it's hooked on the brake booster
25 underneath the master cylinder, correct?

1 A. The speed control switch?

2 Q. Yes.

3 A. Yeah. Actually, it's actually on top of
4 the cylinder if I'm not mistaken.

5 Q. Okay. Now, in your affidavit of March --
6 I'm sorry -- August 28th. I apologize. In
7 paragraph three, you said that Ford had not
8 identified Mr. Shelby's truck as being a truck
9 with a defective switch because it weighs more
10 than 8500 pounds. Isn't that what you said?

11 A. Sorry, I had the first one. Let me get the
12 second one.

13 Q. Okay. Well ---

14 MR. OTT: Your Honor, I think we need
15 to approach based on the Court's prior ruling.

16 THE COURT: All right. Counsel
17 approach.

18 (There was an off-the-record bench
19 conference in the presence of the jury but out of
20 the hearing of the jury.)

21 (Said bench conference being concluded,
22 the following proceedings were had:)

23 THE COURT: Sustained. Rephrase.

24 BY MR. GOLDSTEIN:

25 Q. In your affidavit, you made a statement

1 under oath that Mr. Shelby's truck weighs more
2 than 8500 pounds, didn't you? Isn't that what it
3 says?

4 A. What I stated was that the gross vehicle
5 weight of the vehicle was greater than 8500.

6 Q. Okay. And I'll show you what has been
7 marked as plaintiff's exhibit five which is
8 already in evidence. That's the title of
9 vehicle, isn't it, and doesn't the title show
10 that the vehicle's weight is 4700 pounds? Isn't
11 that right?

12 A. Yes. But, again, I mean, I would need to
13 explain what gross vehicle weight is versus what
14 the vehicle weight is, to be clear on that.

15 Q. Okay. But your affidavit said that it
16 weighs more than 8500 pounds, correct?

17 A. What I put was the gross vehicle weight.

18 Q. Okay.

19 A. Okay? And there is -- there's a difference
20 between the two.

21 Q. Okay. And the title which has been
22 introduced into evidence shows that the gross
23 vehicle weight is 4700 pounds, correct?

24 A. No, it doesn't. What it says is that the
25 weight of the vehicle is 4700.

1 Q. Okay. Now, you also said in your
2 affidavit, the original affidavit, the one dated
3 March 26, 2008, you described your job duties in
4 paragraph two. Correct?

5 A. Yes.

6 Q. And you said your job duties include
7 investigating claims concerning problems or
8 alleged defects with Ford vehicles, correct?

9 A. That's true.

10 Q. All right. And that's why we're here
11 today?

12 A. Yeah.

13 Q. Mr. Shelby's claiming there was a defect in
14 his truck that caused it to burn up?

15 A. Yes.

16 Q. That's his allegation?

17 A. That's his allegation.

18 Q. All right. And you then said that you were
19 familiar with the allegations of the plaintiff's
20 Complaint filed in this case, correct?

21 A. Right.

22 Q. Which means that you read them and you
23 digested them and you brought all of your
24 training and bases and knowledge and experience
25 to bear on the allegations of the plaintiff's

1 Complaint?

2 A. Yeah. To the best of my ability, yes.

3 Q. To the best of your ability. And that
4 included, among other things, filing an Answer
5 with this court, setting out Ford's defenses,
6 correct?

7 MR. OTT: Your Honor, I object.

8 There's no foundation. That's a lawyer's
9 document filed with the court. He didn't prepare
10 it. That's an Answer filed with this court.
11 It's not Answers to Interrogatories or anything
12 like that. The only person who can file an
13 Answer is a lawyer.

14 MR. GOLDSTEIN: Your Honor.

15 THE COURT: Sustained.

16 MR. GOLDSTEIN: You're not going to
17 permit cross-examining on the Answer?

18 THE COURT: I'm sustaining his
19 objection to your form of the question.

20 MR. GOLDSTEIN: Okay.

21 BY MR. GOLDSTEIN:

22 Q. Ford has filed an Answer in this case,
23 correct?

24 A. I don't know all of the answers that we
25 provided.

1 Q. All right. Well, let me ask you this. As
2 the Ford representative who's traveled all the
3 way from Dearborn, Michigan to Charleston,
4 South Carolina to appear as an expert witness in
5 defense of Ford Motor Company in this case, are
6 you telling us that you've never reviewed the
7 Answer?

8 A. What I'm saying is that I provide only part
9 of the overall effort in -- in coming to trial
10 here today. My focus is on the technical
11 investigations and the allegations that relate to
12 the fire investigation. There are a lot of
13 different things that other folks that work
14 within Ford or counsel help us with to get these
15 answers.

16 Q. But you're the person in this case most
17 knowledgeable about Stan Shelby's case?

18 A. I believe that I have some knowledge.
19 Whether I'm the most knowledgeable, I'm not sure
20 about that. I have some knowledge, and I think I
21 have some things to add.

22 Q. When you -- I mean, Ford Motor Company is a
23 huge corporation, right?

24 A. Yes.

25 Q. I mean, how many employees y'all got?

1 A. You know, unfortunately, it changes all the
2 time. I don't know what the number is.

3 Q. Thousands?

4 A. A couple hundred thousand maybe across the
5 entire world.

6 Q. All right. And out of all those employees,
7 Ford Motor Company selected you to come down and
8 talk to this jury. Correct?

9 A. That's -- that's right.

10 Q. Okay.

11 A. It's a big responsibility.

12 Q. It is a big responsibility. And Ford Motor
13 Company wouldn't pick someone who was not
14 qualified or not prepared to answer questions
15 about the allegations in this case, would they?

16 A. I believe that's true, and I believe I'm
17 qualified to answer certainly as it relates to
18 the -- some of the technical questions.

19 Q. All right.

20 A. But not all -- not all of the legal
21 questions. I'm certainly not a lawyer. I don't
22 know the answers to legal questions.

23 Q. All right. Well, are you aware that Ford
24 has interposed a defense to our claim?

25 A. I'm not even sure what that means ---

1 Q. Okay.

2 A. --- Mr. Goldstein. I'm sorry.

3 Q. That's okay. I'll break it down for you.

4 A. Okay.

5 Q. See that fellow right there?

6 A. Yes, I do.

7 Q. That's Stan Shelby. See these twelve
8 people right here? That's the jury. Stan Shelby
9 is asking this jury to make Ford Motor Company
10 compensate him for his loss; do you understand
11 that?

12 A. I do understand that.

13 Q. Okay. Now, over here at this table it's
14 your lawyers. Correct?

15 A. The Ford Motor Company's lawyers.

16 Q. Ford Motor Company's lawyers.

17 A. Right.

18 Q. Nice guys, great lawyers, right?

19 A. Yes.

20 Q. And you?

21 A. Right.

22 Q. Okay. And you realize this is an
23 adversarial relationship. Correct?

24 A. I -- yes, I agree.

25 Q. All right. The plaintiff, as Mr. Ott so

1 eloquently stated in his opening statement, has
2 the burden of proof, the burden of convincing
3 these twelve people that a defect in his Ford
4 vehicle caused it to burn up.

5 MR. OTT: Your Honor, can we have a
6 question that's relevant?

7 THE COURT: Sustained.

8 BY MR. GOLDSTEIN:

9 Q. So are you or are you not familiar with the
10 defenses asserted by Ford Motor Company in this
11 case?

12 A. To some degree, I am, yes.

13 Q. Okay. Well, then do you think it's fair
14 that I ask you about the defenses that Ford Motor
15 Company ---

16 A. Sure.

17 MR. OTT: Objection.

18 THE COURT: Overruled.

19 BY MR. GOLDSTEIN:

20 Q. One of the defenses asserted by Ford Motor
21 ~~Company is that the Complaint that Mr. Shelby~~
22 filed through me is, and I quote, unintelligible.
23 Is there anything about Mr. Shelby's claim that
24 you find unintelligible?

25 MR. OTT: Your Honor, I object. That's

1 irrelevant, and there's not a proper foundation.
2 The unintelligible portion cannot ---

3 THE COURT: Sustained.

4 BY MR. GOLDSTEIN:

5 Q. Do you know what defenses Ford is asserting
6 in this case?

7 A. I don't know all of the -- necessarily the
8 legal defense. I'm aware of the technical issues
9 that exist.

10 Q. Okay. Well, then let's just -- let's just
11 leave the legal behind, and I won't dog a flat
12 horse. Let's just go to the technical.

13 All right. The technical defense, as I
14 understand it, is that you can't determine
15 whether or not the Ford speed control
16 deactivation switch in Stan Shelby's 1996 Ford
17 F-250 did or did not cause a fire because you
18 don't have it. Is that a fair summary?

19 A. I believe that not only is that true, but I
20 don't know that anybody's been able to make that
21 determination.

22 Q. Okay. As an engineer, do you make a
23 distinction between direct evidence and
24 circumstantial evidence? As an engineer, not as
25 a lawyer, as an engineer.

1 A. I believe that they can play different
2 roles, and it certainly depends on the
3 circumstances that you're involved with.

4 Q. And as an engineer, are you familiar with,
5 just for example, James Clerk Maxwell's formulas
6 on electromagnetism, the field theories, field
7 equations?

8 A. Not specifically. I couldn't repeat them
9 to you, but engineers many times rely on
10 references, and if I were ever asked a question
11 like that, I would -- I would go to a reference.

12 Q. Okay. Exactly. But Maxwell Clerk's --
13 Clerk Maxwell's field equations are commonly
14 relied upon, engineers, in doing electromagnetic
15 work, right?

16 A. That could be true.

17 Q. I mean, it's the bedrock of basic tenth
18 grade physics, correct?

19 A. That -- you -- that could be true.

20 Q. Okay. But nobody's ever seen a field
21 theory, right?

22 A. I don't...

23 Q. You can't observe it with your senses?

24 A. I don't know.

25 Q. Okay. And there are things in our daily

1 lives, just common things in our daily lives that
2 we can't observe with our senses, but we know
3 they're there. Right?

4 A. Sure.

5 Q. Okay. Do you believe in electrons?

6 A. Yes.

7 Q. Okay. Never seen one, no? Right?

8 A. I have not, no.

9 Q. Okay. Do you think the sun is going to
10 come up tomorrow?

11 MR. OTT: Objection, Your Honor.

12 Relevance. You know, I think I will
13 stipulate ---

14 THE COURT: Counsel approach.

15 (There was an off-the-record bench
16 conference in the presence of the jury but out of
17 the hearing of the jury.)

18 (Said bench conference being concluded,
19 the following proceedings were had:)

20 THE COURT: Sustained.

21 BY MR. GOLDSTEIN:

22 Q. All right. Let's get focused on this
23 particular case. You in your affidavit in
24 paragraph eight, you've identified for us all the
25 possible causes of the fire in this case; did you

1 not?

2 A. Yes, I did.

3 Q. Okay. Well, let's go over that. You said
4 there are -- and you understand an affidavit is a
5 statement under oath?

6 A. Yes.

7 Q. And just like you're under oath now?

8 A. Yes.

9 Q. You said in your sworn statement there are
10 many possible causes of fires that occur in
11 vehicles. Correct?

12 A. That's true, yes.

13 Q. That's something everybody in the room can
14 agree with?

15 A. I think so.

16 Q. I think so, okay. You said including but
17 limited to, and then you've listed the possible
18 causes; did you not?

19 A. Well, I said including but not limited to.

20 Q. I understand. But you listed -- you listed
21 some?

22 A. Sure.

23 Q. Okay. You said accidental ignition?

24 A. Right.

25 Q. You said arson?

1 A. Right.

2 Q. You said wiring failure?

3 A. Sure.

4 Q. You said modification of component parts?

5 A. That's correct.

6 Q. You said after-market modifications?

7 A. Yes.

8 Q. Fluid leaks?

9 A. Yes.

10 Q. And you said other defects, etc?

11 A. That's correct.

12 Q. Okay. Now, as an engineer and a scientist,
13 if you've identified all the possible causes --
14 let me back up. You're familiar with the
15 scientific method, right?

16 A. Yes, I am.

17 Q. You posit a hypothesis; you collect the
18 data, if the data refutes the hypothesis you
19 discard the hypothesis, and then you'd refine
20 your hypothesis and you'd gather more data?

21 A. Sure.

22 Q. Isn't that how you do it?

23 A. Uh-huh. That's -- that's pretty good.

24 Q. And some data is direct, and some data is
25 circumstantial. Correct?

1 A. I believe that it depends on what you have
2 available to...

3 Q. Well, like the electron, again. Nobody's
4 ever seen an electron or smelled an electron or
5 held an electron, but we have tests to derive
6 their presence, right?

7 A. Yes.

8 Q. Okay. All right. So what you would do if
9 you were a conscientious engineer and if you
10 wanted to be fair to both Stan Shelby and to Ford
11 Motor Company, if you wanted to be fair, you
12 would gather whatever evidence there is to see
13 what you can rule out. Correct?

14 A. That's correct.

15 Q. So if there is no after-market modification
16 to Mr. Shelby's 1996 Ford F-250, if that's a true
17 fact, then you'd rule that out, wouldn't you?

18 A. If that were true. I don't know if that's
19 true or not.

20 Q. I'm not asking you that. I'm just saying
21 ~~if it's true, if you could derive that that's~~
22 true, then you would rule it out?

23 A. If I could derive that was a true -- yes.

24 Q. Okay.

25 A. That's something I would rule out.

1 Q. And the way that you derive whether
2 something is true or not is by either examining
3 the data or talking to somebody, wouldn't you?

4 A. If you -- if you mean inspecting the
5 vehicle as part of gathering the data, that's one
6 thing, yes.

7 Q. Right. Well, do you have children?

8 A. Yes, I do.

9 Q. Okay. How many?

10 A. Two boys.

11 Q. Okay. I have four girls. I think that
12 boys are easier. Of course, I've never had boys.
13 How old are your children?

14 A. Fourteen and twelve.

15 Q. All right. Well, when they were younger,
16 not so much now, but when they were younger, did
17 you ever catch them telling something that wasn't
18 quite true?

19 A. Sure.

20 Q. And you would test their accuracy ---

21 MR. OTT: Objection. Relevance.

22 THE COURT: Let him finish the
23 question.

24 BY MR. GOLDSTEIN:

25 Q. If Mr. Shelby says I didn't make any

1 after-market modifications, isn't it a question
2 of whether you believe him or not as to whether
3 or not that's true?

4 A. I would have no reason to not believe him.

5 Q. Okay. Fair enough. When there is a defect
6 in a Ford motor vehicle -- and I'm not picking on
7 Ford, in any motor vehicle. When there is a
8 defect in a Ford motor vehicle, aren't y'all
9 obligated under federal law to report that defect
10 to the National Highway Traffic Safety
11 Administration?

12 MR. OTT: Objection, Your Honor.

13 THE COURT: If he knows. Overruled.

14 THE WITNESS: Well, it's my -- my job,
15 I've been assigned the responsibility of
16 investigating our vehicles in the real world
17 conditions, not unlike Mr. Shelby or 5 Star,
18 Incorporated's vehicle here today. We have other
19 people then that take data and evaluate that data
20 and go forward depending on the criteria that
21 they have.

22 BY MR. GOLDSTEIN:

23 Q. Okay. So the answer to the question is
24 yes, if you find there is something wrong, then
25 you have a duty to report it?

1 A. Well, what I -- my duty lies, and that's a
2 responsibility of a design analysis engineer, is
3 to take the information that we are able to
4 gather from investigations in places like
5 Charleston, South Carolina and other places back
6 to people such as the automotive safety office or
7 our investigations group that look at things that
8 -- how our vehicles are performing from a safety
9 perspective.

10 Q. Okay. Well, I'm not sure you -- I
11 understand what you said, but I'm still not sure
12 you've answered my question yet. Is the answer
13 yes, that if you discover there is something
14 wrong with a vehicle or a class of vehicles you
15 have a duty to report that to the National
16 Highway and Traffic Safety Administration?
17 Correct?

18 A. I guess the answer is I don't know the
19 answer to that question.

20 Q. Okay.

21 A. What I do is report my findings back to
22 different personnel. That could include members
23 of the automotive safety office, as I mentioned,
24 and also even our product development or our
25 product engineering teams.

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

6 A. Absolutely, I would tell.

7 Q. How would you tell them?

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

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

16 MR. OTT: Your Honor, objection.

17 THE COURT: Overruled.

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

1 occur after that initial investigation.

2 BY MR. GOLDSTEIN:

3 Q. And do you have a mechanism set up at Ford
4 Motor Company to do precisely that?

5 A. Yes.

6 Q. And what's that department called?

7 A. Well, the activity's called the critical
8 concerns review group, is one of those
9 activities.

10 Q. Does the critical concerns review group
11 have any concern with the speed control
12 deactivation switch?

13 MR. OTT: Objection, Your Honor. It's
14 covered by Your Honor's rulings.

15 THE COURT: Approach.

16 (There was an off-the-record bench
17 conference in the presence of the jury but out of
18 the hearing of the jury.)

19 (Said bench conference being concluded,
20 the following proceedings were had:)

21 THE COURT: Mr. Goldstein, you're
22 withdrawing your question?

23 MR. GOLDSTEIN: Yes, Your Honor. I'm
24 withdrawing it, and I'm going to ask one or two
25 more, then I'll go sit down and be quiet.

1 BY MR. GOLDSTEIN:

2 Q. Mr. Olson, do you know what caused the fire
3 on September 26th? If I say September 26th,
4 that's the day the fire department got there. Do
5 you know what caused the fire to Stan Shelby's
6 truck?

7 A. I do not.

8 Q. Okay. If you wanted to know what caused
9 the fire in Stan Shelby's truck, would you talk
10 to the fire investigator who was on the scene and
11 ask him what he thinks caused the fire?

12 A. I'm not sure if I would be able to speak to
13 him directly. Certainly, I would be able to
14 review information that he's provided, such as
15 reports and hopefully photographs, things of that
16 nature.

17 Q. And would you rely on that information in
18 arriving at your ultimate opinion?

19 A. I would include it. Absolutely.

20 Q. Okay. If there is -- if there is a problem
21 ~~with the speed deactivation control switch in~~
22 Mr. Shelby's truck in that it becomes
23 over-energized by carrying 15 amps through a
24 switch that's designed to carry two switches --
25 two amps, wouldn't the obvious economical simple

1 fix be to insert a two-amp fuse in that wiring
2 circuit?

3 A. I believe that it would require more
4 investigation, and I don't know it's a question I
5 could answer right here.

6 Q. Okay. But you would agree with me as an
7 engineer that Ohm's law, the law that determines
8 temperature as proportional to resistance, is a
9 basic fundamental high school level foundation of
10 physics, correct?

11 A. Ohm's law doesn't address temperature.

12 Q. Okay. It talks about resistance?

13 A. Resistance.

14 Q. Okay.

15 A. And voltage. And current.

16 Q. All right. And the greater the resistance,
17 the more voltage and amperage is required to
18 overcome it, correct?

19 A. I'm not exactly sure about that.

20 Q. Well, when you wire a house, you don't use
21 oak to wire your house; you use copper, right?

22 A. That's correct.

23 Q. Okay. And that's because the electricity
24 flows through the copper with much less
25 resistance?

1 A. Yes.

2 MR. GOLDSTEIN: Okay. That's all I
3 have. Thank you for answering my questions.

4 Oh, Your Honor, I would like to move --
5 oh, it's already in evidence. I'm sorry.

6 THE COURT: Ladies and gentlemen of the
7 jury, we've reached a point we're going to take
8 our mid-morning break.

9 Please do not begin any deliberations.
10 You have not received the law on this case.
11 Please do not discuss this case amongst
12 yourselves.

13 And as I indicated during our previous
14 selection, if you see any of the litigants in the
15 hallway or any of the parties, they have been
16 instructed not to speak with you, not because
17 they're being rude, but they are merely following
18 my court orders.

19 We will take a ten-minute break, and
20 we'll resume.

21 Mr. Olson, if you'll just stay on the
22 stand.

23 If you'll escort the jury out.

24 (Whereupon, the jury goes to the jury
25 room at approximately 11:00 a.m.)

1 THE COURT: You may be seated.

2 Mr. Olson, you may step down, but you
3 may not discuss your testimony with either party.
4 So out of an abundance of caution. If you want
5 to take a comfort break, and then you can return
6 to your seat, please, but do not discuss this
7 case, and you're still under oath.

8 THE WITNESS: I agree.

9 THE COURT: Thank you.

10 It'll be a ten-minute recess.

11 (A break is taken at approximately
12 11:00 a.m.)

13 (The trial reconvenes at approximately
14 11:13 a.m., and the following proceedings were
15 had:)

16 JOHN S. OLSON,
17 being previously duly sworn, resumes the witness
18 stand and is examined and testifies further as
19 follows:

20 MR. GOLDSTEIN: The Court's ruling on
21 the motion in limine adversely to the argument I
22 was making and because it was a motion in limine,
23 I believe the rules require me to renew my
24 attempt to introduce the notice of the recall.

25 I believe Your Honor's ruling was that

1 I couldn't elicit testimony about the recall
2 through this witness; however, that it was
3 admissible through experience and training of the
4 experts.

5 And at this time, I would like to renew
6 my exception to Your Honor's ruling and request
7 permission to elicit from this witness the notice
8 of -- elicit from this witness testimony
9 concerning the recall notice.

10 And if Your Honor is inclined not to
11 change her mind, I ask that I be permitted to
12 make a proffer so that it will be preserved in
13 the record.

14 THE COURT: Aren't you done with this
15 witness, Mr. Goldstein?

16 MR. GOLDSTEIN: Yes, ma'am. But the
17 jury was present, and I didn't want to say that
18 in the presence of the jury. I think I have to
19 renew my effort to elicit the testimony. I
20 really didn't want to spend the night in jail,
21 ~~so I thought now was the right time to do it.~~

22 THE COURT: And I appreciate that,
23 Mr. Goldstein.

24 Again, I ruled yesterday regarding the
25 recall notice as to the Expedition which is not

1 subject matter to this -- to this case. I'll
2 note your objection and your exception, and...

3 MR. GOLDSTEIN: I think I'm required
4 to make a proffer. I can either do a question
5 and answer, or I can just summarize it, either
6 way, however, but I think I'm required to make a
7 proffer.

8 THE COURT: I will allow you to make a
9 proffer. You may do it within question and
10 answer.

11 MR. GOLDSTEIN: Whatever is faster.

12 THE COURT: Do the question and answer.

13 MR. GOLDSTEIN: Okay.

14 DIRECT EXAMINATION (IN CAMERA)

15 BY MR. GOLDSTEIN:

16 Q. Mr. Olson, Ford Motor Company did issue a
17 recall for the speed control deactivation switch;
18 is that correct?

19 A. That's correct.

20 Q. And the original -- the original recall was
21 in January of 2005; is that correct?

22 A. Yes.

23 Q. And then it was expanded in September 2005?

24 A. Yes.

25 Q. And then again in April 2006?

1 A. I'm not sure about the April. I know that
2 in '06 it was expanded.

3 Q. Okay. And the actual NHTSA recall for this
4 particular vehicle has been marked as plaintiff's
5 exhibit 17. There it is, 17. Is that correct?

6 A. That -- that's a document that includes
7 recalls that may apply to the vehicle.

8 Q. Okay. And that's from the National Highway
9 Traffic and Safety Administration, correct?

10 A. Yes.

11 Q. In your materials that you brought with you
12 here today, do you have the actual physical
13 recall?

14 A. For the 5 Star, Incorporated, vehicle?

15 Q. Yes, sir.

16 A. I believe I do.

17 MR. GOLDSTEIN: Okay. At some point
18 that's convenient, Your Honor, I ask that we just
19 mark that for identification. I understand Your
20 Honor's ruling, but ---

21 THE COURT: Well, actually, mark that
22 as Court's exhibit one.

23 MR. GOLDSTEIN: Court's exhibit one.

24 Thank you, Your Honor. And we could do that at a
25 later time so we can move forward.

1 THE COURT: All right.

2 MR. GOLDSTEIN: And that would be the
3 proffer, Your Honor.

4 THE COURT: Thank you. Anything
5 additional before we bring in the jury,
6 Mr. Goldstein?

7 MR. GOLDSTEIN: Nothing, Your Honor.

8 THE COURT: Anything from the defense?

9 MR. OTT: No, Your Honor. Thank you.

10 THE COURT: My inclination is to finish
11 up this witness, and then you have two other
12 witnesses, Mr. Goldstein?

13 MR. GOLDSTEIN: Yes, ma'am.

14 THE COURT: What is your anticipated
15 length for your next witness?

16 (Mr. Ott and Mr. Goldstein confer.)

17 MR. GOLDSTEIN: I'm sorry. Did I say
18 two? Mr. Ott is correcting my math again. I
19 have three. I have the plaintiff ---

20 THE COURT: It was actually the Court's
21 math.

22 MR. GOLDSTEIN: Oh, okay. All right.
23 I have the plaintiff. I was going to call him
24 last.

25 THE COURT: All right.

1 MR. GOLDSTEIN: Mr. Greene, I think,
2 needs to get going, so we'd call him next. And
3 then Mr. Norris who is the fire investigator, I
4 was going to call him next. So Mr. Greene,
5 Mr. Norris, and I'll finish with Stan Shelby.

6 THE COURT: Okay. Then we'll call --
7 after this witness, we'll call Mr. Greene, and
8 I'll see where we are as far as breaking for
9 lunch, depending on the length of the testimony.

10 Please bring in the witness -- the
11 jury.

12 MR. GOLDSTEIN: Judge, while the jury
13 is coming in, may Mr. Ott and Mr. Marshall and I
14 approach very briefly?

15 THE COURT: Yes, sure.

16 (There was an off-the-record bench
17 conference.)

18 (Said bench conference being concluded,
19 the following proceedings were had:)

20 (Whereupon, the jury enters the
21 courtroom at approximately 11:15 p.m.)

22 JOHN S. OLSON,
23 being previously duly sworn, resumes the witness
24 stand and is examined and testifies further as
25 follows:

1 THE BAILIFF: The jurors are all
2 present.

3 THE COURT: Thank you.

4 Y'all may be seated.

5 Ladies and gentlemen of the jury, I
6 just want to let you know we are very diligently
7 keeping track of the hurricane, and so I just
8 want you to know that I will keep you informed as
9 to any closures or anything as that becomes
10 available.

11 Also, the pounding noise that you hear
12 is not thunder or any sort of weather-related
13 activity. They are working on the building. So
14 I just wanted to allay your fears, that there is
15 not the hurricane starting to hit us while we are
16 listening to the testimony in this case.

17 We will break as close to possible at
18 noon, as I indicated to you before, and I will
19 keep you posted as to the remainder of the week
20 as we are progressing. Thank you.

21 I remind you you're still under oath,
22 Mr. Olson.

23 THE WITNESS: Yes, ma'am.

24 THE COURT: Mr. Ott.

25 MR. OTT: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. OTT:

Q. Mr. Olson, you told us about your children.

Are you married?

A. Yes, I am.

Q. How long have you been married?

A. Sixteen years.

Q. And what does your wife do for a living?

A. She works for Marriott. She is a sales and marketing coordinator.

Q. Let's talk about your background in fire investigations. First of all, what are your degrees in?

A. I have a mechanical engineering degree, bachelor of science. It's a four-year degree. Also, I have a master's in business administration. And I have other certifications and memberships, as well.

Q. How long have you in total worked in the automotive industry?

A. Just about 17 years in total.

Q. And are you a member of any professional organizations?

A. Yes.

Q. Tell us about those.

1 A. I am a member of the Society of Automotive
2 Engineers. I am a member of the National Fire
3 Protection Association, a member of the
4 International Association of Arson Investigators.

5 And where -- also, on the side of automotive
6 engineering, I also serve on several
7 subcommittees.

8 Q. Have you ever published or been part of a
9 group that has published in the area of fire
10 investigations or vehicle design?

11 A. Yes.

12 Q. Tell us about that, please.

13 A. Well, I was the coauthor of a publication
14 in 2007 that related to operating temperatures of
15 vehicles when they were running on gasoline
16 versus ethanol. And the purpose for that was for
17 -- to gain an understanding of how temperatures
18 change within the engine compartment and how
19 engineers might design components that may come
20 close to sources of heat for -- for overall
21 vehicle safety.

22 Q. And have you also served your country in
23 the military?

24 A. Yes, I have.

25 Q. Tell us about your military ---

1 A. I joined the United States Army in 1993 --
2 or, excuse me, '83. I served two years in Europe
3 with the U.S. Army. I came back in 1985, and I
4 served one year in the Michigan Army National
5 Guard.

6 MR. OTT: Your Honor, at this time we
7 proffer Mr. Olson as an expert in fire
8 investigation as to origin and cause in vehicle
9 fires.

10 THE COURT: Any objection,
11 Mr. Goldstein?

12 MR. GOLDSTEIN: Your Honor, I wasn't
13 taking notes during my own cross-examination, of
14 course, but I recall Mr. Olson saying that he
15 wasn't an expert when I asked him. I was asking
16 him about his qualifications, and he said he was
17 not an expert.

18 THE COURT: Counsel approach.

19 (There was an off-the-record bench
20 conference in the presence of the jury but out of
21 the hearing of the jury.)

22 (Said bench conference being concluded,
23 the following proceedings were had:)

24 THE COURT: Mr. Ott, what are you
25 asking for this witness to be qualified as an

1 expert in?

2 MR. OTT: In the investigation of fire
3 origin and cause and in particular as to
4 vehicles.

5 THE COURT: I will allow it. I will
6 note your objection, Mr. Goldstein.

7 BY MR. OTT:

8 Q. Mr. Olson, Mr. Goldstein asked you some
9 questions about the vehicle weight which is
10 listed as 4700 pounds, correct?

11 A. That's correct.

12 Q. And the gross vehicle weight was, I think,
13 8800 pounds; is that right?

14 A. That's correct.

15 Q. You said that there was a difference, but
16 he didn't give you an opportunity to explain.
17 Would you please tell us what that difference
18 was?

19 A. Sure. The gross vehicle weight rating is a
20 calculation of not only what the vehicle weighs,
21 but then you also add to it all of the fluids and
22 gasoline that's in the vehicle. You add to it.
23 If the vehicle can seat five passengers, you add
24 the weight of five passengers.

25 In this case, it's a truck that's capable

1 of hauling cargo in the bed of the truck. You
2 would also add that particular weight to the
3 overall weight rating.

4 Also, the weight of a -- towing of a
5 trailer, for example. If you were to tow a
6 vehicle, what that weight would add to the
7 bumper.

8 So gross vehicle weight rating is really an
9 overall indicator of actually how much that
10 vehicle could weigh if it was totally loaded with
11 cargo and passengers and -- and fluids and fuel.

12 Q. Now, Mr. Olson, you are an engineer, and
13 typically engineers aren't involved in lawsuits,
14 are they?

15 A. No. There's very few of us, actually, at
16 Ford that are involved in that aspect.

17 Q. But in the course of litigation, sometimes
18 issues come up that require expertise of an
19 engineer; is that right?

20 A. Yes, that's true.

21 Q. And is that your relationship to this case?

22 A. Yes, it is.

23 Q. Were you brought in after 5 Star,
24 Incorporated, filed this lawsuit and claimed that
25 there was a defect in the vehicle?

1 A. Yes, that's true.

2 Q. And tell us what your responsibility was at
3 that point.

4 A. Well, I had -- I think I first became
5 involved earlier this year or probably -- maybe
6 or late last year. It was to look at the
7 available information, and not all of it, but the
8 information as it relates to the technical
9 investigation and the allegations of an issue
10 with the vehicle.

11 So what I recall at that time was looking
12 at a few photos that were provided, some of the
13 vehicle information, including the warranty and
14 when it was built and the specifications that it
15 was built to. So things of that nature.

16 Q. And as an expert in fire investigations, is
17 it reasonable for you to rely upon some
18 information to arrive at basic facts?

19 A. Sure.. I've always viewed the -- the more
20 information the better. That was -- is always
21 the approach that I want to use.

22 Q. And have you learned of specific
23 information about when this vehicle was
24 manufactured, for instance?

25 A. Yes.

1 Q. When it was sold?

2 A. (The witness nods head up and down.)

3 Q. And when 5 Star purchased it?

4 A. Yes.

5 Q. And the approximate odometer reading at the
6 time of purchase?

7 A. Yes.

8 Q. And did you obtain that information from
9 answers 5 Star provided in the course of this
10 discovery through Answers to Interrogatories?

11 A. Part of it was, and part of it were -- was
12 from Ford's records on this particular vehicle.

13 MR. OTT: Okay. May I approach the
14 witness, Your Honor?

15 THE COURT: You may.

16 BY MR. OTT:

17 Q. I'm going to hand you what's been marked as
18 defendant's exhibit number one and ask if you can
19 identify that document for us, please.

20 A. This is a document that indicates that it's
21 Plaintiff's Answers to Defendant's First Set of
22 Interrogatories.

23 Q. Interrogatories is a big lawyer word for
24 questions?

25 A. Right.

1 Q. And you understand these were questions
2 that we sent to 5 Star and their attorney to
3 provide some basic information about this
4 vehicle?

5 A. Yes.

6 Q. Is that right?

7 A. Yes.

8 Q. And in those answers, did they identify the
9 make, model, year, and vehicle identification
10 number of this truck?

11 A. Yes, they did.

12 Q. And tell us what it is. You don't have to
13 read the VIN number.

14 A. 1996 Ford F-250.

15 Q. And who was the owner?

16 A. 5 Star, Incorporated.

17 Q. And what's the approximate vehicle mileage
18 that they provided us?

19 A. 227,500.

20 Q. Did they also tell us where the vehicle
21 currently is located?

22 A. Yes.

23 Q. And what did they say?

24 A. It says that it is currently crushed and at
25 a steel mill.

1 Q. They said it was crushed as in destroyed?

2 A. That's how I interpret it.

3 Q. All right. And ---

4 MR. OTT: Can I approach again, Your
5 Honor?

6 THE COURT: You may.

7 BY MR. OTT:

8 Q. I hand you what's been marked as
9 defendant's exhibit number two and ask you to
10 please identify that document.

11 A. This is a -- includes information that
12 indicates Plaintiff's Answers to Defendant's
13 Supplemental Interrogatories.

14 Q. And so those were supplemental questions
15 that we sent to the plaintiff to answer in this
16 case. Is that right?

17 A. Yes.

18 Q. And they answered them?

19 A. Yes.

20 Q. And were those questions devoted to what
21 happened to this vehicle?

22 A. Yes. It talks about some dates and who the
23 owner was, I believe, or involved in the decision
24 of what happened to the vehicle.

25 Q. And did the plaintiffs identify Mr. Shelby

1 as the one who made the decision to destroy this
2 vehicle?

3 A. Yes.

4 Q. And when did he destroy it?

5 A. On or about February 2nd, 2006.

6 Q. And how did -- what was the name of the
7 company that actually disposed of the vehicle?

8 A. The answer to that question was BBJ Metal
9 Company in Moncks Corner, South Carolina.

10 Q. And would you please read whether the
11 plaintiff in the supplemental interrogatory
12 number four, either on his own behalf or at his
13 direction, ever informed Ford Motor Company of
14 the decision to crush or destroy this vehicle
15 prior to them actually doing that?

16 A. The answer to that question is no.

17 Q. When you got involved in this case, did you
18 research Ford's records about this vehicle?

19 A. Yes, I did.

20 Q. And did you review any records having to do
21 with any -- whether anyone notified Ford of the
22 decision to destroy this vehicle before that was
23 actually done?

24 A. Yes. I couldn't -- I couldn't find
25 anything on that.

1 Q. Now, we've talked about the scientific
2 method. Is the scientific method based upon the
3 ability to test a theory?

4 A. Yes, in part.

5 Q. As an expert in the cause and origin of
6 fires, is it generally sufficient to arrive at an
7 opinion as to an origin of a fire without the
8 ability to investigate the scene, the vehicle, or
9 the allegedly responsible part?

10 A. It makes it extremely difficult when you
11 don't have those types of elements to do a
12 thorough investigation.

13 Q. And, generally, as an expert in cause and
14 origin of fires, is it possible for a fire
15 investigator to make a determination of the
16 specific cause of fire without the ability to
17 inspect the scene, the vehicle, or the alleged
18 part?

19 A. Yes. Again, it becomes extremely difficult
20 when you can't look at physical evidence.

21 Q. Are you a member of the National Fire
22 Protection Association?

23 A. Yes, I am.

24 Q. Tell us what that is. And we'll just call
25 it NFPA because I don't think I can continue to

1 repeat that without messing it up.

2 A. Well, I'm a -- I'm a member of the NFPA.

3 And the 921 document is -- is recognized

4 certainly within the United States and maybe even

5 all over the world as a -- as a respected and a

6 peer reviewed guideline for investigating the

7 fire, the cause and origin of a fire.

8 It provides everything from techniques that

9 you follow, to being safe when you do these kinds

10 of things, to preserving evidence, to even

11 standard forms maybe that you would use,

12 techniques on how to photograph. So a variety of

13 topics.

14 And in a general sense -- and it doesn't

15 apply just to vehicles or structures. It's

16 really -- it talks about wildfires and vehicle --

17 vehicle fires, fires in commercial buildings, or

18 in residential areas, as well.

19 Q. Now, have you been provided the photographs

20 that are available that were taken at some point

21 of this vehicle?

22 A. Yes.

23 Q. And have you been provided the North

24 Charleston fire report?

25 A. Yes.

1 Q. Have you reviewed sworn testimony in the
2 form of a deposition from a Mr. Greene and a
3 Mr. Norris?

4 A. Yes.

5 Q. And, in fact, Captain Sanders who testified
6 earlier?

7 A. Yes.

8 Q. Mr. Olson, having reviewed that information
9 that's been provided, do you have an opinion
10 whether there ever was an investigation performed
11 on this vehicle and this part pursuant to the
12 authoritative NFPA 921?

13 A. I believe that from my experience and my
14 knowledge of NFPA 921 that the investigation that
15 ensued by the other individuals was not
16 consistent with their methods.

17 Q. And tell us, Mr. Olson, having reviewed the
18 material that is still available, did Ford just
19 immediately conclude that because the vehicle had
20 been destroyed and the part destroyed that there
21 was nothing we could do about this case and so
22 we're going to end up defending ourselves?

23 A. That we're going to end up -- I'm sorry?

24 Q. That we're going to end up defending this
25 case?

1 A. No. I think that the -- the process was,
2 as I understood it, was to review the
3 information, to hear what type of work was done,
4 and even in light of the fact that we weren't
5 afforded the opportunity to come down and take a
6 look at it.

7 Q. So even though they destroyed the vehicle
8 and the part, you did what you could as the
9 investigator for Ford to make whatever opinions
10 you could; is that right?

11 A. Sure. That -- that's true.

12 Q. Based on the information that was
13 available, were you able to arrive at an opinion
14 as to the origin of this particular fire?

15 A. I was not able to arrive at any opinion
16 based on a very limited number of photographs. I
17 think in total there may have been four or five,
18 and not all of them even included particularly
19 usable or photos that would provide information
20 about this vehicle and how the fire started.

21 No fires -- or no photos, excuse me, of
22 anything within the structure that would indicate
23 to me that we could look closer at the vehicle as
24 the origin, and I can go on from there, even with
25 -- and just the engine compartment of the vehicle

1 itself.

2 Q. Now, similarly, based on the limited
3 information that you had available, have you been
4 able to arrive at an opinion to a reasonable
5 degree of engineering certainty as to what caused
6 this particular fire?

7 A. My opinion would be that the cause of the
8 fire would be undetermined.

9 Q. And what is that opinion based on?

10 A. The opinion is based on the methodology
11 that NFPA 921 spells out; and that is, to review
12 the available information, look at physical
13 evidence, to the best of your ability, and to
14 consider all aspects, try to determine where the
15 origin of the fire was, and then after that's
16 done, determine a cause.

17 And with the limited information that was
18 provided to me in this case, I had no other
19 decision but to -- to provide the opinion that
20 there was no way to determine the origin of this
21 fire, let alone cause.

22 Q. If this vehicle had been preserved for
23 purposes of this lawsuit or if the plaintiff had
24 not destroyed it, would you be able to inspect
25 the vehicle?

1 A. We -- we generally get that chance to do
2 that.

3 Q. Do you inspect vehicles for Ford in other
4 claims or even lawsuits?

5 A. Yes, I do. I think in six years I have
6 investigated or inspected somewhere between two
7 and three hundred vehicles.

8 Q. And if this vehicle had not been destroyed
9 by the plaintiff and this specific part were
10 available for inspection, are there tests that
11 can be done even on the remains of a switch
12 post-fire?

13 A. Yes. Yes, it can.

14 Q. What type of tests could be performed, and
15 what information would those tests potentially
16 reveal?

17 A. Well, there's -- there's several things.
18 First of all, we could photo document the switch
19 and allow others to take a look at it, including
20 myself, to observe any type of characteristics
21 the switch might have.

22 We could X-ray it, where X-ray would allow
23 us to look at materials and connectors that are
24 inside the switch.

25 And we could even go a step further and use

1 what's called a scanning electron microscope that
2 not only allows you to look at things but then
3 allows you to -- can tell you what materials you
4 have present in there.

5 And so those are just some of the things
6 that we could do.

7 Q. Are we able to do that in this case?

8 A. No. Unfortunately, we're not.

9 Q. Has the absence of the truck and the part
10 they claim caused this fire, has the absence of
11 those two things disadvantaged our defense of
12 this case?

13 A. I believe it's a severe disadvantage in the
14 sense that we can't look at it, we can't feel or
15 touch wires.

16 It's not unusual for me when I go inspect a
17 vehicle to take a hundred or more photos, and
18 that allows, especially with digital cameras
19 these days, to really provide a lot of
20 information. And sometimes it's not unusual to
21 even see things in those photos when you get back
22 that you might not have observed when you're at
23 the scene.

24 Q. In fact, is there an explanation in
25 NFPA 921, the guide for fire and explosion

1 investigations, as to how someone should properly
2 document a scene and suspected product with
3 photographs?

4 A. It provides not only ways to do that, but
5 it also -- it also indicates how important it is
6 to do those kind of things.

7 Q. Is it in fact designed for other
8 investigators to be able to come behind the
9 person taking the photographs and arrive at the
10 same opinions that the person who took those
11 photographs did?

12 A. Sure. I mean -- I mean, even the captain
13 who was here earlier talked about the importance
14 of preserving evidence. And I don't know that he
15 was specific when he said whether it was arson or
16 not, but -- but the same thing applies regardless
17 of whether it's arson or something else, even if
18 we're talking purely vehicle safety and somebody
19 from a manufacturer, whether it's Ford or others,
20 want to come out and take a look at -- at what
21 happened.

22 Q. Are there many possible explanations for a
23 fire in any vehicle?

24 A. Yes. Yes. Unfortunately, they -- vehicles
25 carry electrical loads in them, they carry

1 volatile fluids, gasoline, and brake fluid, and
2 even windshield washer fluid has alcohol in it.
3 So there's -- there's a lot of things
4 unfortunately in a vehicle that in the event a
5 fire develops can -- can be a hazard.

6 Q. Mr. Olson, let's talk about the mileage on
7 this particular vehicle being, let's say, over
8 225,000 miles. I think the exact number was
9 227,500. But are you familiar with the general
10 maintenance schedule for an F-250 truck?

11 A. I think so. To kind of a limited degree.

12 Q. Okay. Are you familiar with the expected
13 longevity of different parts within the engine
14 compartment?

15 A. Yes.

16 Q. Given that kind of mileage, what would you
17 expect in a vehicle with that kind of mileage and
18 that kind of age on it as far as whether the
19 parts in the engine compartment are even original
20 equipment manufactured parts?

21 A. Well, I think it was testified earlier that
22 this vehicle had been around about ten years and
23 well over 200,000 miles. Things like batteries
24 and belts and spark plug wires and fluids within
25 transmission and radiators, oil changes, all of

1 those things that require maintenance and in some
2 case are considered wearable items tend to be
3 replaced. And with 200 -- over -- over 200,000
4 miles, I would suspect that that was the case
5 here.

6 Q. Have we been provided any records
7 concerning the maintenance history of this
8 vehicle?

9 A. No. I think we may have some warranty
10 information when this vehicle was -- was
11 relatively new, but to my knowledge there are
12 none.

13 MR. OTT: With the Court's indulgence.

14 (Mr. Ott and Mr. Marshall confer.)

15 MR. OTT: Thank you, Mr. Olson. That's
16 all the questions I have.

17 THE COURT: Mr. Goldstein.

18 MR. GOLDSTEIN: May it please the
19 Court.

20 REDIRECT EXAMINATION

21 BY MR. GOLDSTEIN:

22 Q. You said as an expert in fire cause and
23 origin that you've inspected over 200 to 300 --
24 you said you've inspected between two and three
25 hundred vehicle fires. Correct?

1 A. It's in that range.

2 Q. Okay. How many of those did you testify a
3 fire was caused by a defective speed deactivation
4 control switch?

5 A. Testified? I don't believe any.

6 Q. Okay. Let me rephrase the question. Out
7 of the 200 to 300 vehicles that you've inspected,
8 how many did you conclude were fires caused by a
9 defective speed control deactivation switch?

10 A. I don't know the precise number. I know
11 that there were instances where I was able to
12 look at the vehicle where I could not rule it
13 out.

14 Q. Okay.

15 A. And that's to the -- the point of the
16 investigation where, you know, different things
17 happened with the case. Maybe it was resolved
18 after that, I don't know.

19 Q. Well, I apologize for being redundant, but
20 I still do not believe you've answered my
21 question, so I'm going to ask it one more time.

22 Of the 200 to 300 vehicles you've inspected
23 as an expert in fire cause and origin, of those,
24 how many did you determine were caused by a
25 defective speed control deactivation switch?

1 Now, maybe your answer was I don't know.
2 Was that your answer?

3 A. The answer is that for some of them I could
4 not rule it out. So I would say that it is -- it
5 is one of the possibilities. I've never
6 definitely concluded that, at least in my
7 involvement, that the switch was at issue.

8 Q. Well, is it a fair inference to draw, is it
9 a fair inference for this jury to draw that if
10 you flew around the country on behalf of Ford
11 opining that their cars were burning up because
12 they had a defective speed control deactivation
13 switch that you wouldn't be an employee of Ford
14 much longer?

15 MR. OTT: Objection, Your Honor.

16 THE COURT: Sustained.

17 BY MR. GOLDSTEIN:

18 Q. You testified that in conducting an
19 investigation it's very important to take
20 detailed photos because, and I believe you said,
21 sometimes you go back to your office and you look
22 and you see, darn, there's something in the photo
23 I missed out on the scene. Isn't that right?

24 A. That happens.

25 Q. Okay. And you have digital photos right

1 there on the table in front of you in this case,
2 don't you?

3 A. I have -- I don't think they're digital. I
4 think they're just four-by-six prints.

5 Q. Okay. Well, how about plaintiff's exhibits
6 -- you don't have some more photos up there?

7 There you go. Aren't those nice, clear, crisp,
8 digital photos?

9 A. Well -- there are some.

10 Q. Okay.

11 A. But there are -- more than two-thirds of
12 them are of an office chair and different -- and
13 a computer area and stuff. There are a few of
14 the vehicle.

15 Q. So you don't trust photos taken by somebody
16 else as much as you trust the photos taken by
17 you?

18 A. No, that's not true.

19 Q. All right. Now, you said something very
20 interesting. And I was completely confused. In
21 my examination of you, I thought you told me you
22 weren't an expert in fire cause and origin, but
23 now you tell me you are, and -- or maybe I just
24 misunderstood you. I do that a lot, and I
25 apologize if I did. But you are an expert in

1 fire cause and origin?

2 A. Mr. Goldstein, I've -- I've -- in addition
3 to the two or three hundred vehicles I believe
4 that I've inspected, I've also attended or been
5 an instructor in hundreds of hours of training,
6 as well, at it relates to vehicle fire cause and
7 origin.

8 Q. That's what I'm saying. I mean, you have
9 told us you're an expert in the detection of fire
10 cause and origin, correct?

11 A. I believe so.

12 Q. Okay. And based on your training, wouldn't
13 a reasonably trained expert in fire cause and
14 origin, wouldn't the first place such an expert
15 look is to determine whether or not there was a
16 nationwide recall on the switch that you were
17 looking at? Wouldn't a reasonable expert do
18 that?

19 MR. OTT: Objection.

20 THE COURT: Approach.

21 (There was an off-the-record bench
22 conference in the presence of the jury but out of
23 the hearing of the jury.)

24 (Said bench conference being concluded,
25 the following proceedings were had:)

1 THE COURT: Ladies and gentlemen of the
2 jury, there is a matter that I must take up
3 outside of your presence. Please do not begin
4 deliberations. Do not discuss this matter
5 amongst yourselves.

6 And I will either -- if we go into the
7 noon hour, we will just go ahead and break for
8 lunch. So I'll send a note back with the bailiff
9 to let you know that if this is -- if we can
10 handle this and not break into the lunch hour,
11 we'll go ahead and do that, just to keep y'all
12 informed. Thank you.

13 (Whereupon, the jury goes to the jury
14 room at approximately 11:45 a.m.)

15 THE COURT: Thank you. Be seated.

16 We're going to go ahead and put this on
17 the record, the discussion we had at side bar.

18 Mr. Ott, you are objecting to the fact
19 -- the statement. I'll be happy to hear from you
20 on the record.

21 ~~MR. OTT: Your Honor, he just asked the~~
22 question that the Court had ruled was
23 inadmissible in our motion in limine to exclude
24 the 2005 recall. He just asked the very question
25 that he's been admonished not to ask.

1 And, accordingly, we move for a
2 mistrial, and associated with that, move for our
3 costs in defending this case, based on his
4 willful violation of the Court's clear order
5 yesterday regarding the inadmissibility of the
6 recall.

7 THE COURT: Counsel, Mr. Goldstein.

8 MR. GOLDSTEIN: Your Honor, nobody has
9 more fear of going to jail than I do. Rumpole of
10 the Bailey said -- I don't know, you're too young
11 to remember Rumpole of the Bailey, but he said
12 every lawyer goes to law school to maximize his
13 or her chances of not going to jail. I'm that
14 guy.

15 You ruled, over my objection, you ruled
16 that I cannot elicit any testimony about a
17 nationwide recall except as it relied and related
18 to an expert's training and educational
19 experience. That was Your Honor's ruling. I
20 took exception to it, but I obeyed it to the
21 letter. I didn't come anywhere close to
22 violating Your Honor's order.

23 He qualified him as an expert. I could
24 have sworn he said in my cross-examination he
25 said he wasn't an expert, but, you know, Mr. Ott

1 says I'm hallucinating. Maybe I was.

2 But he qualified him as an expert.
3 I'm entitled to inquire as to what a reasonable
4 expert would rely upon in his education and
5 experience, which is completely 100 percent
6 consistent with Your Honor's ruling in this case.

7 I have not violated your order. I have
8 done exactly what Your Honor allowed me to do.
9 Nothing more, nothing less.

10 He opened the door. The door was open
11 as to this expert witness's education, training,
12 and qualification to give an opinion.

13 MR. OTT: If I may, Your Honor.

14 Your Honor's ruling as to allowing an
15 expert to testify based on their experience and
16 training was specific to other similar incidents,
17 the O.S.I. ruling. You absolutely did not put
18 that prohibition -- or, actually, I should say
19 you did not allow an expert to come in and
20 testify about a recall.

21 The Court's order was clear. The
22 recall document concerning the 2001 Expedition
23 was not coming in because it didn't concern this
24 vehicle. The recall did not come in because of
25 Rule 407 and the rationale of Bragg as to

1 post-manufactured conduct.

2 The allowance of an expert to talk
3 about other incidents was in the context of other
4 similar incidents, and I did not object to
5 Mr. Goldstein's questions about other vehicle
6 fires where a switch was in fact suspected or
7 even questioned, saying in those other fires you
8 inspected did you determine whether they caused
9 -- he even used "defective" -- a defective switch
10 caused a particular fire. And I did not object
11 because I consider that within the Court's
12 allowance. However, that corollary or condition
13 only concerned O.S.I. and not the recall.

14 Now, he has used the word "recall,"
15 "nationwide recall," in front of the jury, and I
16 think has violated the Court's clear order.

17 Now, this opening the door argument, I
18 have no idea how I opened the door. I did not
19 mention anything about the recall.

20 The cause and origin opinion I elicited
21 was that nobody, given the dearth of information
22 post-fire, could arrive at an opinion as to the
23 cause in general or the origin in general of this
24 vehicle fire.

25 I didn't mention anything about the

1 possibility of being recall related or not. That
2 issue was never broached. I don't think I asked
3 him anything about this specific switch or its
4 design, manufacture, or the like.

5 So I fail to see how I've opened any
6 door that would allow Mr. Goldstein to ask that
7 question, without even approaching the bench, I
8 mind you, without even approaching the bench and
9 getting the Court's ruling.

10 MR. GOLDSTEIN: Judge, if I -- yes,
11 ma'am. I'm sorry.

12 THE COURT: In the Court's ruling
13 yesterday on your motion in limine to exclude
14 evidence of other accidents, incidents, lawsuits,
15 or settlements involving Ford vehicles, the Court
16 granted your motion, granted your motion with the
17 exception to narrowly allow the expert to testify
18 as to experience, skill, or education as to the
19 speed control devices.

20 Over Mr. Goldstein's objection, I
21 ~~allowed Mr. Olson to be qualified as an expert in~~
22 the investigation of fire cause and origin.

23 Your question, and I paraphrase, but
24 your question: You did what you could to
25 determine the cause of the fire? Based upon the

1 information that was available, have you been
2 able to determine the cause?

3 You then had answers based upon
4 methodology and again cited the manual's 921.

5 You inquired as to the available
6 information, physical evidence, and the limited
7 information available to Mr. Olson.

8 And then you did inquire: Did you
9 inspect for other lawsuits two to three hundred
10 vehicles?

11 Indicated that other tests, could have
12 done, and that Ford would have come and inspected
13 based upon the numerous causes of fire.

14 Based upon my ruling or reading of
15 Rule 702, 703, and the fact that this is your
16 expert that you had me qualify him as an expert
17 in fire origin and cause, the fact that he did
18 proffer the fact that he does have the specific
19 recall notice in his file for this specific
20 vehicle, I am allowing that question.

21 I'll note your objection, and I am not
22 finding that there is any cause for a mistrial.

23 Counsel, would you like for me to
24 release the jury for lunch, allow you some
25 additional time, and we can...

1 MR.. OTT: Yes, Your Honor, I would.

2 THE COURT: And based upon the Court's
3 previous ruling, I believe that recall notice --
4 that I have indicated would be marked as Court's
5 one.

6 If you would just release the jury for
7 lunch.

8 THE BAILIFF: Yes, ma'am.

9 THE COURT: Thank you. They'll need to
10 be back in their jury room at 1:15.

11 Mr. Olson, you may step down to
12 retrieve that document for the Court, if you will
13 do that. And I again remind you of my
14 admonishment, please do not discuss your
15 testimony with either defense attorney or
16 plaintiff's counsel, and you are still under
17 oath.

18 THE WITNESS: Yes, ma'am.

19 THE COURT: You may step down.

20 THE WITNESS: Thank you.

21 THE COURT: Thank you.

22 (The witness leaves the witness stand.)

23 (Court's Exhibit No. 1, Ford recall
24 notice for Shelby vehicle, is marked for
25 identification.)

1 THE COURT: Will you give me the
2 document, please. Thank you.

3 (Court's Exhibit No. 1 is tendered to
4 the Court.)

5 THE COURT: We'll be in recess. I'll
6 be in chambers if counsel wishes to come and
7 discuss this matter with me further. Please,
8 we'll resume -- the jury will be back at 1:15.

9 Mr. Olson, please make sure you're
10 available since you'll be back on the witness
11 stand, and we'll get started about 1:20.

12 The Court's in recess.

13 (A lunch break is taken at
14 approximately 12:00 noon.)
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AFTERNOON SESSION

(The trial reconvenes at approximately 1:40 p.m., and the following proceedings were had:)

THE COURT: During the lunch hour, an in-chambers conference was had by plaintiff's counsel as well as counsel for the Defendant Ford Motor Company, again inquiring as to the specific rationale for the Court's ruling.

And, again, based upon my ruling on the motion in limine to exclude evidence of other accidents, incidents, lawsuits, and/or settlements involving Ford vehicles, the Court granted that motion with the exception to narrowly allow the expert to testify as to experience, skill, or education as to the speed control deactivation switches.

Based upon the extensive inquiry into the investigation of the expert that the Court qualified Mr. Olson to be in the investigation of fire cause and origin, the Court's reviewed the question by Mr. Goldstein to which Mr. Ott objected and found that it went specifically to impeachment as to the skill, education, and experience of the expert.

1 Anything further, Mr. Ott?

2 MR. OTT: Yes, Your Honor.

3 And with all due respect, I stress that
4 I am not arguing with the Court, and I hope that
5 the Court is not taking it that way, but I do
6 need to put all grounds on the record.

7 I think what I've summarized so far in
8 my argument before our lunch break is that the
9 Court's -- and our understanding from the defense
10 side, the Court's ruling yesterday on three
11 separate motions was that there was a motion as
12 to the recall in general not coming into evidence
13 based on *Bragg* and post-manufactured conduct,
14 Rule 407 and 403; that there was a separate
15 motion as to a recall document that pertained to
16 a 2001 vehicle that had nothing to do with this
17 case; and then number three, there was a motion
18 as to other similar incidents, claims, lawsuits.

19 And we understood the Court's ruling to
20 be that you were not going to exclude other
21 evidence -- or other similar claims evidence as
22 far as it pertained to an expert's ability to
23 offer opinions based on experience and that
24 they've seen the switch caused a fire and that
25 would form the basis, which is entirely separate

1 from the issue of whether the part had been
2 recalled.

3 So, you know, I respectfully disagree
4 with the characterization that because an expert
5 considered all possible causes, to include
6 recall, that somehow that affects their
7 qualifications to render testimony, but I
8 understand the Court's ruling on that.

9 However, the problem in this instance,
10 if that's all it would take to admit the recalls
11 and ask any expert, which would apply to
12 plaintiff's experts Mr. Greene or Mr. Norris or
13 could even apply to Captain Sanders, that did you
14 consider all possible causes of this fire and
15 isn't one of those possible causes the recall on
16 this part, well, if that's all it takes to have
17 to do with the qualification of an expert, then
18 we submit that the Court perhaps should have
19 ruled differently on our motion in limine.

20 However, the prejudice in this instance
21 is that we have tried this case on a particular
22 theory that this recall is not coming into
23 evidence.

24 We've tried other cases where we get in
25 closing and let the jury know right off the bat

1 that this part had been recalled, but it's only
2 in .999999-you know-7 percent of all these
3 vehicles never have a problem with the switch,
4 it's a rare occurrence even within the recall
5 population, and make them prove their case under
6 these facts because they've destroyed their
7 evidence.

8 So, and it's even more prejudicial in
9 this case because in reliance on what we
10 understood the Court's ruling to be, I have
11 admonished -- in preparing Mr. Olson to testify,
12 I admonished him do not mention the word "recall"
13 based on the Court's ruling. That's what we
14 understand to be the Court's ruling.

15 And so if I asked him the question,
16 again, based on what we talked about in chambers
17 -- I think the context was available evidence,
18 meaning photographs, the police report, and such
19 that had been provided by the plaintiff -- do you
20 consider all available evidence that had been
21 provided by the plaintiffs, and not whether this
22 vehicle was recalled, in reaching an opinion,
23 that that limited amount of evidence was
24 insufficient to allow any fire investigator to
25 reach an opinion as to origin and cause, taking

1 that issue out of the context of my question
2 aside, you know, all the witness has done is
3 adhere to the Court's ruling as we understood the
4 admonishment.

5 And to allow impeachment now to say,
6 well, isn't it true you should have as a
7 reasonable investigator considered the fact that
8 this vehicle has been recalled by Ford for this
9 exact same problem, of course he's considered
10 that.

11 As I said and as the affidavits show,
12 we've admitted throughout this case that this
13 vehicle was indeed recalled. It was in the
14 recall population come August 2006.

15 But to allow him now to use it as
16 impeachment by "aren't you hiding the fact that
17 this vehicle was recalled from the jury," when
18 all this witness was doing was abiding by the
19 Court's rulings from yesterday, is extremely
20 prejudicial.

21 So even if the Court disagrees about
22 whether we've opened the door or not, the impact
23 now is absolutely unfairly prejudicial under 403.

24 And it would only be admissible as
25 impeachment for a limited purpose, but that would

1 not then make the recall itself admissible, thus
2 changing Your Honor's ruling from yesterday.

3 So I again just wanted to put all that
4 on the record, Your Honor.

5 THE COURT: Mr. Goldstein.

6 MR. GOLDSTEIN: Your Honor, I think
7 we've already discussed this in sufficient detail
8 for me to say much, but Your Honor's ruling on
9 the motion in limine yesterday clearly was that
10 the recall couldn't come in as an independent
11 stand alone exhibit to prove the plaintiff's
12 allegation; however, it could come in, if I
13 remember Your Honor's words, but I think you said
14 for the limited purpose -- I think that's what
15 you said -- limited purpose of going to an
16 expert's -- and I forget the exact words
17 Your Honor used, I think it was qualification,
18 training, education, expertise, something along
19 that line.

20 Mr. Ott qualified this witness, over my
21 objection, as an expert witness. Once he did
22 that, he became subject to cross-examination on
23 his expertise, his training, and on what he did,
24 what data he relied on in reaching his opinion.

25 And it was perfectly legitimate

1 cross-examination to point out to the expert
2 witness or to inquire of the expert witness as to
3 why he did not avail himself of the type of
4 information that is commonly relied upon by
5 similarly situated experts, which is what I did.
6 I believe that was completely consistent with
7 Your Honor's ruling yesterday.

8 MR. OTT: Again, he didn't say -- I
9 mean, he's been forthright through this whole
10 thing, as has Ford, that this vehicle's in the
11 recall population. All he was doing was adhering
12 to the Court's ruling that don't mention the word
13 "recall."

14 And now to come back and use his
15 adherence to the Court's ruling as evidence that
16 he is trying to hide something, that he should be
17 impeached by hiding something that the Court has
18 told him not to say, i.e., the recall, I can't
19 imagine a more unfairly prejudicial position that
20 Mr. Olson is in.

21 MR. GOLDSTEIN: Your Honor, may I
22 reply?

23 THE COURT: Briefly.

24 MR. GOLDSTEIN: Mr. Ott made a
25 strategic trial decision to qualify this witness

1 as an expert. That was his decision. Once he
2 did so -- and you qualified him over my
3 objection. Once he did so, he made him subject
4 to the type of cross-examination that is rendered
5 with every expert who takes the stand in every
6 case anywhere.

7 MR. OTT: Your Honor, again, that was
8 just an additional basis for the mistrial. If
9 the Court's going to allow the recall to come in
10 just because a qualifying expert has considered
11 that as a possibility, then we can retry this
12 case and try it a whole lot differently if that
13 was the Court's ruling, which, again, I did not
14 understand that to be.

15 But the prejudice now to make it look
16 like Mr. Olson is hiding something from the jury
17 by simply adhering to the Court's admonition not
18 to use the word "recall," I mean, I don't know
19 what else to say other than the prejudice from
20 our position is something we can't overcome in
21 this case, and it deserves a mistrial separate
22 and apart from whether Mr. Goldstein violated the
23 Court's ruling yesterday.

24 THE COURT: The Court has the power to
25 change its ruling on a motion in limine at any

1 point during the trial based upon information
2 that convinces the Court that the previous ruling
3 was incorrect or with any sort of reflection as
4 to the Court's ruling.

5 Mr. Ott, this was your motion in
6 limine. You knew that the recall -- the Court
7 was very clear and has made substantial notes and
8 indicated that any of these items could be
9 introduced for -- if the proper foundation was
10 laid.

11 The Court specifically stated with the
12 exception to narrowly allow the expert to testify
13 as to experience, skill, or education as to the
14 speed control deactivation switches.

15 That was a decision that you made. You
16 indicated to the Court that you wished Mr. Olson
17 to be qualified as an expert as to fire cause and
18 origin. There were several questions, again,
19 that indicated based upon all information and
20 actually cited and held up the manuals, that from
21 the Court's understanding and recollection of the
22 proffered testimony as well as arguments by the
23 counsel that clearly indicates that Mr. Olson as
24 an expert would consult a recall notice.

25 For all of those reasons articulated,

1 the Court is going to allow the impeachment as to
2 Mr. Olson's experience, skill, or education in
3 relying upon the speed control deactivation
4 switches and to -- but at this time, the Court is
5 not allowing the recall notice, Court's exhibit
6 number one, to be admitted into evidence barring
7 some foundation laid by the plaintiff.

8 And I will -- I will note your
9 exception.

10 MR. OTT: I understand the Court's
11 ruling.

12 THE COURT: Thank you.

13 MR. OTT: Thank you.

14 MR. GOLDSTEIN: Nothing further,
15 Your Honor.

16 THE COURT: All right. Bring in the
17 jury.

18 Mr. Olson, you are still under oath.

19 (Whereupon, the jury enters the
20 courtroom at approximately 1:55 p.m.)

21 THE BAILIFF: All jurors are present.

22 THE COURT: Thank you.

23 Please be seated.

24 Mr. Goldstein.

25 MR. GOLDSTEIN: May it please the

1 Court, Your Honor.

2 JOHN S. OLSON,

3 being previously duly sworn, resumes the witness
4 stand and is examined and testifies further as
5 follows:

6 REDIRECT EXAMINATION (CONTINUED)

7 BY MR. GOLDSTEIN:

8 Q. Mr. Olson, you told us that as an expert in
9 fire cause, origin and cause, you relied upon the
10 National Fire -- and I knew I'd forget -- the
11 National Fire, what's the name?

12 A. Protection.

13 Q. Protection. And it's Association? And you
14 identified these manuals as being authoritative?

15 A. Yeah.

16 Q. And it's something that you rely upon?

17 A. Yes.

18 Q. These are standards that are promulgated
19 and circulated among committees to the sort of
20 procedures manual. Is that a fair statement?

21 A. Yeah. I would -- I would characterize it
22 as a guide.

23 Q. Okay. And you rely upon this guide in
24 undertaking an investigation in a particular
25 fire?

1 A. Yes. That's true. Or elements of it,
2 anyway.

3 Q. All right. And Chapter 11, since we've
4 only got one copy, I'm going to read it to you
5 and then hand it to you and confirm that I'm
6 reading it correctly. Chapter 11 talks about
7 sources of information; is that correct?

8 MR. GOLDSTEIN: Your Honor, may I
9 approach the witness?

10 THE COURT: You may.

11 BY MR. GOLDSTEIN:

12 Q. Chapter 11 talks about sources of
13 information; is that correct?

14 A. Yeah.

15 Q. All right. And under Chapter 11, it says:
16 "By necessity, the thorough fire investigation
17 also encompasses interviewing and the research
18 and analysis of other sources of information."
19 Is that correct?

20 A. That -- that sounds correct. I haven't
21 memorized it, but...

22 Q. All right. Here, let me hand it to you and
23 ask you if I read it to you correctly.

24 A. (The witness reviews document.) Yes, you
25 did.

1 Q. Okay. And so is it fair to say that any
2 undertaking of a fire investigation, what you
3 want to do is you want to gather all the evidence
4 that's available?

5 A. Yes.

6 Q. And that would include interviewing the
7 witnesses who are on the scene?

8 A. That's correct. Many times we're not
9 necessarily afforded the opportunity to
10 interview, but certainly through deposition
11 transcripts or statements that were made, sure.

12 Q. So you read Mr. Shelby's deposition then?

13 A. Yes, I did.

14 Q. And you didn't ask if you could interview
15 him at any time?

16 A. I personally did not.

17 Q. Okay. And how about Mr. Norris, Chief
18 Norris, did you interview him?

19 A. No, I did not. I read his deposition.

20 Q. But he is available, correct?

21 A. I didn't ---

22 Q. I mean, he didn't -- you didn't try to
23 contact him and he hide from you or anything?

24 A. No, he did not.

25 MR. OTT: Your Honor, objection.

1 THE COURT: Overruled.

2 BY MR. GOLDSTEIN:

3 Q. How about Mr. Greene, our expert, you read
4 his deposition?

5 A. Yes, I did.

6 Q. And he's a professional engineer, isn't he?

7 A. I'm not sure. He might be.

8 Q. Okay. But you read his deposition, and you
9 don't recall if he's an engineer or not?

10 A. I don't recall if he's a professional
11 engineer.

12 Q. Okay. And as an engineer, you have to show
13 courtesy to one another, right?

14 A. Sure.

15 Q. Just like the lawyers show courtesy to one
16 another?

17 A. Yes. Absolutely.

18 Q. Okay. And y'all actually have a book that
19 lists all the engineers, and you can look up the
20 engineer's phone number and address in your book
21 of professional engineers?

22 A. I'm not sure about that. I know in the
23 State of Wisconsin you can.

24 Q. All right. Well, did you make any effort
25 to call 1-555-1212 and see if you could get

1 Lennie Greene's phone number?

2 MR. OTT: Your Honor, objection. He is
3 their hired expert. We can't contact him.

4 THE COURT: I'll allow it.

5 BY MR. GOLDSTEIN:

6 Q. You didn't try to call him and interview
7 him?

8 A. Oh, no. I had his -- I believe I may have
9 had his report as well as his deposition.

10 Q. Okay. And so you had that stuff?

11 A. Sure.

12 Q. All right. And you gave it whatever weight
13 you thought was appropriate. Right?

14 A. Sure.

15 Q. And you've got the photographs. Correct?

16 A. Yeah.

17 Q. And you just have to say yes for the court
18 reporter.

19 A. Yes. The -- well, I mentioned there were
20 photographs. We talked about the ones here.

21 We've looked at a number of them, so...

22 Q. Okay. Well, and you would agree that, for
23 example, plaintiff's exhibit number 11, that
24 depicts the area of the vehicle where the speed
25 deactivation control is situated, right?

1 A. Yeah, the upper one does.

2 Q. Upper one, yeah.

3 A. Yes.

4 Q. And you would agree with me that photograph
5 shows that the speed deactivation switch is no
6 longer visible in the photograph?

7 A. That's correct, yes.

8 Q. And is it a fair, reasonable inference to
9 deduce that it was consumed in the fire?

10 A. Not necessarily.

11 Q. Okay.

12 A. There are other options.

13 Q. There are other options?

14 A. Sure. If you took -- it could be down
15 below the vehicle.

16 Q. Now, as an expert in fire cause and origin,
17 tell us what percent of the speed deactivation
18 control switch is comprised of combustible
19 material.

20 A. I'm not sure if I can put a percentage on
21 it. I know that there are elements that are
22 combustible. However, there are elements that in
23 a normal vehicle fire would not be combustible.

24 Q. Okay.

25 A. And it certainly depends on how long it's

1 been in a fire, how long it's exposed to the
2 heat, and how hot those temperatures got.

3 Q. Okay. Would you agree with me that the
4 speed deactivation control switch is composed of
5 approximately 80 percent combustible material?

6 A. I'm not sure. I would be surprised if
7 it's that high, although I don't know that I
8 would argue ---

9 Q. Okay.

10 A. --- that particular percentage.

11 Q. And the speed deactivation control switch
12 is energized by electricity, correct?

13 A. Yes.

14 Q. We've already established that, 15 amps,
15 right?

16 A. Yeah.

17 Q. Okay. And it works on a hydraulic
18 principle using brake fluid to deactivate the --
19 part of that pressure, correct?

20 A. Yeah. It's a -- it works on pressure
21 behind the switch that either opens or closes a
22 switch.

23 Q. And that pressure is maintained by means of
24 brake hydraulic fluid, correct?

25 A. It's -- it's when the brake pedal is

1 depressed that it actually is -- the switching
2 switch opens contacts channels is how it works.

3 Q. And brake hydraulic fluid, it burns
4 incredibly well, doesn't it?

5 A. It is a combustible fluid. I would give
6 you that. It has different properties than if
7 you were to compare it to gasoline, for example,
8 but it's a petroleum product and it does burn.

9 Q. And unlike gasoline which will vaporize, a
10 hydraulic fluid will not. It'll sit there and
11 burn even hotter, won't it?

12 A. Well, I don't know about that. Well,
13 hydraulic fluid will also vaporize.

14 Q. Okay.

15 A. Not just like gasoline.

16 Q. At a higher temperature and a greater
17 pressure, correct?

18 A. Than gasoline?

19 Q. Yes.

20 A. Actually, lower -- or, well, as far as
21 vaporization, you know, I'm not exactly sure.

22 Q. Okay. Now, this other manual, the NFPA 921
23 guide for fire and explosion investigation, 2008
24 edition, on page nine -- on page 921-7, it says,
25 in talking about application, it says: This

1 document -- this document meaning the NFPA -- is
2 designed to produce a systematic working
3 framework or outline by which effective fire and
4 explosion investigation and origin and cause
5 analysis can be accomplished. Right?

6 A. Sure. I agree.

7 Q. You would agree with that. It contains
8 specific procedures to assist in the
9 investigation of fire and explosions, right?

10 A. I would agree. I would agree also, or I'd
11 also add, that every fire is unique and then
12 sometimes you can't always follow every
13 procedure.

14 Q. There you go. Well, you anticipated my
15 next question. Thank you. It also says:
16 Deviations from these procedures, however, are
17 not necessarily wrong or inferior but need to be
18 justified. Correct?

19 A. I agree.

20 Q. Okay. Do you know who the authors of this
21 document are, by the way, the members of the
22 committee that authored this document?

23 A. Well, I'm actually one of the members who
24 contribute to a committee that provides input
25 technically, but there are many authors.

1 Q. That's right. Lastly, as an expert in fire
2 cause and origin, following the standards of the
3 NFPA 921, isn't it a requirement of you as an
4 expert in attempting to derive the cause, the
5 origin and cause of a fire, to rely upon
6 generally accepted scientific information?
7 Correct?

8 A. I think that's fair. Yes.

9 Q. And isn't there a wide body of generally
10 accepted scientific information routinely relied
11 upon by experts such as yourself regarding the
12 Ford speed deactivation control switch?

13 A. A wide body of?

14 Q. Wide body of scholarly literature on which
15 an expert such as yourself routinely rely?

16 MR. OTT: Objection, Your Honor.

17 THE COURT: If he knows.

18 BY MR. GOODSTEIN:

19 Q. Do you know?

20 A. I really don't know what you mean by a wide
21 body. We've certainly read allegations of -- of
22 this kind of thing. I mentioned before that we
23 do see it from time to time. So if you consider
24 that, I don't know.

25 Q. Okay. Well, let me break it down and then

1 I'll be done. You remember being in high school?

2 A. (The witness nods head up and down.)

3 Q. And you'd get assigned to go do a book
4 report, remember that?

5 A. Right.

6 Q. Or look up something. And you would go get
7 the *Encyclopedia Britannica* or you'd get
8 *Webster's Dictionary* or you'd get -- right?

9 A. Right, a resource.

10 Q. A resource.

11 A. Okay.

12 Q. And as we grow older and as we develop into
13 certain areas, we learn to rely on widely
14 accepted scholarly works in our particular field.
15 Correct?

16 A. I think so. I think I'm following you.

17 Q. Yeah. A physician, you go in the emergency
18 room, and the physician's got that little *Merck*
19 *Manual* in their pocket, right? They always carry
20 a *Merck Manual*? You know that *Merck Manual*?

21 A. I don't know precisely.

22 Q. All right. Engineers got the -- what's
23 that book that has all the tables in it, the
24 logarithmic bases and all that stuff in it?

25 A. The *Engineering Handbook*.

1 Q. *Engineering Handbook?*

2 A. Sure.

3 Q. Lawyers, we've got our rule book. Correct?

4 A. (The witness nods head up and down.)

5 Q. I mean, you know, carpenters got their
6 books, and auto mechanics got their books, right?

7 A. Yes.

8 Q. Would you agree with me that in the
9 particular area of fire -- expert in detection of
10 fire origin and cause that the *Fire and Arson*
11 *Investigator* is precisely such a scholarly
12 periodical routinely relied upon by experts such
13 as yourself?

14 A. I would agree.

15 Q. Okay. And isn't it true that the *Fire and*
16 *Arson Investigator* did a detailed analysis of the
17 Ford speed control deactivation switch, correct?

18 A. I'm sorry? Can you ---

19 Q. Well, let me show you what's been marked
20 plaintiff's ---

21 MR. OTT: Your Honor, objection.

22 THE COURT: Counsel approach.

23 (There was an off-the-record bench
24 conference in the presence of the jury but out of
25 the hearing of the jury.)

1 (Said bench conference being concluded,
2 the following proceedings were had:)

3 THE COURT: Sustained.

4 BY MR. GOLDSTEIN:

5 Q. Last question. The NFPA 921 standard that
6 you've testified is a widely followed standard,
7 correct?

8 A. I believe I characterized it as a
9 guideline.

10 Q. Guideline. Fair enough, guideline.
11 Contained within that guideline is a directive as
12 a standard when investigating vehicle fire. One
13 of the things the investigator is supposed to do
14 is to check to determine if there are any recalls
15 for that vehicle, for the target vehicle,
16 correct?

17 MR. OTT: Objection, Your Honor.

18 THE COURT: Sustained. Rephrase.

19 BY MR. GOLDSTEIN:

20 Q. Let me ask you this. If you are
21 investigating a vehicle fire, not this particular
22 vehicle fire, a hypothetical vehicle fire, what
23 documents would you rely upon in surveying the
24 literature to make a determination as to the fire
25 origin and cause?

1 A. The document?

2 Q. Yeah. What scholarly material, what
3 external sources? Let me start over. Go back to
4 tenth grade. Remember you're in tenth grade and
5 you get an assignment and you go get the
6 encyclopedia, right? If your assignment is
7 Picasso, you go get the "P," you open up to
8 Picasso, and you read about it. Right?

9 A. Right.

10 Q. Isn't that fairly standard?

11 A. I guess so.

12 Q. Okay. And don't fire experts such as
13 yourself in fire origin and cause, don't they
14 have routine scholarly works that they refer to
15 or sources of information that they rely upon in
16 assessing a hypothetical fire?

17 A. I would agree that would be certainly part
18 of your investigation.

19 Q. Okay. And it is part of your
20 investigation?

21 A. Sure.

22 Q. You go and you see what the literature
23 holds, right?

24 A. And literature is a fairly broad term. And
25 what I do or what I normally do if I'm asked to

1 investigate a fire and unaware of what this
2 vehicle is, is I'll start looking at our drawings
3 or specifications. I'll find out about the
4 vehicle, about how the systems work if I'm not
5 familiar with them already. So I do prepare for
6 the investigation.

7 Q. Okay.

8 A. It's not unusual for us to have a report
9 from somebody such as Mr. Greene to say, well, we
10 think it's this, and certainly that's something
11 that I have available, and I utilize the tools
12 that I have to -- to conduct the investigation,
13 but that is what I would consider to be a
14 starting point.

15 Q. Okay. You would consider the literature to
16 be a starting point?

17 A. A starting point or a piece of the puzzle.

18 Q. Okay. And in a hypothetical fire, forget
19 Mr. Shelby, just go with a hypothetical fire,
20 would you go out and look at what the literature
21 out there holds, whether or not there has been
22 anything written in a scholarly peer reviewed
23 periodical regarding a similar type of
24 incident?

25 A. That is a possibility. It depends. It

1 depends on what the -- what the allegation is, if
2 we happen to know the allegation. Sometimes it's
3 Ford engineers who know a little bit more about
4 the vehicle than -- than others might. So we
5 have a little bit of an opportunity to use our
6 knowledge, and I think that's why I'm in the
7 position that I'm in.

8 Q. Okay. Last question. In your capacity to
9 have superior knowledge as being a Ford design
10 engineering ---

11 A. I'm not sure I'd characterize it as
12 superior. I'd ---

13 Q. All right. Well, familiarity with Ford
14 vehicles?

15 A. That's all right.

16 Q. Wouldn't you agree with me that you
17 have been aware for many years that there is a
18 defect in the Ford speed control deactivation
19 switch?

20 A. I don't know when you -- when you talk
21 about many years, I'm not exactly sure about
22 that. I know that we've seen instances of this
23 maybe more than we did, let's say, in 1995 if
24 that's what you mean.

25 MR. GOLDSTEIN: Yes, sir. Thank you.

1 That's all the questions I have.

2 MR. OTT: Nothing further, Your Honor.

3 THE COURT: May this witness step down?

4 Mr. Goldstein?

5 MR. GOLDSTEIN: Yes, Your Honor.

6 THE COURT: May this witness step down?

7 MR. GOLDSTEIN: Oh, I'm sorry. Yes. I
8 apologize, Judge. Of course, yes.

9 THE COURT: You may step down,
10 Mr. Olson.

11 (The witness is excused from the
12 witness stand.)

13 THE COURT: Mr. Goldstein, call your
14 next witness.

15 MR. GOLDSTEIN: Leonard Greene.

16 MR. OTT: Your Honor, I just need to
17 put something on the record as far as the motions
18 yesterday just to make the proper record based on
19 what Mr. Goldstein...

20 THE COURT: Counsel approach.

21 Ms. Blaire, you may go ahead and swear
22 him in.

23 (There was an off-the-record bench
24 conference in the presence of the jury but out of
25 the hearing of the jury.)

1 (Said bench conference being concluded,
2 the following proceedings were had:)

3 LEONARD GREENE,
4 being first duly sworn by the clerk, is examined
5 and testifies as follows:

6 THE CLERK: Please have a seat. For
7 the record, if you would please state your name,
8 spelling your last name.

9 THE WITNESS: It's Leonard Alan Greene.
10 And Greene is like the color with an "E" on the
11 end.

12 THE COURT: Mr. Goldstein.

13 MR. GOLDSTEIN: Yes, ma'am.

14 THE COURT: Your witness.

15 MR. GOLDSTEIN: Thank you, Your Honor.
16 May it please the Court.

17 DIRECT EXAMINATION

18 BY MR. GOLDSTEIN:

19 Q. You already told us your name. What's your
20 occupation?

21 A. My occupation is a professional consulting
22 engineer.

23 Q. And before I ask you how one becomes a
24 professional consulting engineer, let me ask you
25 about your education background, starting with

1 college, please.

2 A. I received a bachelor of science in
3 electrical engineering from Georgia Tech,
4 master's in business administration from the
5 University of Southern California, and that's my
6 formal education.

7 Q. Okay. And professional associations?

8 A. Yes.

9 Q. Can you tell us what some of those are?

10 A. For the purposes of my appearance today, it
11 would be the National Fire Protection
12 Association; Society of Automotive Engineers;
13 National Academy of Forensic Engineers; and IAAI,
14 the International Association of Arson
15 Investigators.

16 Q. Okay. Are you licensed by the State of
17 South Carolina?

18 A. I am, yes.

19 Q. You're licensed in what?

20 A. Electrical engineering.

21 Q. Okay. And when you were talking about
22 pursuant to these organizations, is that the same
23 organization whose standards are contained in
24 those manuals?

25 A. Yes.

1 Q. Okay. Now, you've testified before in
2 court, right?

3 A. Right.

4 Q. You've testified for me, haven't you?

5 A. Yes.

6 Q. All right. And you get paid a fee for
7 being here?

8 A. Yes.

9 Q. Right?

10 A. Yes.

11 Q. How do you bill?

12 A. By the hour.

13 Q. Okay. Tell the jury how much you bill by
14 the hour.

15 A. It's \$200 an hour for my engineering time
16 and \$250 an hour for testimony time such as being
17 on the stand now.

18 Q. Do you restrict your testimony to cases
19 that are only for the plaintiffs, or do you
20 testify in defense cases, as well?

21 A. Both.

22 Q. How many times would you say you've
23 testified in court?

24 A. More than 50, less than a hundred.

25 Q. Okay. And how many times, and I don't mean

1 exactly, but approximately how many times has
2 that been for the defense and how many times has
3 that been for the plaintiff?

4 A. I'd say it's about evenly split.

5 Q. Okay. And when a lawyer such as myself
6 hires you for your expert opinion, do we tell you
7 what to say?

8 A. No. And you don't hire me for my expert
9 opinion. You usually hire me to take a look at
10 the situation and see if I can provide technical
11 assistance.

12 Q. Okay. Have you ever given an opinion to a
13 lawyer before that the lawyer was not happy to
14 hear?

15 A. Oh, yes.

16 Q. Okay. What do you base your opinion upon?
17 I mean, in a hypothetical case.

18 A. It's generally on physical evidence. I try
19 to base as much of it as possible on physical
20 evidence. If you don't have physical evidence,
21 then you try to take a look at what other
22 possible evidence you may find which may be in
23 the literature, it may be in the field talking to
24 other experts who have seen similar situations,
25 and it -- it may be just based on your own

1 experience.

2 Q. Okay. Well, I may have forgotten to ask
3 you this question. Speaking of experience, how
4 long have you been an engineer?

5 A. Since I was about three years old, and my
6 mother tells me that. I received my double-E
7 degree from Georgia Tech in 1968.

8 Q. Okay. And do you own your own business?

9 A. Yes.

10 Q. What's it called?

11 A. Orbital Engineering. That's O-R-B-I-T-A-L.

12 Q. Have you ever been qualified as an expert
13 in fire origin and cause before?

14 A. Yes. Numerous times.

15 Q. How about electrical engineering?

16 A. Yes.

17 Q. All right. How about defective products?

18 A. Yes.

19 Q. Have you ever done an investigation on an
20 electrical component as a possible cause of a
21 fire before?

22 A. Many times. And products.

23 Q. And have you been qualified as an expert by
24 various courts?

25 A. Yes.

1 MR. GOLDSTEIN: Your Honor, I would
2 offer Mr. Greene as an expert in fire origin and
3 cause, as well as electrical component design,
4 including but not limited to the investigation of
5 a defective electrical product.

6 THE COURT: Mr. Ott.

7 MR. OTT: Your Honor, to renew the
8 motion in limine we made yesterday regarding
9 Mr. Greene's opinion, I do that at this point.
10 If we need to go into that on the record, we can,
11 but it has to do with Rule 702 and 703.

12 THE COURT: All right. Mr. Ott, I will
13 allow you to voir dire this witness.

14 MR. OTT: Your Honor, I don't have any
15 questions regarding his qualifications. My
16 objections, as we discussed yesterday, have to go
17 to his actual opinions. So I don't have any voir
18 dire at this point unless the Court wants to
19 rehear the motion from yesterday.

20 THE COURT: I'll overrule your
21 objection and note your exception for the record.

22 MR. OTT: Thank you, Your Honor.

23 THE COURT: Thank you.

24 MR. OTT: Secondly, I don't think he's
25 qualified as an expert in automotive design if

1 that's what I understood Mr. Goldstein to offer
2 him as. He was only identified and testified
3 when I deposed him that he was going to be a fire
4 origin and cause expert, and that was my
5 understanding of his purpose.

6 THE COURT: Mr. Goldstein, you're
7 requesting that I treat him as an expert to be
8 qualified as an expert to fire origin and cause
9 and electrical component and design?

10 MR. GOLDSTEIN: Yes, ma'am. He's an
11 electrical engineer. Yes, ma'am.

12 THE COURT: Is that...

13 MR. OTT: Your Honor, then I'd have a
14 few questions about that aspect because that's a
15 problem.

16 THE COURT: So no objection to
17 qualifying him as an expert in fire origin --
18 investigating fire origin and cause?

19 MR. OTT: That's correct, only as to
20 his qualifications.

21 THE COURT: And, specifically, again,
22 Mr. Goldstein, so we're clear of your...

23 MR. GOLDSTEIN: Electrical engineering,
24 including but not limited to a defective
25 electrical product.

1 THE COURT: You may inquire.

2 MR. OTT: Thank you.

3 VOIR DIRE EXAMINATION

4 BY MR. OTT:

5 Q. Mr. Greene, have you ever worked for an
6 automotive manufacturer?

7 A. No, I have never.

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

11 A. Yes.

12 Q. Who was that?

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

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

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

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

1 A. Correct.

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

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

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

11 A. No.

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

15 A. Yes.

16 Q. Who was that?

17 A. Delco Electric.

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

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

25 Q. So that was having to do with a boat but

1 not specific to a vehicle?

2 A. It was a vehicle engine in the boat.

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

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

10 Q. Were those accident reconstruction cases?

11 A. No. Those were also fire cases.

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

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

17 Q. Have you ever done any teaching regarding
18 automotive design?

19 A. No.

20 Q. Have you ever published any papers that
21 have to do with automotive design?

22 A. No.

23 Q. Or any other similar topic related to
24 automobile design?

25 A. Well, I've published in the field of

1 accident reconstruction. That's about it.

2 Q. But that wouldn't necessarily include
3 automotive design, correct?

4 A. Correct.

5 Q. You understand that, sir?

6 A. I understand that.

7 MR. OTT: Your, Honor that's all the
8 questions I have.

9 THE COURT: All right. And, Mr. Ott,
10 based upon your voir dire of Mr. Greene's
11 qualifications, are you still objecting to having
12 him qualified as an expert in electrical
13 engineering, including but not limited to
14 defective products?

15 MR. OTT: Specific to automobiles, yes,
16 Your Honor.

17 THE COURT: You're objecting to him
18 being qualified as an expert in electrical
19 engineering specific to automobiles?

20 MR. OTT: Related to automotive design.
21 That's how I understood he's being proffered. I
22 don't think he has that expertise.

23 THE COURT: Counsel approach.

24 (There was an off-the-record bench
25 conference in the presence of the jury but out of

1 the hearing of the jury.)

2 (Said bench conference being concluded,
3 the following proceedings were had:)

4 THE COURT: Mr. Ott, I'll note your
5 objection. I will qualify Mr. Greene as an
6 expert in electrical engineering including but
7 not limited to defective products, and note your
8 objection.

9 DIRECT EXAMINATION (CONTINUED)

10 BY MR. GOLDSTEIN:

11 Q. Before I ask you specific questions related
12 to the case that brings us here today, I want to
13 ask you a hypothetical question. Is it possible
14 to investigate the origin and cause of a fire
15 when the subject has been immolated, destroyed by
16 fire?

17 A. It happens actually quite frequently. We
18 wind up being given what I call a black hole, and
19 it's really nothing but a burned structure or a
20 carcass of a vehicle, and you're asked to
21 investigate where the fire started and what
22 caused it.

23 Q. Is it possible -- now, let me direct your
24 attention to Mr. Shelby's lawsuit. Is it
25 possible for you to have an opinion about the

1 origin and cause of the fire in Mr. Shelby's
2 truck when you've never seen the truck?

3 A. Well, anything's possible, but it's more
4 than possible that it's within the realm of
5 engineering probability that I can do so.

6 Q. Okay. If that's the case, then let me back
7 you up, back up in time. Did I ask you to
8 examine the origin and cause of the fire in
9 Mr. Shelby's 1996 Ford F-250?

10 A. Yes.

11 Q. And did you do that?

12 A. Through photographs, I did.

13 Q. Okay. Did you rely upon any other
14 testimony or other information?

15 A. Well, based on my experience, this type of
16 vehicle is subject to speed control deactivation
17 switch fires, and I did a recall search and found
18 out that there were ---

19 MR. OTT: Objection..

20 THE COURT: Counsel approach.

21 (There was an off-the-record bench
22 conference in the presence of the jury but out of
23 the hearing of the jury.)

24 (Said bench conference being concluded,
25 the following proceedings were had:)

1 THE COURT: Mr. Ott, I sustain your
2 objection.

3 Ladies and gentlemen of the jury, you
4 need to disregard the witness's last response.
5 It was not responsive, and I have ruled, as the
6 finder of the law, I have ruled that that
7 question and response was not admissible and not
8 properly before you. I instruct you to disregard
9 that response.

10 I note your request, Mr. Ott, and
11 respectfully deny it at this time.

12 MR. OTT: And that's just a renewal of
13 my previous motion made right before lunch, just
14 so we're clear.

15 THE COURT: That's correct, Mr. Ott.
16 Proceed, Mr. Goldstein.

17 BY MR. GOLDSTEIN:

18 Q. Does the absence of the alleged failed
19 component make it impossible for you to have an
20 opinion?

21 MR. OTT: Your Honor, objection.
22 Leading.

23 THE COURT: Rephrase, Mr. Goldstein.

24 BY MR. GOLDSTEIN:

25 Q. Do you have an opinion as to what caused

1 the fire in Stan Shelby's truck?

2 A. Based on my experience in looking at
3 numerous similar fires, my research in the
4 literature, and my -- I guess I would say peer
5 information group sources, yes, I do, and it
6 would be the speed control deactivation switch.

7 Q. Why do you have that opinion?

8 A. Well, because among my peers that have been
9 doing fire investigations for many years, I have
10 not encountered one who has not seen such fires
11 in Ford vehicles. I, myself, have investigated a
12 number of them, and the literature is quite
13 complete with information regarding this type of
14 fire.

15 Q. Well, let me take you to the next question.
16 If you arrived at an opinion that the fire was
17 caused by a malfunctioning speed control
18 deactivation switch, my next question is: How
19 does that happen?

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

1 all the time. That's number one.

2 Number two is the fact that the protective
3 device is not coordinated with the switch. The
4 switch is rated for two amperes. The protective
5 device is rated for 15 amperes. So the switch
6 can really overheat and start a fire before the
7 15-ampere fuse would ever blow.

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

17 So if you have a slight leak in this
18 membrane, this flammable brake fluid will get on
19 the other side where the electrical switch is,
20 and you have a source of ignition, and then you
21 have enclosing a whole assembly of insulating
22 plastic which keeps the heat in there and causes
23 the temperature to rise until it can eventually
24 reach the ignition point and start a fire, and
25 you have then brake fluid freely coming out into

1 the switch, or what was the switch assembly which
2 is now burning, and the fire rapidly accelerates
3 from that point on.

4 Q. What is the fix for that problem?

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

6 MR. OTT: Your Honor, objection.

7 THE COURT: Counsel approach.

8 (There was an off-the-record bench
9 conference in the presence of the jury but out of
10 the hearing of the jury.)

11 (Said bench conference being concluded,
12 the following proceedings were had:)

13 BY MR. GOLDSTEIN:

14 Q. Mr. Greene, let me rephrase the question.

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

19 A. It's not.

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

23 A. Oh, yes.

24 Q. If you were designing such a switch, how
25 would you design it differently to avoid the

1 problem you just described?

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

6 Second thing that I would do is I would put
7 another small fuse in series with the switch
8 which would limit the current to one to two amps,
9 whatever the allowed limit was that would allow
10 the switch to function effectively but not
11 overload and overheat.

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

17 Q. Has the Ford speed deactivation control
18 switch been the subject of scholarly work in the
19 periodicals routinely relied upon by professional
20 engineers such as yourself?

21 A. Yes. And also government agencies have
22 written about it.

23 Q. Okay. I show you what's been ---

24 MR. OTT: Objection, Your Honor.

25 THE COURT: Sustained.

1 MR. OTT: Ask that the last response be
2 stricken from the record.

3 THE COURT: Ladies and gentlemen of the
4 jury, I have sustained defense counsel's
5 objection. I ask that you disregard that last
6 response from and it will be stricken from the
7 testimony. It was nonresponsive. Thank you.

8 BY MR. GOLDSTEIN:

9 Q. I show you what's been marked plaintiff's
10 exhibit three, and my first question is can you
11 identify it.

12 A. Yes. This is an article that I furnished
13 you.

14 Q. And where is the article from?

15 A. It's the *Fire and Arson Investigator*
16 magazine which is published by the International
17 Association of Arson Investigators.

18 Q. Is that the type of -- is that a peer
19 reviewed periodical?

20 A. Oh, yes.

21 Q. Explain to the jury what we mean when we
22 say peer review.

23 A. If someone writes an article for a
24 publication that's a professional publication,
25 such as myself or someone else, you submit it to

1 an editorial board, and the editorial board has
2 got technical expertise and experience in the
3 area that you're publishing in. They will review
4 the article, frequently will suggest
5 modifications and some changes, and then allow
6 you to proceed with publishing it; or if they
7 don't believe that the article is valid, they
8 will reject it and not allow it to be published.

9 Q. Is that periodical that you're holding in
10 your hand, is that the type of scholarly work
11 that experts such as yourself routinely rely upon
12 in forming opinions about fire origin and cause?

13 A. Yes.

14 Q. Is it universally recognized by experts
15 across the country?

16 A. Yes.

17 Q. Did you rely on it in part in forming your
18 opinion?

19 A. Yes.

20 MR. GOLDSTEIN: Your Honor, I offer
21 plaintiff's exhibit three into evidence.

22 MR. OTT: Objection, Your Honor.
23 There's no foundation. The author is not here.
24 It's hearsay, it contains opinions, and it
25 violates the Court's previous orders.

1 THE COURT: Counsel, please approach
2 and bring the exhibit.

3 (There was an off-the-record bench
4 conference in the presence of the jury but out of
5 the hearing of the jury.)

6 (Said bench conference being concluded,
7 the following proceedings were had:)

8 THE COURT: I sustain your objection,
9 Mr. Ott.

10 Mr. Goldstein, we'll continue on.

11 BY MR. GOLDSTEIN:

12 Q. Did you assemble some information in
13 attempting to derive the cause, the origin and
14 cause of this fire?

15 A. Well, I did a literature search, and I also
16 analyzed the photographs that you provided.

17 Q. And when you say you did a literature
18 search, don't tell us what you searched, but is
19 that the kind of thing that a fire cause and
20 origin expert would do in attempting to arrive at
21 the origin and cause of a fire?

22 A. Well, the product failure is always the
23 first thing that I do.

24 Q. Okay. And contained within the information
25 you discovered, rather than butchering one of my

1 exhibits, do you have a diagram of the Ford speed
2 control deactivation switch?

3 A. Yes, I do.

4 Q. Do you mind if I take it away from you?

5 A. You may have it.

6 (Mr. Goldstein and Mr. Ott review
7 document.)

8 MR. OTT: Make your motion or what you
9 want to do. I can't answer questions ---

10 MR. GOLDSTEIN: Judge, I need to borrow
11 your scissors now. Thank you.

12 (Mr. Goldstein prepares exhibit.)

13 (Plaintiff's Exhibit No. 25, sketch of
14 speed control deactivation switch, is marked for
15 identification.)

16 BY MR. GOLDSTEIN:

17 Q. I show you what has been marked plaintiff's
18 exhibit 25. Can you identify that?

19 A. That's a cut out diagram of the page that I
20 furnished you.

21 Q. Okay. And what is it a diagram of?

22 A. The speed control deactivation switch.

23 Q. And using the photographs which are already
24 in evidence, where does that speed deactivation
25 control switch sit on the 1996 Ford F-250 that

1 Mr. Shelby had?

2 A. The top photograph, which has been marked
3 as plaintiff's exhibit 11, shows the brake
4 booster pump which is this round cylindrical
5 object next to the firewall adjoining the
6 passenger compartment. In front of that, you'll
7 see some tubing that comes out. It's a metal
8 tubing that's about 3/8's of an inch inside
9 diameter, and the switch would be at the end of
10 that.

11 MR. GOLDSTEIN: Your Honor, may I ask
12 permission for the witness to step down so that
13 the jurors can see where he's pointing in the
14 photograph?

15 THE COURT: Can all the jurors see from
16 the witness stand where he's pointing?

17 Any objection to him standing in front
18 of the jury?

19 MR. OTT: I still haven't seen exactly
20 what it is that they want to put -- so he can't
21 publish it to the jury until he ---

22 MR. GOLDSTEIN: Well, this is a
23 photograph that's already ---

24 THE COURT: Number 11 is already in
25 evidence.

1 MR. OTT: But as long as -- the one in
2 his hand that was handed to you, I don't know
3 what it is or if it was previously provided to
4 us.

5 (Mr. Ott reviews exhibit.)

6 MR. OTT: There's something on the back
7 of this, Your Honor. I don't know what it is.

8 THE COURT: Okay. Counsel approach.
9 Please bring the exhibit.

10 (There was an off-the-record bench
11 conference in the presence of the jury but out of
12 the hearing of the jury.)

13 (Said bench conference being concluded,
14 the following proceedings were had:)

15 THE COURT: Ladies and gentlemen, it's
16 an appropriate time for us to now take our
17 midafternoon break. Please do not begin your
18 deliberations. Please do not begin your
19 discussions. You have not been given all the
20 tools with which to begin your deliberations.
21 We'll be in recess for 15 minutes, and we will
22 then start again.

23 If you'll please escort the jury.

24 Mr. Greene, you may be seated.

25 THE WITNESS: Okay.

1 (Whereupon, the jury goes to the jury
2 room at approximately 2:45 p.m.)

3 THE COURT: Thank you. Please be
4 seated.

5 Mr. Greene, you may step down during
6 our midafternoon break, but please do not discuss
7 this case or your testimony with either
8 plaintiff's counsel or defense counsel. Thank
9 you. You may step down.

10 THE WITNESS: Thank you. I recycle
11 paper, and what's on the back of that is just
12 recycled from something from the office.

13 THE COURT: I appreciate that. Thank
14 you, Mr. Greene.

15 Counsel, if we could take our 10-minute
16 break and get your exhibits together.

17 MR. GOLDSTEIN: Yes, ma'am. Well, I
18 wanted plaintiff's exhibit three, and they
19 objected. I was just trying to get a schematic
20 of the switch, so this is the only one that I
21 know of.

22 THE COURT: All right. And there is an
23 objection to it as presented at this point, and
24 so you need to correct the back of that exhibit
25 so that there is no objection. I don't know what

1 those names and numbers are, but...

2 MR. OTT: And then, Your Honor, if it's
3 easier for Mr. Goldstein, as long as the witness
4 says "I recycle the paper," like he just did, and
5 that has nothing to do with this, I don't care.
6 I just didn't know what it was.

7 THE COURT: It would be very easy in my
8 arts and crafts expertise, Mr. Goldstein, to take
9 a blank piece of paper and tape it to the back so
10 that it is all covered up.

11 MR. GOLDSTEIN: Yes, ma'am.

12 THE COURT: All right.

13 MR. GOLDSTEIN: I will do that.

14 THE COURT: Anything before we break
15 for our midafternoon break? From the plaintiff?

16 MR. GOLDSTEIN: Nothing, Your Honor.

17 MR. OTT: Nothing, Your Honor. Thank
18 you.

19 THE COURT: Please, additionally,
20 Mr. Goldstein, if there is going to be any other
21 exhibits, please have them marked and ready to
22 go.

23 MR. GOLDSTEIN: I'm not aware of any.

24 THE COURT: And I will leave my
25 scissors there, but do not take them.

1 We're in recess.

2 (A break is taken at approximately
3 2:50 p.m.)

4 (The trial reconvenes at approximately
5 3:05 p.m., and the following proceedings were
6 had:)

7 THE COURT: Thank you. Please be
8 seated. And please bring in the jury.

9 THE BAILIFF: Yes, ma'am.

10 (Whereupon, the jury enters the
11 courtroom at approximately 3:05 p.m.)

12 THE BAILIFF: The jurors are seated,
13 Your Honor.

14 THE COURT: Thank you. Please be
15 seated.

16 Mr. Greene, I remind you you're still
17 under oath.

18 You may proceed.

19 MR. GOLDSTEIN: May it please the
20 Court. Your Honor, I offer plaintiff's exhibit
21 25, and I believe it is now without objection.

22 THE COURT: Have you shown it to
23 defense counsel?

24 MR. GOLDSTEIN: Yes, ma'am.

25 MR. OTT: No objection.

1 THE COURT: All right. Plaintiff's 25
2 into evidence without objection.

3 (Plaintiff's Exhibit No. 25, previously
4 marked for identification, is received in
5 evidence.)

6 DIRECT EXAMINATION (CONTINUED)

7 BY MR. GOLDSTEIN:

8 Q. Okay. Mr. Greene, what I'd like you to do
9 is -- I noticed some of the jurors straining to
10 see. So what I'd like you to do is step down
11 here in front of the jury, please.

12 A. (The witness leaves the witness stand and
13 stands in front of the jury-box.)

14 Q. And I'd like to take plaintiff's exhibit 11
15 and hold it where everyone can see it, and if you
16 could, explain to the jurors where the speed
17 control deactivation switch is located.

18 THE COURT: And, Mr. Greene, I still
19 need my court reporter to take down everything
20 you say, so I need you -- your back's to her, and
21 that's fine, but I just need you to speak up very
22 loudly. Okay?

23 THE WITNESS: Yes, ma'am.

24 THE COURT: Thank you.

25 THE WITNESS: The photograph in exhibit

1 11 that shows the area where the switch was --
2 and I say was, because there's no evidence of it
3 there now -- is the top photograph.

4 The top right part of the photograph
5 shows this cylindrical round object, and that's
6 called the brake booster. It's connected to the
7 brake pedal. And what it does is, when you mash
8 on the brakes or you push on your brake pedal, it
9 increases the pressure of the brake fluid. So it
10 helps operate the brakes and stop the car faster.

11 The switch was located at the end of
12 this little piece of metal tubing that I'm
13 pointing to that comes out of the brake booster.
14 The connector is still present, but the switch
15 has been destroyed.

16 MR. OTT: Objection, Your Honor.
17 That's pure speculation.

18 THE COURT: Sustained.

19 BY MR. GOLDSTEIN:

20 Q. In the photograph that you were just using,
21 plaintiff's exhibit 11, does that photograph
22 depict evidence of a fire?

23 A. Yes, it does.

24 THE COURT: Mr. Greene, you can go
25 ahead and take the witness stand.

1 BY MR. GOLDSTEIN:

2 Q. And are there burn patterns ---

3 THE COURT: Hold on, Mr. Goldstein.

4 MR. GOLDSTEIN: Sorry.

5 THE COURT: If you'll allow him to take
6 the witness stand.

7 (The witness returns to the witness
8 stand.)

9 THE WITNESS: Yes, there is evidence of
10 a fire.

11 BY MR. GOLDSTEIN:

12 Q. Are there burn patterns?

13 A. Yes, there are.

14 Q. Are burn patterns routinely relied upon by
15 fire origin and cause investigators to determine
16 the origin of fire?

17 A. Yes.

18 Q. Where do the burn patterns in this case
19 identify the cause of the fire?

20 A. The burn patterns basically indicate that
21 everything that's combustible in the area where
22 the switch was located has been burned away.

23 What's remaining is noncombustible metal
24 material that has a very high melting point
25 relative to the temperatures in this fire.

1 The origin of the fire appears to be right
2 where the switch would have normally been
3 present. And in my opinion, the cause of the
4 fire was a malfunction of the switch.

5 Q. Okay. And how much of the switch is
6 composed of combustible material?

7 A. I think it's about -- if you take a look at
8 the mass of the switch, it would be about 80
9 percent of the volume or the size of the switch
10 has got components that will burn.

11 Q. And what is the characteristic of brake
12 fluid in a fire?

13 A. It's very flammable. It has a ignition
14 flash point of about 250 to 300 degrees
15 Fahrenheit. When it's heated to that temperature,
16 it just will burn violently.

17 Q. How does that compare to gasoline?

18 A. Gasoline has got a flash point of negative
19 something Fahrenheit, which means it'll start to
20 vaporize in very cold conditions and will flash
21 or sort of explode even when the temperature is
22 very low.

23 Q. Okay. Now, plaintiff's exhibit 25 which is
24 already in evidence is a -- well, it's already in
25 evidence, so I guess I can say what it is.

1 That's a diagram of the speed control
2 deactivation switch?

3 A. It is.

4 Q. And can you use plaintiff's exhibit 25 and
5 tell us, just point to the defects that you
6 testified about earlier?

7 A. If I point to it, you're not going to be
8 able to see it from where I am, but labeled on
9 this diagram is a item that's called "seal."
10 It's in a little square box. Right above it is
11 another square box that says "gasket." And right
12 below that is a little square box that says
13 "seal," and that was the diaphragm that I was
14 referring to that was defective that eventually
15 leaked, that seal.

16 Q. Have you investigated speed control -- have
17 you investigated other speed control deactivation
18 switch fires?

19 A. Yes.

20 Q. What has been your experience in
21 investigating a speed control deactivation switch
22 fire as to the existence of the switch itself
23 after the fire?

24 A. In all the fires that I've investigated
25 involving these switches, I can think of four

1 offhand. I only found part of the remains of the
2 switch in one fire. The other fires, the switch
3 was consumed.

4 Q. Okay. Is it impossible to determine the
5 cause and origin of this fire because the switch
6 has not been preserved?

7 A. No.

8 Q. If you had the switch for electron
9 microscope testing and X-ray and all the things
10 that Mr. Olson testified about, how certain could
11 you become as to the speed deactivation control
12 switch being the cause of the fire?

13 A. Well, if you had the switch in good
14 physical condition so that you could test it with
15 those types of instruments, you could be fairly
16 certain if it was close to the point of failure.
17 But if it had already failed and self-immolated,
18 it burned itself up, I don't think it would be
19 possible because it by design creates an inferno
20 when it fails and consumes itself.

21 Q. What percent does your opinion drop down
22 from near certainty if you had the switch? How
23 much have you dropped down because you don't have
24 a switch?

25 MR. OTT: Objection, Your Honor.

1 Irrelevant.

2 THE COURT: Overruled.

3 THE WITNESS: If I had the remains of
4 the switch -- in a fire like this, the switch
5 would no longer be present. If I had whatever
6 remains might exist, I might be able to say with
7 another five percent confidence that there is
8 more evidence or less evidence of the switch
9 involvement, but there'd be so little remaining
10 it would be difficult to draw conclusions.

11 BY MR. GOLDSTEIN:

12 Q. What are you relying on in reaching your
13 opinion today as to the origin and cause of the
14 fire and the design defect in the switch?

15 A. The origin of fire is where the switch was
16 located; and the history, shall I say, of the
17 switch is what I rely on in determining the
18 opinion as to cause.

19 Q. Is it your opinion within a reasonable
20 degree of engineering certainty that the speed
21 deactivation control switch caused the fire to
22 Stan Shelby's 1996 Ford F-250?

23 A. Yes, it is.

24 Q. Is it your opinion with a reasonable degree
25 of engineering certainty that the fire was caused

1 because of a design defect in the switch?

2 A. Yes, it is.

3 Q. Last question, most important question.

4 Were you also in the Army?

5 A. Yes.

6 MR. GOLDSTEIN: Okay. Thank you.

7 Answer any questions one of these lawyers may
8 have for you.

9 THE COURT: Counsel.

10 MR. OTT: Thank you, Your Honor.

11 THE COURT: Mr. Ott.

12 CROSS-EXAMINATION

13 BY MR. OTT:

14 Q. You started electrical engineering back in
15 1982; is that right, Mr. Greene?

16 A. Yes, sir.

17 Q. A large part of what you do is called
18 forensic engineering; is that right?

19 A. That's correct.

20 Q. And forensic engineering is not engineering
21 like designing switches or it's not designing
22 something for use in products. Forensic
23 engineering is litigation. Correct?

24 A. It's not always litigation. It's mostly
25 determining what caused something to fail. And

1 in the case of litigation, frequently it's a
2 personal injury or a property loss. But forensic
3 engineering has to do with failures of some sort,
4 and a lot of the forensic engineering I do has to
5 do with building moisture and indoor air quality
6 problems.

7 Q. But a lot of what you do is involved in
8 litigation, right, Mr. Greene?

9 A. Oh, yes.

10 Q. And even the cases that are not yet
11 actually in suit, a lot of them are claims that
12 are anticipated by you or the attorney that hires
13 you to go into a lawsuit, right?

14 A. That's probably correct, yes.

15 Q. That's a lot of what you do for a living,
16 isn't it?

17 A. It's lately more than half of my income. I
18 still have a design practice, but my forensic
19 consulting is more income than my design
20 practice, but I still have employees and do
21 design work.

22 Q. The employees who do the design work, are
23 they the ones actually doing the design work?

24 A. No. I'm doing the design work. They're --
25 they're assisting.

1 Q. What design work is it?

2 A. We take a building like this and design the
3 electrical systems including lighting, power,
4 data communications, fire protection, mechanical
5 systems including heating and air-conditioning
6 and plumbing systems.

7 Q. But more than half of what you do is
8 litigation or things that are anticipated to go
9 into litigation, correct?

10 A. I wouldn't say it's litigation. I would
11 say it's forensic engineering.

12 Q. But we just defined what that means, right?
13 It's lawsuits or about to go in a lawsuit?

14 A. No. I disagree with your definition. I
15 think it's more technical than -- than litigation
16 in nature.

17 Q. How many times have you worked with
18 Mr. Goldstein?

19 A. Probably about six or seven.

20 Q. And tell me about the other type of cases
21 you worked on with him.

22 A. I remember one was an electrocution case.
23 I remember one involved a explosion in a hospital
24 patient room. And I think there may have been
25 another one that involved an automobile accident

1 or motor vehicle accident, but I can't remember
2 the others.

3 Q. Do you reconstruct accidents as part of
4 what you do?

5 A. I do, yes.

6 Q. So you reconstruct accidents, and you
7 testify about products being defective?

8 A. Yes.

9 Q. Now, on all those other cases when you get
10 involved, isn't it true typically, Mr. Greene,
11 that you will actually inspect the product at
12 issue before giving an opinion?

13 A. Well, in the cases that I mentioned, the
14 explosion in the hospital room, I was not able to
15 inspect anything there. All I had were
16 photographs. And the case of the electrocution,
17 frequently that's all I get a chance to look at
18 it.

19 In the case of automobile accidents,
20 frequently I get there years after the accident,
21 and I don't have any physical evidence to work
22 with. All I have are the records of the scene
23 and the police reports.

24 Q. Are you saying that when you talk about a
25 defective product you usually don't even look at

1 the product?

2 A. No. What I said is, first of all, I try to
3 rely on physical evidence when physical evidence
4 is available. That's always the first thing that
5 I rely on.

6 When physical evidence is not available, I
7 will rely upon whatever is available if it is in
8 fact sufficient for me to render an opinion.

9 Q. And physical evidence would be vehicles,
10 correct?

11 A. Correct.

12 Q. It would be the product that you're
13 testifying about, correct?

14 A. Yes, sir.

15 Q. It would be an examination of the scene,
16 correct?

17 A. That's correct.

18 Q. It would be taking measurements from the
19 scene, correct?

20 A. And photographs.

21 Q. And actually providing photographs of the
22 scene, the product itself, or the vehicles?

23 A. That's correct.

24 Q. I mean, that's typically what you do?

25 A. And sometimes take evidence into custody.

1 Q. And, now, let's compare that with what
2 you've done in this case. Have you interviewed
3 anyone, Mr. Greene?

4 A. I've interviewed Chief Norris. I spoke
5 with him, and he's the only other person that I
6 spoke with.

7 Q. When did you speak to Chief Norris?

8 A. Last week.

9 Q. Okay. At the time that you formulated your
10 opinions -- well, strike that, Your Honor.

11 Let's go back, Mr. Greene. When were you
12 hired about this particular lawsuit?

13 A. (The witness reviews documents.) On
14 December 21st of 2007, my first entry is a \$500
15 retainer from Attorney Goldstein.

16 Q. Now, you understand that the case had been
17 pending for a full year before you were ever
18 involved; is that right?

19 A. Well, yes, looking at the fire report.

20 Q. And, now, when Mr. Goldstein identified
21 you, you had to come and sit for what's called a
22 deposition; is that right?

23 A. Right.

24 Q. And that's under oath testimony, and I was
25 the attorney who asked you a bunch of questions

1 about your opinions?

2 A. Correct.

3 Q. Right? Mr. Goldstein was there?

4 A. Yes.

5 Q. Okay. And at that time, that's when you
6 gave what opinions you had already formulated
7 about this case, correct?

8 A. At that time, yes.

9 Q. And as of that time was February 13,
10 2008...

11 MR. OTT: May I approach, Your Honor?

12 THE COURT: You may.

13 THE WITNESS: Yes, that's correct.

14 BY MR. OTT:

15 Q. --- when I took your deposition. You
16 remember that?

17 A. Vaguely. It was a while ago and many
18 depositions ago.

19 Q. But I asked you if you had done enough to
20 formulate all your opinions at that point,
21 correct?

22 A. Yes.

23 Q. And you, indeed, indicated that you had
24 done all the work that you needed to give the
25 opinions that you've given us already?

1 A. Correct.

2 Q. And at that time you had not interviewed a
3 single witness, correct?

4 A. That's correct.

5 Q. So you formulated your opinions without
6 interviewing a single witness?

7 A. Well, the information I had was there was
8 no witness to the actual fire that had occurred
9 when the building was unoccupied.

10 Q. Did you interview Mr. Shelby?

11 A. No.

12 Q. Have you ever spoken with Mr. Shelby about
13 what he saw that day?

14 A. No.

15 Q. Is the only person that you've talked to
16 about the basic facts of this case before last
17 week when you spoke with Chief Norris in fact
18 Mr. Goldstein?

19 A. Yes.

20 Q. He's the source of all your information?

21 A. No.

22 Q. He's the source of the information that you
23 relied upon in forming opinions, though; is that
24 correct?

25 A. No. No. I also did a lot of research and

1 relied on information that he provided to me in
2 terms of some of the circumstances leading up to
3 the fire, but I also relied on the fire report.
4 I also relied on research that I did.

5 Q. All right. When I took your deposition
6 back in February of 2008, did you know the
7 vehicle had been destroyed?

8 A. I don't recall. I also relied on
9 photographs that I was provided by Mr. Goldstein.

10 Q. You don't recall whether or not you learned
11 that morning that the vehicle had in fact been
12 destroyed?

13 A. I know it was destroyed. I know it had
14 been destroyed for -- for a long time. It was
15 destroyed shortly after the fire.

16 MR. OTT: With the Court's indulgence,
17 Your Honor.

18 THE COURT: Yes, sir.

19 BY MR. OTT:

20 Q. Did you prepare a written report for
21 Mr. Goldstein?

22 A. I believe so, yes.

23 Q. And did you summarize your opinions for
24 Mr. Goldstein in that report?

25 A. Yes, I did.

1 Q. And was that report dated January 31, 2008?

2 A. Well, I'll have to find it to see. If
3 you're willing to stipulate that is the date.

4 Q. Pardon me?

5 A. I'll stipulate that was the date.

6 Q. So that was before your deposition?

7 A. Yes.

8 Q. Now, isn't it true in your report to
9 Mr. Goldstein that you said that the switch
10 remains can be examined post-fire to confirm
11 failure?

12 A. Yes.

13 Q. Well, if you knew that the switch had been
14 destroyed and wasn't available, why would you be
15 telling him to do testing about a switch that
16 doesn't exist as of January 31, 2008?

17 A. Because the vehicle had been destroyed
18 doesn't necessarily mean that there was no
19 evidence of the switch preserved.

20 Frequently, when I do a fire investigation,
21 I'll preserve evidence of the -- the switch or

22 the product that allegedly failed, and the rest
23 of the vehicle or assembly is disposed of.

24 Q. Okay. So you're telling us that you knew
25 the vehicle was destroyed, but you didn't know

1 the switch was destroyed?

2 A. I didn't know if the fire department had
3 it. I didn't know if anybody had it in custody.
4 I didn't know if it existed or not. So I was
5 raising the issue that if it existed it could be
6 examined.

7 Q. All right. Let me just ask you a simple
8 question. When did Mr. Goldstein advise you that
9 the switch had been destroyed?

10 A. I don't remember. I'm sure after the
11 report was written he told me there was no
12 switch.

13 Q. All right. Let's go back to the
14 investigation you did in this case. So we've
15 established you did not interview anyone before
16 formulating your opinions, correct?

17 A. That is correct.

18 Q. The only person you really talked to about
19 the substance of this case before providing your
20 opinions was Mr. Goldstein, correct?

21 A. I would say that I also spoke with other
22 fire investigators that I know locally and talked
23 to them about this fire and similar fires, but I
24 didn't discuss any of the specifics of this fire.

25 Q. And that was just general discussion, not

1 specific to this case?

2 A. Right. When we -- when we come across
3 something, frequently we'll share the
4 information.

5 Q. But the point is you didn't interview any
6 witnesses?

7 A. That's right. I did not.

8 Q. You didn't take any measurements, correct?

9 A. That's right. By the time I got involved,
10 the scene was basically gone.

11 Q. You have not utilized at any point any
12 scientific equations or formulas, correct?

13 A. I have not, but I've relied on what's been
14 published.

15 Q. You've not personally performed any
16 mathematical calculations in reaching your
17 opinions, right?

18 A. Again, I've relied on what's been
19 published.

20 MR. OTT: Your Honor, could I get an
21 answer? He can explain his answer all he wants,
22 but I think I'm entitled to a yes or no ---

23 THE COURT: Counsel approach.

24 (There was an off-the-record bench
25 conference in the presence of the jury but out of

1 the hearing of the jury.)

2 (Said bench conference being concluded,
3 the following proceedings were had:)

4 THE COURT: Rephrase your question.

5 BY MR. OTT:

6 Q. Have you, Mr. Greene, personally performed
7 any mathematical calculations as part of this
8 case?

9 A. No.

10 Q. Now, have you taken any photographs?

11 A. No.

12 Q. Have you inspected the vehicle?

13 A. No.

14 Q. Have you inspected the part, the speed
15 control deactivation switch?

16 A. No.

17 Q. Have you inspected or performed any tests
18 on the vehicle?

19 A. No.

20 Q. Have you personally ordered any tests on
21 the vehicle?

22 A. No. Again, the vehicle wasn't available,
23 so this line of questioning is all irrelevant.

24 Q. Well, we'll get to that in a second about
25 why it's -- why it's relevant or not. But you've

1 never been to the scene of the fire, have you?

2 A. I have not.

3 Q. Have you ever reviewed any maintenance,
4 service, or repair records for this vehicle?

5 A. No.

6 Q. Do you even have an understanding of any of
7 its service, maintenance, or repair history?

8 A. I do not.

9 Q. Do you know what the mileage on this
10 vehicle was at the time of the fire?

11 A. It was in excess of 200,000 miles.

12 Q. Given the age of this truck being about ten
13 years old and over 200,000 miles, it certainly
14 would not have surprised you if many of the parts
15 in the engine compartment were no longer original
16 equipment parts, would it?

17 A. I have a '95 Ford F-150. It's got almost
18 all original parts except for the radiator.

19 Q. Okay. But that's at least the radiator in
20 your vehicle has been?

21 A. Been changed, yes.

22 Q. And you do drive a Ford?

23 A. Yes.

24 Q. This same type of vehicle?

25 A. It's a 150. Good truck.

1 Q. Do you have any idea about the ownership
2 history of this vehicle?

3 A. No.

4 Q. Do you know when Mr. Shelby acquired it?

5 A. No.

6 Q. Do you have any knowledge whether there
7 were any after-market modifications made to this
8 truck?

9 A. I was told there were none. I asked that
10 question.

11 Q. Told by whom?

12 A. Mr. Goldstein.

13 Q. Do you have any idea whether this vehicle
14 was ever involved in an accident in its over ten
15 years of existence and 200-and-something-thousand
16 miles?

17 A. I don't know.

18 Q. Now, let's talk about the origin of the
19 fire. Is it your testimony today that you do
20 have an opinion to a reasonable degree of
21 engineering certainty about the origin of this
22 fire?

23 A. Yes.

24 Q. Do you remember telling me the exact
25 opposite back in February of 2008 when I deposed

1 you?

2 A. No.

3 Q. You don't remember that?

4 MR. OTT: Your Honor, may I open his
5 original deposition?

6 (The original deposition of Mr. Greene
7 is unsealed by the Court.)

8 MR. OTT: Thank you, Your Honor. May I
9 approach the witness?

10 THE COURT: You may.

11 BY MR. OTT:

12 Q. Mr. Greene, I hand you a copy of the
13 transcript from your deposition.

14 THE COURT: And just for the record,
15 that will be Court's number two.

16 (Court's Exhibit No. 2, original
17 deposition of Mr. Greene, is marked for
18 identification.)

19 BY MR. OTT:

20 Q. And we've gone over this. You do remember
21 giving your deposition under oath in this case,
22 correct?

23 A. Yes, I do.

24 Q. And you answered the questions from me
25 about your opinions; is that right...

1 A. That's right.

2 Q. --- and the investigation you did. Will
3 you turn, please, to page 51 of your transcript?

4 A. Okay.

5 Q. And I'm going to read my question from
6 line 12, and I want you to read your answer on
7 line 15:

8 "Is it your testimony to a reasonable
9 degree of engineering certainty that you cannot
10 give the origin of this fire?" What was your
11 answer under oath back then?

12 A. "Yes."

13 Q. So at the time of your deposition under
14 oath, you testified to a reasonable degree of
15 engineering certainty that you could not in fact
16 determine the cause of this fire?

17 A. No.

18 Q. But your testimony today is the complete
19 opposite; isn't that right, Mr. Greene?

20 A. No, no, no. We're getting our cause and
21 origin mixed up.

22 At the time of my deposition, I was talking
23 about -- you were asking me about the origin of
24 the fire, not the cause of the fire.

25 Previous to my deposition, I had issued the

1 report which was issued on January 31st, and in
2 the report I gave the origin and the cause. So
3 my original opinion was in the report as to
4 origin and cause.

5 Now, when you were taking my deposition,
6 you were asking me specifically about the origin
7 of the fire, and I did not say that I could give
8 you specific information on the origin of the
9 fire more than I'd already given in my report.

10 What I had already provided, what I'd
11 already given you was what I had available and is
12 what I was able to offer you.

13 Q. All right. Mr. Greene, let's set our
14 context then.

15 A. Okay.

16 Q. What is the origin of a fire?

17 A. It's where it starts.

18 Q. Okay. And the cause of the fire is just
19 that. Somewhere within the origin, you find a
20 cause of the fire.

21 A. Correct.

22 Q. They're two different things.

23 A. They're related but different.

24 Q. You can have an opinion about an origin but
25 not have an opinion about a cause, correct?

1 A. Correct.

2 Q. All right. And so when I asked you on this
3 particular day -- let's just read it real
4 carefully again just to make sure we're not
5 missing each other, and I'm going to go to the
6 next question this time:

7 "Is it your testimony to a reasonable
8 degree of engineering certainty that you cannot
9 give the origin of this fire?" And what was your
10 answer?

11 A. "Yes."

12 Q. But today you agree you have given an
13 opinion about the origin of this fire; is that
14 right?

15 A. Continuing in the deposition, you asked how
16 can I have an opinion about the cause and not the
17 origin.

18 MR. OTT: Your Honor, I would ask that
19 he please answer my question.

20 THE WITNESS: Okay. I'm sorry. Would
21 you restate the question?

22 BY MR. OTT:

23 Q. At the time you were under oath giving this
24 deposition, you said you did not have an opinion
25 about the origin of this fire. Isn't that

1 correct?

2 A. In response to this question, that is
3 correct.

4 Q. But today you have in fact given us an
5 opinion about the origin of this fire?

6 A. You cannot give an opinion on cause without
7 knowing origin.

8 Q. Let's read the next one. After you said
9 yes to my question about not having an opinion
10 about the origin of this fire, my next question
11 was:

12 "But you can have an opinion to a
13 reasonable degree of engineering certainty about
14 the cause of the fire?" And your answer was?

15 A. "Yes."

16 Q. So you understood that you were saying you
17 had no opinion about the origin but you were
18 having an opinion about the cause. That's what
19 this says, isn't it?

20 A. That's exactly what this says, I agree.

21 Q. Okay. And that is because you couldn't
22 formulate an opinion about the origin of this
23 fire because you never inspected the scene,
24 right?

25 A. Correct.

1 Q. You never inspected the truck, right?

2 A. Correct.

3 Q. You never inspected any component part in
4 the engine compartment, correct?

5 A. Correct.

6 Q. To include the switch or anything, right?

7 A. Correct.

8 Q. And the photographs of the scene and the
9 truck are not sufficient for you or any other
10 fire investigator to come behind and formulate an
11 opinion about the origin simply by looking at
12 those photographs?

13 MR. GOLDSTEIN: Objection as to calling
14 for what another fire investigator might know.
15 No objection to the question as it relates to the
16 witness.

17 THE COURT: Rephrase, please, Counsel.

18 BY MR. OTT:

19 Q. The photographs that you've seen are not
20 sufficient or good enough for you as a fire
21 investigator to look behind them and formulate an
22 opinion about the origin of this fire based
23 solely on those photographs. Isn't that correct?

24 A. No.

25 Q. That isn't correct?

1 A. No. I go into the example that I gave a
2 little bit later on the same page of my
3 deposition testimony regarding coffee makers.

4 Q. All right. Let's keep it to this case.

5 A. Okay.

6 Q. Can you tell us that the -- looking at
7 those photographs whether the burn patterns are
8 more heavily shown on the passenger or driver's
9 side of this engine compartment?

10 A. Driver's side.

11 Q. Let's go to page 50 then, Mr. Greene. Back
12 up one page, please. Let's start with line 15.

13 And you understand we're talking about the
14 damage shown in those photographs to the engine
15 compartment; is that right?

16 A. Yes.

17 Q. "Well, then, how can you say it's more
18 heavily evolved" -- it should be involved -- "in"
19 one area than another?" And your answer?

20 A. "I'm not."

21 Q. "Can you testify that the burn patterns are
22 more or greater on the passenger side than the
23 driver's side or vice versa?" And what was your
24 answer?

25 A. "No. What I can testify to is that the

1 burn patterns are consistent with this being a
2 switch fire. I cannot say where the fire
3 started. I don't know if anyone would be able to
4 say that because there was so much damage to the
5 vehicle."

6 Q. Okay. So there you are again saying I
7 cannot say where the fire started. The origin of
8 the fire, I cannot say. Correct?

9 A. Well, because I wasn't at the scene to look
10 at it. Right.

11 Q. Exactly. And the photographs don't allow
12 you to make an opinion about the origin of the
13 fire because you can't tell which is more heavily
14 damaged, the passenger side or the driver's side,
15 right?

16 A. Well, I am going to defer to the answers on
17 that. Well, let me answer your question first.
18 I couldn't make the determination, but I believe
19 Chief Norris will address that.

20 Q. Okay. Well, that's fine. So you're going
21 to defer to Chief Norris on his opinions?

22 A. He was there.

23 Q. You personally, because you were not there,
24 the photographs are not good enough, and you've
25 never inspected the scene or the vehicle, you

1 personally cannot give us an opinion about the
2 origin of this fire. Is that correct,
3 Mr. Greene?

4 A. No. I gave an opinion about the origin of
5 this fire in my report previous to the
6 deposition.

7 Q. Back during the deposition, you couldn't
8 give us that opinion, could you?

9 A. I couldn't based on -- on the fact that I
10 have not been to the scene.

11 Q. Do you know why you cannot inspect this
12 truck or the switch?

13 A. I understand that it was sold for salvage
14 or turned -- disposed of for salvage.

15 Q. Do you understand that 5 Star destroyed it?
16 The truck?

17 A. They destroyed it?

18 Q. Correct.

19 A. How?

20 Q. So you don't know one way or the other?

21 A. No. I would -- I would be surprised if
22 they would have a motive to destroy the truck.

23 Q. Whether or not they had the motive, are you
24 aware that 5 Star in fact had this vehicle
25 destroyed?

1 A. Different question. Yes, they did have the
2 vehicle destroyed.

3 Q. And along with that, the switch and any
4 parts from the vehicle engine compartment.
5 Correct?

6 A. Yes. Everything.

7 MR. OTT: All right. May I approach
8 the witness, Your Honor?

9 THE COURT: You may.

10 BY MR. OTT:

11 Q. I'm going to hand you what's been marked as
12 defendant's exhibit number one. And before you
13 look at that document, is it reasonable,
14 Mr. Greene, for you as a forensic fire
15 investigator to rely on information exchanged
16 between parties in a lawsuit by way of written
17 discovery?

18 A. Yes.

19 Q. And are you familiar with what are called
20 interrogatories?

21 A. Yes, I am.

22 Q. Those are just questions from one party to
23 another?

24 A. Right.

25 Q. And it's reasonable for you to rely on the

1 plaintiff's answers in this case to help us
2 evaluate your opinion; is that right?

3 A. That's reasonable..

4 Q. All right. Would you look at page --
5 excuse me -- question four, and will you agree
6 with me that these are the plaintiff's answers to
7 written questions that we served on them?

8 A. Yes.

9 Q. And with question number four, isn't it
10 true that they identified the current vehicle
11 location as being crushed and at a steel mill?

12 A. Correct.

13 Q. If you would, please, look at exhibit
14 number two. Do you have that in front of you,
15 sir?

16 A. Yes.

17 Q. And these are the plaintiff's answers to
18 supplemental or additional interrogatories that
19 we sent to them?

20 A. Yes.

21 Q. ~~And isn't it true that in those answers to~~
22 ~~interrogatories they identified that Mr. Shelby~~
23 ~~of 5 Star, Incorporated, was the one who made the~~
24 ~~decision to destroy the vehicle and its component~~
25 ~~parts?~~

1 A. Yes.

2 Q. And he did that on or about February 2nd,
3 2006?

4 A. Correct.

5 Q. And turning to the next page, question
6 four, the vehicle was destroyed without
7 Mr. Shelby or anyone else at 5 Star or
8 Mr. Goldstein or anyone else on their behalf
9 notifying Ford Motor Company that they were going
10 to destroy that crucial evidence. Isn't that
11 right?

12 A. The answer is no.

13 Q. That's not right?

14 A. No. The answer to the question as to
15 whether anyone was notified is no. So no one was
16 notified.

17 Q. Now, were you surprised to find out that
18 the vehicle had been destroyed without notifying
19 the alleged manufacturer?

20 A. I thought the manufacturer had been
21 notified. So this is the first I found out that
22 the manufacturer was not notified. Normally, the
23 manufacturer would be notified.

24 Q. All right. And, in fact, in your report to
25 Mr. Goldstein on January 31, 2008 -- and we're

1 talking about the post-fire examinations that you
2 wanted to have done, the post-fire tests. Do you
3 see that in your report?

4 A. Yes.

5 Q. So you're talking about there are tests out
6 there that can be done on a switch remains?

7 A. Correct.

8 Q. So you're contemplating doing that type of
9 tests that we've talked about, right?

10 A. Right. If the remains were available.

11 Q. And you're assuming that they're available,
12 right?

13 A. I was assuming in this report, that's
14 correct. And that was dated January 31st which I
15 guess was some time after the vehicle had been
16 disposed of.

17 Q. We'll get to that.

18 A. Okay.

19 Q. So you as the fire investigator hired
20 wanted to look at the part, right?

21 A. I always want to look at physical evidence
22 first.

23 Q. In fact, you wanted to do these tests that
24 would conclusively determine whether this fire
25 caused -- excuse me -- whether the switch caused

1 the fire or was a victim of this fire. Right?

2 A. That it might make the determination.

3 Sometimes tests are inconclusive.

4 Q. But you wanted to do them?

5 A. Oh, sure.

6 Q. There's no doubt about that?

7 A. Right, because it's physical evidence. And
8 every time we have physical evidence, that's the
9 first thing you want to rely on.

10 Q. And when you told Mr. Goldstein you wanted
11 to do these tests, you obviously didn't know that
12 the vehicle and the part had been destroyed,
13 right?

14 A. Correct.

15 Q. And you were in fact telling him, and I'm
16 going to quote: As this is a potentially
17 destructive test, the manufacturer should be put
18 on notice to inspect the vehicle prior to switch
19 removal and testing. Isn't that what you put in
20 your report to Mr. Goldstein?

21 A. Exactly.

22 Q. So you didn't know the switch had been
23 destroyed, you didn't know that the truck had
24 been destroyed, you wanted to do testing on the
25 switch, and you told Mr. Goldstein that he better

1 advise Ford Motor Company to be present when you
2 did this testing?

3 A. That's correct.

4 Q. So I guess Mr. Goldstein neglected to tell
5 you all those crucial facts when he was giving
6 you the background of this case?

7 A. Correct.

8 Q. Now, why is it important, Mr. Greene, to
9 put a manufacturer on notice of these type of
10 tests that you wanted to do?

11 A. If it's a destructive test, the parties
12 that are adverse need to be present, because as
13 the term "destructive" implies, you're probably
14 going to wind up damaging the evidence in the
15 process of doing the testing.

16 Q. To do that type of testing and put the
17 manufacturer on notice, first you need to
18 actually preserve that type of evidence, right?

19 A. That is correct. You don't put somebody on
20 notice if you don't have anything to look at.

21 Q. In fact, what you were telling
22 Mr. Goldstein contemplated and assumed that he in
23 fact had kept the truck and kept the part?

24 A. And put the manufacturer on notice.

25 Q. But he did none of those things?

1 A. I don't know. I know that he didn't keep
2 the truck. I don't -- I can't say if he put the
3 manufacturer on notice.

4 Q. Didn't we just read that, interrogatory
5 number four, where they admitted that they had
6 never put Ford on notice before they destroyed
7 this crucial evidence?

8 A. (The witness further reviews exhibit.)

9 Yes. You're right. They did not notify Ford
10 Motor Company of the decision to crush or
11 otherwise dispose of the subject vehicle.

12 Q. Why is it important to preserve evidence,
13 Mr. Greene?

14 A. I think that's pretty obvious, because
15 frequently the outcome of a legal case resides on
16 the evidence that's presented to the finder of
17 fact.

18 Q. And it's important to give somebody in a
19 lawsuit the opportunity to actually inspect the
20 part that you claim is defective, right?

21 A. If it's available, yes.

22 Q. It was available at one point before they
23 destroyed it, right?

24 A. Yes.

25 Q. It's important to let them know that this

1 is going on so they have the opportunity to hire
2 an expert, like you, to come in and offer their
3 opinions. Right?

4 A. Right. But frequently what happens is,
5 before I get hired or Mr. Goldstein or some
6 attorney gets involved, the evidence is disposed
7 of.

8 Q. If you had been hired from the git-go,
9 Mr. Greene, would you ever have allowed them to
10 destroy this crucial piece of evidence?

11 A. No.

12 Q. Why not?

13 A. Well, as you said, it's a crucial piece of
14 evidence, and you need to reclaim it so that
15 everyone will have an opportunity to inspect it
16 and examine it. All of the interested parties
17 need that opportunity.

18 Q. And that's standard practice in the fire
19 investigation industry, correct?

20 A. Yes, sir.

21 Q. Or even in forensic engineering that you
22 also do, correct?

23 A. Those are the fair rules we play by.

24 Correct.

25 Q. Fair, that's a good word. The fact that

1 they destroyed the evidence and did not notify
2 Ford before destroying that evidence, that's not
3 fair, is it?

4 A. I don't know what the intent or the
5 circumstances were, so I can't comment on that
6 aspect of it.

7 Q. I thought you just used the word "fair."

8 A. Oh, I did. It's fair to let everybody look
9 at the evidence. But if the evidence is disposed
10 of, for example, in an automobile accident the
11 vehicles are taken to a salvage yard and sold off
12 as salvage and disappeared, you don't always have
13 the evidence that you would like to have
14 available, so you have to rely on other factors.

15 So it's possible that for some reason there
16 was some motivation other than spoliation to
17 dispose of this evidence.

18 Q. What's spoliation?

19 A. Spoliation is somehow carelessly or
20 negligently getting rid of evidence, damaging
21 evidence, or losing evidence.

22 Q. That's what happened in this case, right?
23 They spoliated the evidence, the truck and the
24 switch?

25 A. I would not draw that conclusion without

1 more information.

2 Q. Well, isn't that what the definition of
3 spoliation is, destroying evidence to a claim or
4 a lawsuit without notifying the other side of the
5 claim or lawsuit?

6 A. If the evidence has already been destroyed
7 before the lawsuit arises, then I don't think
8 spoliation would apply; but if the action has
9 commenced and the evidence is destroyed, I
10 believe then the term would apply.

11 Q. Now, is there any dispute, though,
12 Mr. Greene, that Ford Motor Company has been
13 extremely disadvantaged in its defense of this
14 case by the fact that 5 Star destroyed this truck
15 before giving notice to Ford that it was going to
16 destroy the truck?

17 A. That would be a significant disadvantage to
18 Ford, I agree.

19 Q. It's prejudicial?

20 A. I'm sorry, I don't know the meaning of that
21 term.

22 Q. You don't remember that -- that term?

23 A. Well, I know what the "prejudicial" term is
24 in regards to gender, race, religion, etc., but
25 legally, I'm sorry, I can't answer the question.

1 Q. Well, is there any doubt that Ford has been
2 severely disadvantaged in its defense of this
3 case because 5 Star destroyed the switch that
4 they claim is defective without first notifying
5 Ford that they were going to do so?

6 A. I agree they're disadvantaged. Now, the
7 extent they're disadvantaged, I really can't say.

8 Q. Let's go back to your deposition again.
9 Page 12, please. I'll read from line seven, and
10 give your answers to my questions, okay, sir?

11 "Will you agree with me that Ford Motor
12 Company is extremely prejudiced in its defense of
13 this case without the ability to inspect this
14 vehicle?" What was your answer?

15 A. "Yes."

16 Q. "Would you agree with me that Ford Motor
17 Company is extremely prejudiced in the defense of
18 this case without the ability to inspect the
19 parts that are allegedly defective?" And what
20 was your answer?

21 A. "Yes."

22 Q. And that was under oath, right?

23 A. Yes.

24 Q. So they were extremely prejudiced back in
25 February but not today?

1 A. Well, the -- the fact that they were
2 compromised or at a disadvantage, I cannot
3 disagree with. I agree with you, totally honest.

4 But I don't know whether the switch would
5 have even been there after the fire, what remains
6 would have been there, what tests could have been
7 done, what would have been conclusive or
8 inconclusive.

9 So I'm reluctant today to go to the point
10 of extremely disadvantaged. But, yes, they would
11 have certainly been disadvantaged.

12 Now, if I knew for a fact that there was
13 remains of the switch and that was lost, then I
14 would say extremely would apply, but I don't
15 really know whether there were any remains of the
16 switch left after this fire.

17 Q. You contemplated that when you sent your
18 report to Mr. Goldstein, didn't you?

19 A. Oh, sure. I would have liked to have
20 looked at the remains of the switch.

21 Q. I assume you weren't telling Mr. Goldstein
22 to do tests on evidence that didn't exist?

23 A. Well, some of the switch is noncombustible.
24 The metal contacts, if they still could be
25 located, would not have been burned in the fire.

1 And that would have been the -- the -- I guess
2 the item of interest to me would be to look at
3 those contacts.

4 Q. And you can test those contacts?

5 A. Well, you could visually inspect them, you
6 could test them, you could -- yes.

7 Q. And those tests would help us to determine
8 whether this fire in fact was caused by that
9 switch or not, right?

10 A. Possibly. Possibly the contacts were so
11 badly heat damaged that there couldn't be any
12 testing done. You don't know until you actually
13 have them in your possession and see how damaged
14 they are.

15 Q. All right. Have you ever held one of these
16 switches in your hand, Mr. Greene?

17 A. Not one that's intact.

18 Q. Have you ever held one that's originally
19 designed in your hand?

20 A. No. Again, that's the same thing. I've
21 never held one that is not on the vehicle that
22 came out of the box and is a new original
23 equipment manufacturer product.

24 Q. And you don't even know exactly how this
25 switch works, do you?

1 A. I have a pretty good idea.

2 Q. All right. Let's go to page 31 of your
3 deposition, line ten. I'm going to read my
4 questions. Please read your answers.

5 "If someone steps on the brake pedal, tell
6 me how the switch activates and works." And what
7 was your answer under oath back in February?

8 A. Back then the answer was "I don't know."
9 Now I do.

10 Q. "Have you ever tested the switch?" And
11 what was your answer?

12 A. "No."

13 Q. Have you still ever tested the switch to
14 today?

15 A. No.

16 Q. Who designed the switch, Mr. Greene?

17 A. I think that the switch was built to
18 specifications that Ford designed, and the
19 supplier was Texas Instruments.

20 Q. You've never designed any type of component
21 part for use in an automobile, correct?

22 A. Correct.

23 Q. Much less a switch like this, correct?

24 A. That's correct.

25 Q. You've never even developed a protocol,

1 right?

2 A. For what?

3 Q. For a design for this type of switch.

4 You've talked about a hypothetical one, but
5 you've never designed ---

6 A. Oh. No, I've never -- never been asked to
7 do that.

8 Q. Okay. You've never designed a speed
9 control deactivation switch?

10 A. No. I've never been asked to do that.

11 Q. So you've never tested any type of speed
12 control deactivation switch that you may in your
13 mind have thought about?

14 A. Correct.

15 Q. Can you design a better switch on
16 automobiles, Mr. Greene, than the engineers at
17 Ford Motor Company?

18 A. I believe I can design a safer switch.
19 Better is a yardstick that I think would require
20 a little more definition.

21 Q. So is it your testimony, Mr. Greene, that
22 back in 1995, and actually even before that when
23 the switch was designed, but '95 when they put it
24 in this vehicle that Ford Motor Company should
25 have called you and got your input on how to

1 design the switch?

2 A. No. They should have had some internal
3 review that would have caught the fact that there
4 was some serious potential failure issues with
5 this switch.

6 Q. Do you know that there was or was not such
7 an internal review?

8 A. I don't know.

9 Q. Do you even know when the first switch
10 fire, if we call it that, was even ever
11 discovered?

12 A. I don't know.

13 Q. Certainly, you don't have any information
14 at the time Ford manufactured and sold this
15 vehicle that they were aware of fires in any of
16 their vehicle lines, do you?

17 A. Not when they manufactured and sold it. I
18 think that the switch fires really became more
19 prevalent later on.

20 Q. And is it your testimony, Mr. Greene, that
21 whenever there is a vehicle fire involving a Ford
22 vehicle that has one of these switches that it is
23 automatically the switch that caused that
24 particular vehicle fire?

25 A. No. My testimony is that under certain

1 circumstances there is an extremely high
2 probability that it's the switch that caused the
3 fire.

4 Q. But what you have to do is examine what
5 evidence is available and try to determine in
6 each individual case whether that switch in fact
7 caused the fire, right?

8 A. In this case we have a lot of evidence
9 available that points to the switch. The fact
10 that the fire started when the vehicle was keyed
11 off is a very significant factor.

12 Q. Well, let's talk about how you arrived at
13 your cause opinion, okay? Now, we agree that you
14 need to follow the scientific method; is that
15 right?

16 A. Yes.

17 Q. What is the scientific method?

18 A. Well, the scientific method is induction
19 and deduction. And if you have something that
20 happens over and over again each time in the same
21 way with the same result, you can deduce that the
22 next time it's going to happen with the same
23 result, and it is that principle of deduction
24 that I used to conclude that the switch was the
25 cause of the fire.

1 Q. Mr. Greene, how can any expert determine or
2 form an opinion about the cause of the fire
3 without inspecting the fire scene?

4 A. Normally, you would inspect the fire scene.
5 But, again, if you have -- and I'll use the
6 example of a coffee maker -- evidence that there
7 was a coffee maker involved in the fire scene and
8 you know this coffee maker was responsible for
9 causing a lot of fires and you don't see the
10 coffee maker because it's been destroyed in the
11 fire and there's nothing left of the kitchen
12 either, even visiting the scene wouldn't help
13 you.

14 Q. Is a coffee maker on the same level as a
15 vehicle engine?

16 A. It's the similar -- it's similar in analogy
17 in terms of trying to identify a cause when your
18 evidence is limited, missing, or consumed by
19 fire.

20 Q. In general, Mr. Greene, can anyone make a
21 determination of the cause of a fire if you
22 cannot inspect the scene?

23 A. No, because in general every fire is
24 different. And that's why NFPA 921 gives you
25 guidelines how to inspect fires in general. But

1 with certain types of product fires, fires and
2 failures, they have a lot of commonality, and you
3 can deduce whether that product failure was
4 involved in the cause.

5 Q. In general, Mr. Greene, can you make a
6 determination of the cause of a vehicle fire if
7 you cannot inspect the vehicle or its component
8 parts?

9 A. In general, no. If you're given no
10 information, you cannot do that.

11 Q. And what physical evidence, Mr. Greene,
12 have you reviewed to formulate any opinion in
13 this case?

14 A. I had no physical evidence.

15 Q. And so you can't base your opinion about
16 the cause upon any physical evidence; is that
17 right?

18 A. Right.

19 Q. Now, will you agree that to be firmly
20 grounded in science and an objective opinion that
21 it needs to be capable of being proven or not
22 proven by scientific testing?

23 A. Yes. And there is literature that has done
24 that in this case.

25 Q. And we've talked about tests that we

1 actually could have done to this switch to
2 determine whether or not it was actually a cause
3 of this fire or a victim of this fire, right?

4 A. If the switch wasn't so badly destroyed or
5 if in fact we could locate it.

6 Q. And we've talked about X-rays, right?

7 A. X-rays I don't think would be applicable.

8 Q. How about an electric continuity test?

9 A. Yes. That would be very important.

10 Q. How about inspecting the contacts?

11 A. Yes. That's very important.

12 Q. Contacts under magnification?

13 A. Yes. Very important.

14 Q. So you're saying that you're not aware of
15 X-ray tests?

16 A. Well, you can do X-ray tests if the switch
17 is intact, because that means you can't see what
18 the contacts look like inside the switch. But
19 looking at the photographs of this fire, I think
20 that the heat damage was so extensive that the
21 ~~contacts would have been opened and exposed.~~

22 Q. But you don't know what the scene of this
23 fire looked like, do you?

24 A. I know what the pictures of the vehicle
25 indicated.

1 Q. You don't know what happened to the switch
2 in this fire, do you?

3 A. No.

4 Q. Let's go to page 36, Mr. Greene.

5 Question: "What testing can be done to the
6 remains of a speed control deactivation switch
7 after the fire?" Read your answer, please.

8 A. "I think the best thing to do would be
9 X-ray examination and then electrical continuity
10 tests and then an inspection of the switch
11 contacts under magnification."

12 Q. Can we do any of those things in this case,
13 Mr. Greene?

14 A. No.

15 Q. And all those would be objective scientific
16 ways for us to test your opinions; is that right?

17 A. If in fact the switch remains had not been
18 so extensively damaged that we could make those
19 tests, yes.

20 Q. But you already told us that you assumed
21 the switch remains were available when you asked
22 Mr. Goldstein to do tests on those, right?

23 A. Correct. When I did the report.

24 Q. Now, so we cannot do any testing on the
25 switch, so we cannot test your opinion, can we?

1 A. There is no physical evidence that you can
2 use to test my opinion, but it was based on
3 deduction.

4 Q. And there's no way for other scientists or
5 peers to come in and say your opinion is valid
6 and reliable or that it's invalid and unreliable,
7 is there?

8 A. That's not correct. Because there's a lot
9 of, again, literature that's been published that
10 would support my opinion.

11 If this were the first switch and the first
12 switch fire, we couldn't use deductive logic, but
13 after tens of thousands you can begin to draw
14 some conclusions.

15 So if I had the first switch fire, I would
16 have to do testing. I would have to deduce a
17 conclusion through testing.

18 Q. Well, let's go back to your deposition,
19 Mr. Greene. Page 54, please, sir.

20 "Is there any way to objectively test your
21 opinion based on physical evidence to determine
22 its validity?"

23 A. "In this case, specifically, no."

24 Q. Jump down to line 14: "But we can't peer
25 review your opinion, can we?" What was your

1 answer?

2 A. "No, because we don't have the object. The
3 object is missing."

4 Q. "Right. And the object was missing because
5 the plaintiff destroyed it without giving notice
6 to my client?"

7 A. "I don't know why, but it is missing."

8 Q. "And thus Ford Motor Company doesn't have
9 an opportunity to test your opinion nor would any
10 scientist, correct?"

11 A. "That's correct."

12 Q. Looking to the next page: "If we had the
13 switch, we could test it?" I'm jumping, I'm
14 sorry, down to line ten.

15 A. That's -- the answer is yes. The answer
16 is: "You would have remains of the switch."

17 Q. "That could be X-rayed?"

18 A. "Correct."

19 Q. "That could be subjected to the
20 magnification tests you mentioned?"

21 A. "Correct."

22 Q. "That could be subjected to the electrical
23 continuity test you mentioned?"

24 A. "Correct."

25 Q. "All of which would be objective ways to

1 test your theory or your opinion, correct?"

2 A. "Correct."

3 Q. "But we can't do that?"

4 A. "Correct."

5 Q. "And thus we are left with your opinion
6 with no way to test it, no way to subject it to
7 peer review, and no way to know the error
8 inherent in your opinion. Correct?"

9 A. "Correct." That's all based on the fact
10 that we didn't have the switch.

11 Q. And we didn't have the switch because the
12 plaintiff destroyed it?

13 A. Well, for whatever the reason, it was not
14 available.

15 Q. You are a member of NFPA, correct?

16 A. Correct.

17 MR. OTT: May I approach the witness,
18 Your Honor?

19 THE COURT: You may.

20 BY MR. OTT:

21 Q. And do you agree that NFPA promulgates
22 standards for fire investigators to follow in
23 investigating a fire such as this?

24 A. Well, I don't want you to use the word
25 "standard." There's a big difference between

1 standard and a guide.

2 Q. Does NFPA 921 contain a guide for a fire
3 investigator such as you to follow when
4 inspecting a vehicle fire such as this?

5 A. It's a guide for inspecting fires in
6 general, and it is based on the fact that every
7 fire is different.

8 Q. But it does provide the guideline, correct?

9 A. It's a guide, yes.

10 Q. And you try to follow it, don't you?

11 A. Whenever possible, but it's not something
12 that you have to follow rigorously without
13 exception.

14 Q. Is the NFPA 921 authoritative in the fire
15 investigation field?

16 A. It is.

17 Q. And did you follow 921 in formulating your
18 opinion about the cause here?

19 A. No. It would not apply.

20 Q. Why couldn't you follow the authoritative
21 guide in your industry to arrive at your
22 causation opinion?

23 A. Well, as we talked about in my deposition
24 testimony before, about not being able to
25 determine the origin of the fire using NFPA 921

1 guidelines since I didn't go to the scene, I
2 could not determine an origin per the NFPA 921
3 guidelines.

4 Q. And, in fact, you couldn't determine the
5 cause pursuant to the NFPA 921 guidelines,
6 either, could you?

7 A. If you follow NFPA, you cannot determine a
8 cause without determining an origin. But as NFPA
9 itself states, there are many cases and
10 exceptions to following the guide.

11 Q. And because you did not follow the guide,
12 then you cannot conclude that under NFPA 921
13 standards that the switch in this case actually
14 caused this fire, can you?

15 A. And, again, 921 guide. It's not a
16 standard. And under the guide, which doesn't
17 apply, you can't determine anything because it
18 doesn't apply.

19 Q. Under NFPA 921, you cannot determine that
20 this switch caused the fire, can you?

21 A. Correct.

22 Q. In fact, if you would have followed
23 NFPA 921 guidelines, NFPA 921 would have demanded
24 that you reach the conclusion that the cause of
25 this fire was undetermined; isn't that right,

1 Mr. Greene?

2 A. No. If I followed NFPA 921 guidelines, I
3 would have had to have visited the scene, which
4 was impossible because the scene no longer
5 existed. So that's why I say that NFPA 921
6 doesn't apply.

7 MR. OTT: With the Court's indulgence,
8 Your Honor.

9 THE COURT: Yes, sir.

10 MR. OTT: Your Honor, at this point we
11 would move to introduce defendant's exhibits
12 numbers one and two into evidence.

13 MR. GOLDSTEIN: Your Honor, they are my
14 Answers to Interrogatories and Request for
15 Production. They're redacted. I have no
16 objection to them being entered, but I do not
17 want them to be entered in a redacted fashion.
18 If he wants to put them in, put the whole thing
19 in.

20 THE COURT: Let me see one and two.

21 (The Court reviews exhibits.)

22 THE COURT: Defendant's one and two
23 over plaintiff's objection.

24 MR. OTT: Thank you, Your Honor.

25 THE COURT: Thank you.

1 (Defendant's Exhibit No. 1, previously
2 marked for identification, is received in
3 evidence.)

4 (Defendant's Exhibit No. 2, previously
5 marked for identification, is received in
6 evidence.)

7 MR. OTT: Mr. Greene, those are all the
8 questions I have. Thank you for your time.

9 THE WITNESS: Thank you, sir.

10 THE COURT: Mr. Goldstein.

11 REDIRECT EXAMINATION

12 BY MR. GOLDSTEIN:

13 Q. Mr. Greene, the photographs that you
14 testified from earlier, is the speed deactivation
15 control switch visible in those photographs?

16 A. No, sir.

17 Q. Why not?

18 A. It's been burned away, in my opinion.

19 MR. OTT: Objection, Your Honor. I
20 move to strike. It's completely speculative.

21 THE COURT: Overruled.

22 BY MR. GOLDSTEIN:

23 Q. If the speed deactivation control is burned
24 away, what happens to it at the time of its
25 immolation?

1 A. It's composed of mostly combustible
2 materials, such as plastic composites, and it
3 also has highly combustible liquid in there, the
4 brake fluid. And it gets very hot, and what is
5 burnable will burn. And the high melting
6 temperature metal parts of the switch, which
7 would primarily be the electrical parts, would
8 remain, but they are normally very, very
9 difficult to find.

10 Q. Okay. Now, so when Mr. Ott is asking you
11 about Mr. Shelby, quote, destroying the truck,
12 you wouldn't test the truck, would you?

13 A. No.

14 Q. You would test the switch?

15 A. If you could find the remains.

16 Q. Okay. And tell the jury how many of these
17 fires have you personally investigated.

18 A. I've personally investigated four of them,
19 and I've only found partial remains on one.

20 Q. What happened to the other ones?

21 A. The heat damage and burn damage was so
22 extensive and there was so much fire debris, I
23 just couldn't locate them.

24 Q. Mr. Ott asked you about scientific testing.
25 You said that you would review the literature

1 that has been done in these cases. Was that your
2 answer?

3 A. Yes.

4 Q. What kind of literature has been done in
5 these cases?

6 A. There have been published articles by the
7 I-double-A-I and the National Institute of
8 Standard and Testing and other organizations.
9 Ford has also published some information.

10 Q. How many of these switch speed control
11 deactivation switch fires have been reported
12 nationwide?

13 A. I don't know.

14 MR. OTT: Objection, Your Honor.

15 THE COURT: I'll allow it.

16 BY MR. GOLDSTEIN:

17 Q. Do you know if it's more than a hundred?

18 MR. OTT: Objection, Your Honor. He
19 just said he doesn't know.

20 THE COURT: Sustained.

21 BY MR. GOLDSTEIN:

22 Q. Does the literature on which you would rely
23 in investigating a switch deactivation control
24 switch fire talk about the number of instances of
25 the failure of the switch?

1 A. Yes. And it talks about the number and
2 type of vehicles affected and the range of
3 dates.

4 Q. And are there government's published
5 figures that relate to the frequency and
6 occurrence of such fires?

7 MR. OTT: Objection, Your Honor.

8 THE COURT: Sustained.

9 BY MR. GOLDSTEIN:

10 Q. Chief Norris, was he on the scene?

11 A. Yes, sir. He told me he was.

12 Q. Okay. And have you interviewed him?

13 A. Yes, sir, I have.

14 Q. And in forming your opinion, have you
15 relied in part on information supplied by Chief
16 Norris?

17 A. Yes.

18 (Plaintiff's Exhibit No. 23, letter to
19 Mr. Kernodle from Mr. Goldstein dated 12/20/05,
20 is marked for identification.)

21 (Plaintiff's Exhibit No. 24, letter to
22 Mr. Kernodle from Mr. Goldstein dated 1/17/06, is
23 marked for identification.)

24 BY MR. GOLDSTEIN:

25 Q. Okay. Now, Mr. Ott asked you a series of

1 questions about the truck being destroyed. I
2 can't remember if he said by me or by my client
3 or both. I show you what's been marked
4 plaintiff's exhibits 23 and 24. Let me just ask
5 you if you know what those are.

6 A. This is a letter of ---

7 MR. OTT: Your Honor, before he
8 publishes the exhibit or has it entered into
9 evidence, we do have an objection to it.

10 MR. GOLDSTEIN: Well, let me finish
11 my...

12 BY MR. GOLDSTEIN:

13 Q. Don't tell us what they say. Just do you
14 know what they are?

15 A. Yes.

16 Q. I mean, can you identify them?

17 A. Yes.

18 Q. All right. Is the author of those
19 documents the same author as defendant's exhibits
20 one and two?

21 A. I'm sorry, I don't remember one and two.

22 Q. Remember Mr. Ott showed you defendant's
23 exhibits one and two and asked you to glean
24 information from them? Do you recall those?

25 A. Yes.

1 Q. Do you see who the author of those two
2 documents are, is?

3 A. I do.

4 Q. Who is the author?

5 A. You are.

6 Q. Okay. Have you ever seen those before
7 today?

8 A. I don't think so.

9 Q. Okay. Now, back to 22 and 23, have you
10 ever seen those before today?

11 A. No.

12 Q. Okay. Based on your review of plaintiff's
13 exhibit 22 or 23, are you of the opinion that
14 Stan Shelby, acting through counsel, attempted to
15 notify someone on behalf of Ford as to the
16 claim?

17 MR. OTT: Objection, Your Honor. I
18 think you need to see what he's talking about.

19 THE COURT: Counsel approach with the
20 exhibits.

21 (Plaintiff's Exhibit No. 26,
22 Plaintiff's Answers to Defendant's Supplemental
23 Interrogatories, is marked for identification.

24 (Plaintiff's Exhibit No. 27,
25 Plaintiff's Answers to Defendant's First Set of

1 Interrogatories, is marked for identification.)

2 (There was an off-the-record bench
3 conference in the presence of the jury but out of
4 the hearing of the jury.)

5 (Said bench conference being concluded,
6 the following proceedings were had:)

7 THE COURT: I will sustain your
8 objection as to plaintiff's exhibit 23 and 24.
9 Plaintiff's exhibits 26 and 27 are the bases of
10 the Court's ruling on defendant's exhibit one and
11 two.

12 You may continue, Mr. Goldstein.

13 MR. GOLDSTEIN: Thank you, Your Honor.

14 BY MR. GOLDSTEIN:

15 Q. Based on the review of materials provided
16 to you here today, do you think that the
17 plaintiff attempted to put Ford Motor Company on
18 notice?

19 MR. OTT: Objection, Your Honor.

20 THE COURT: If he knows.

21 ~~THE WITNESS:~~ Yes.

22 BY MR. GOLDSTEIN:

23 Q. Okay. Now -- oh. Mr. Ott asked you when
24 Ford -- do you know when Ford first discovered
25 the propensity of the speed control deactivation

1 switch to burn?

2 A. Yes.

3 Q. When did it make its presence known in the
4 literature? How long has this been in the
5 literature?

6 A. Since the mid to late nineties.

7 Q. Okay. And does the literature reflect
8 extensive scientific testing of the speed control
9 deactivation switch?

10 A. Yes.

11 Q. And is that testing -- is the type of
12 testing done in the scientific literature the
13 same as the kind of testing that can be done to a
14 part that has been consumed in a fire?

15 A. Provided the part is sufficiently intact to
16 undergo the testing, yes.

17 Q. Is there any way to know with any certainty
18 as to whether or not this missing speed control
19 deactivation switch was or was not in sufficient
20 condition for testing?

21 A. Probably not.

22 Q. And you say probably not, based on what?

23 A. My experience in looking at the fires that
24 I've seen.

25 MR. GOLDSTEIN: Thank you, sir. That's

1 all the questions I have.

2 THE COURT: Mr. Ott.

3 MR. OTT: Your Honor, with the Court's
4 indulgence.

5 RECROSS-EXAMINATION

6 BY MR. OTT:

7 Q. Mr. Greene, I want to understand your
8 testimony about exactly when you learned that the
9 evidence had been destroyed.

10 A. It was after I issued my original report.
11 I spoke with Mr. Goldstein -- Mr. Goldstein --
12 excuse me -- and he told me there is no truck,
13 there is no switch, it's gone.

14 Q. So after you had already formulated your
15 opinions about the origin and cause, you
16 discovered that in fact the truck and the part
17 at issue had been destroyed?

18 A. Correct.

19 Q. So you can formulate an opinion about
20 origin and cause without inspecting the truck
21 and in fact without even knowing the truck's in
22 existence?

23 A. Using the process of deduction, if
24 something has occurred over and over and over
25 again and you have a pattern that fits that

1 occurrence, which we do in this case, the answer
2 is yes. The circumstances are more than
3 coincidental.

4 Q. But the point is, Mr. Greene, at the time
5 you formulated your opinions and wrote your
6 report, you thought the truck was available to be
7 inspected, right?

8 A. I thought we could -- I thought we could
9 more conclusively prove that it was the switch if
10 we could find the remains, but that was it. It
11 would just be an additional piece of evidence.

12 Q. So at that time, then, when you formulated
13 your report outlining your opinions, the only
14 information that you had reviewed was what had
15 been provided to you by Mr. Goldstein, right?

16 A. Right. Which was the circumstances of the
17 fire and the fire report.

18 Q. Let's look at page 61 of your deposition,
19 please.

20 MR. GOLDSTEIN: Your Honor, this is far
21 -- this is redirect examination which is limited
22 to matters brought out in re -- I'm sorry.

23 THE COURT: It's actually recross.

24 MR. GOLDSTEIN: Recross. Sorry. I'm
25 getting tired. This is recross. May I be heard?

1 This is recross examination which is limited to
2 matters brought out in redirect examination, and
3 now we've gone way beyond the bounds of the very
4 few questions I asked him.

5 THE COURT: All right. You inquired as
6 to whether or not he knew that Ford had received
7 notice. I'll allow it.

8 BY MR. OTT:

9 Q. Let's look at page 61 of your deposition,
10 Mr. Greene.

11 A. Yes.

12 Q. Reading from line six: "When did you learn
13 that the vehicle had been destroyed?" Your
14 answer?

15 A. "Not until today."

16 Q. So that was the morning of your deposition
17 Mr. Goldstein finally revealed that crucial fact
18 to you; is that right?

19 A. That it was destroyed. I assumed that it
20 was somewhere else, in a salvage yard or in some
21 location that might still be available for
22 inspection, but it wasn't until the day of the
23 deposition that I learned that it was in fact
24 demolished.

25 Q. And you cannot think of a more crucial

1 piece of evidence than the truck or the switch
2 involved in this case, can you?

3 A. No.

4 Q. Now, I want to explore this issue of notice
5 to Ford Motor Company. We've already looked at
6 supplemental answer number four that the
7 plaintiff admitted it had never notified Ford
8 Motor Company before it decided to destroy the
9 switch and the truck; is that correct?

10 A. That's what the document said, yes.

11 Q. And that was their answer, right?

12 A. Correct.

13 Q. I didn't say that. That was their answer
14 out of their mouth through their attorney.
15 Correct?

16 A. Correct.

17 Q. Now, somehow now your opinion's changed
18 about whether plaintiffs notified Ford Motor
19 Company or not, before they destroyed this truck?

20 A. Not my opinion as to whether they notified
21 Ford Motor Company, but I just saw some documents
22 earlier that would indicate there was an attempt
23 made to notify Ford Motor Company. Whether those
24 documents would indeed constitute sufficient
25 legal notice, I can't say..

1 Q. So as we sit here today, can we agree,
2 Mr. Greene, that you do not have any information
3 to prove that plaintiff notified Ford Motor
4 Company before it decided to destroy the truck
5 and the switch?

6 A. That's correct. I can see an attempt was
7 made, but I don't know if notice -- if
8 constructive notice was actually engaged.

9 Q. And I assume that if they actually had that
10 notice they wouldn't have answered interrogatory
11 number four saying we never notified Ford before
12 we destroyed the evidence?

13 A. Correct.

14 Q. They would have responded differently?

15 A. I would agree with you. I'd assume the
16 same.

17 MR. OTT: Okay. Thank you, sir.

18 THE COURT: You may step down,
19 Mr. Greene.

20 May this witness be excused from the
21 courthouse? Any objections?

22 MR. GOLDSTEIN: None from the
23 plaintiff, Your Honor.

24 THE COURT: Any objections?

25 MR. OTT: None, Your Honor.