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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the 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.

FINAL BRIEF OF APPELLANT

March 17, 2010

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR BY NOT DISMISSING THE CASE BASED ON RESPONDENT'S SPOILIATION OF THE MOST CRUCIAL PIECES OF PHYSICAL EVIDENCE WHEN EVEN RESPONDENT'S EXPERTS ADMITTED THE PREJUDICE TO FORD WAS EXTREME?
- II. WAS FORD ENTITLED TO JUDGMENT BECAUSE RESPONDENT FAILED TO PROVE THE ESSENTIAL ELEMENTS OF ITS CLAIM FOR NEGLIGENT DESIGN DEFECT, OR AT A MINIMUM, A NEW TRIAL DUE TO ERROR IN THE COURT'S JURY INSTRUCTION?
- III. DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR BY ALLOWING RESPONDENT TO INTRODUCE TESTIMONY AND EVIDENCE REGARDING AN IMPROPER MEASURE OF DAMAGES FOR LOST PROFITS?
- IV. DID THE TRIAL COURT ERR BY NOT GRANTING FORD'S MULTIPLE MOTIONS FOR MISTRIAL BASED ON THE CUMULATIVE PREJUDICE MOUNTING FROM IMPROPER CONDUCT OF RESPONDENT AND RESPONDENT'S COUNSEL?

STATEMENT OF THE CASE

Respondent 5 Star, Inc. filed this product liability action in the Court of Common Pleas for Charleston County on December 5, 2006, seeking damages from a fire allegedly caused by a defect in Respondent's 1996 Ford pickup truck. The Complaint's only cause of action was for negligent design of the truck to recover actual and punitive damages. Ford's Answer generally denied the allegations and asserted additional defenses.

Following a trial during September 2-4, 2008, the jury returned a verdict awarding Respondent \$41,000.00 in actual damages. Ford timely moved for judgment notwithstanding the verdict, new trial absolute, and new trial *nisi remittitur*. After hearing argument on September 24, 2008, the trial court denied Ford's post-trial motions. Ford received written notice of the trial court's ruling on October 3, 2008.

Ford filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCF, on October 9, 2008. Respondent submitted a memorandum in opposition alleging Ford's motion constituted a successive post-trial motion. As a result, and out of an abundance of caution, Ford filed and served its Notice of Appeal on November 3, 2008. Thereafter, the trial court heard Ford's motion to alter or amend the judgment on November 20, 2008. At the hearing, counsel for Ford first learned that the trial court entered an order on October 30, 2008, taxing costs against Ford in the amount of \$416.21 and reflecting a \$3,000.00 stipulated set off from the verdict. The trial court denied Ford's Rule 59(e), SCRCF, in an order Ford's counsel received on December 12, 2008. Ford filed and served an Amended Notice of Appeal on December 17, 2008.

STATEMENT OF FACTS

I. The Truck.

Respondent, a lawn maintenance and pressure washing company, owned a 1996 Ford F-250 pickup truck. Ford designed and manufactured, in part, and finally assembled the truck on or about November 3, 1995, and sold it to the original purchaser on November 15, 1995. (R. p. 23, at ¶ 3) Nearly ten years later, Respondent purchased the used vehicle for \$1,500.00 when the odometer registered over 227,000 miles. (R. p. 563, line 23-p. 564, line 6; p. 930-931, at ¶ 5; p. 857)

II. The Fire.

Respondent's truck was parked for the weekend inside its warehouse in North Charleston on September 24, 2005, along with lawn maintenance equipment including tractors, trailers, lawn mowers, weed eaters, and pressure washers. When Respondent's owner, Stan Shelby, returned two days later, he discovered a fire had occurred in the warehouse. (R. p. 522, line 6-p. 523, line 11) The City of North Charleston Fire Department responded and extinguished what remained of the fire. The department's chief fire investigator, Benjamin Norris, performed a limited 30-45 minute investigation in which he ruled out arson as a potential cause of the fire. (R. p. 483, lines 14-22; p. 501, lines 9-11) Norris did not photograph, measure or otherwise document the scene. (R. p. 487, lines 20-25)

Respondent's theory is that an alleged defect in the Speed Control Deactivation Switch—a part Ford recalled in August 2006—caused the fire. During his inspection, Norris saw debris under the truck but did not look for the switch because it was outside his scope of responsibility. (R. p. 491, lines 7-18) Although Norris did not see the

switch, he suspected it caused the fire and so advised Shelby. Norris instructed Shelby to secure the scene and the vehicle, and to notify the appropriate insurance company so it could hire an investigator. (R. p. 501, line 21-p. 502, line 11)

III. The Spoliation.

After hiring an attorney to pursue a claim against Ford, Respondent had the truck, including the switch, towed from his property and crushed at a steel mill on February 2, 2006. (R. p. 418, line 23-p. 419, line 6; p. 571, lines 15-18; p. 572, lines 14-20; p. 934, at ¶¶ 1-3, 6) Respondent never notified Ford of its claim or the availability of the truck for inspection before destroying this crucial evidence. (R. p. 571, lines 12-14; p. 576, lines 14-16; p. 935, at ¶ 4; p. 24, at ¶ 10) Ten months later, Respondent filed this action.

Following Respondent's destruction of the truck, the entire universe of evidence documenting the condition of the truck and the scene after the fire consists of seventeen photographs taken by either an insurance adjustor or Shelby a week after the fire. (R. p. 858-868) Six of these show damaged office equipment in Respondent's office, and three show the exterior of the warehouse, but none of these photographs concern the origin or cause of the fire. In fact, no photograph shows the condition of the scene as it existed immediately after the fire. Nor do any depict other potential ignition sources, including multiple pieces of gas-powered lawn equipment, within the warehouse. None of the photos show the truck in the warehouse; rather, the only seven photos of the truck were taken after it had been moved from the scene. These photos are not digital quality, and two are in fact blurry. All experts agree the photographs alone are insufficient for an investigator to formulate an opinion about the origin or cause of this fire. (R. p. 315, lines 12-20; p. 416, line 13-p. 418, line 10; p. 500, lines 21-24) All experts agree the

prejudice to Ford resulting from Respondent's destruction of the only physical evidence is extreme. (R. p. 318, lines 9-15; p. 428, lines 11-18; p. 504, line 22-p. 505, line 2)

IV. The Damages.

Respondent sued to recover the value of the truck, damage to the building and office, lawn and pressure washing equipment, and the rental cost for equipment to repair the building and keep the business operating. Lastly, Respondent alleged lost profits resulting from business interruption. Shelby calculated \$18,000.00 of "lost profits" by dividing Respondent's 2004 gross revenue by the total number of working days in 2004, and multiplying that daily revenue by 15—the estimated number of days Respondent's business was interrupted. Shelby did not deduct expenses, overhead or taxes from this calculation to arrive at a net profit figure, and he could not identify any projects, calls or jobs lost because of the fire. (R. p. 532, line 21-p. 534, line 17; p. 567, lines 10-20)

ARGUMENT

I. THE TRIAL COURT ERRED BY NOT DISMISSING THE CASE BASED ON RESPONDENT'S SPOILIATION OF THE MOST CRUCIAL PIECES OF PHYSICAL EVIDENCE WHEN EVEN RESPONDENT'S EXPERTS ADMITTED THE PREJUDICE TO FORD WAS EXTREME.

The trial court abused its discretion by not dismissing the case based on Respondent's spoliation of evidence. *See Kershaw County Bd. of Educ. v. U.S. Gypsum*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990) ("An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law."). It is undisputed that Respondent, **after** hiring an attorney to pursue a claim against Ford, had the subject vehicle and all component parts towed from his property and crushed at a steel mill prior to notifying Ford of its potential claim or that this important evidence would be destroyed. (R. p. 310, line 25-p. 311, line 25; p. 418, line 23-p. 419, line 6; p. 420, line 9-p. 421, line 16; p. 571, lines 4-18, p. 572, lines 17-20; p. 577, lines 7-10) Regardless of its intent, Respondent breached its duty to preserve material evidence for litigation and deprived Ford of the fundamental fairness every litigant is entitled.

A. Respondent undoubtedly spoliated the evidence.

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. *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001); *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 litigation

when a party reasonably should know the evidence may be relevant to anticipated litigation. *Silvestri*, 271 F.3d at 591 (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2nd Cir. 1998)). At the very least, a party has “an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.” *Silvestri*, 271 F.3d at 591.

Norris immediately advised Shelby of a potential claim related to the switch. Norris further instructed Shelby to secure both the scene and the truck. (R. p. 501, line 21-p. 502, line 11) Shelby did neither. He also did not document the post-fire condition of the scene or the truck. Later, Respondent hired its attorney, thus proving Respondent’s knowledge of foreseeable litigation. At that point, both Respondent and its lawyer owed a duty to preserve all evidence related to the claim, to include especially the vehicle and the switch. While Shelby attempted to quibble at trial by stating he personally did not destroy the truck and only wanted it off his property, he contacted a salvage company to remove the truck, knowing it was not going to be preserved and not expecting to see it again. (R. p. 570, lines 3-13; p. 571, lines 4-18; p. 572, lines 10-20; p. 577, lines 7-10; p. 581, lines 12-14) At the very least, Respondent was obligated to notify Ford both of its claim and the possible destruction of the evidence before it happened; however, Respondent failed to do so. The conclusion is inescapable that Respondent, represented by counsel and intending to pursue product litigation related to the truck, spoliated the most important pieces of evidence in any product liability case. Thus, the only question is whether the trial court’s chosen sanction, an adverse inference jury charge, was an abuse of discretion.

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

The Supreme Court of South Carolina has held that trial courts have discretion to issue sanctions under Rule 37, SCRPC. *Kershaw County*, 302 S.C. at 395, 396 S.E.2d at 372. Specifically, courts have the power to issue sanctions for spoliation of evidence. *Id.* The right to impose sanctions arises from a court's inherent power to control the judicial process and litigation, but the power is limited to that which is necessary to redress conduct "which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-46, 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"); *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987) ("whatever sanction is imposed should serve to protect the rights of discovery provided by the Rules."). "[B]ecause no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions-all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition." *Shaffer Equip*, 11 F.3d at 457. The courts must protect the integrity of the judicial process because, "[a]s soon as the process falters . . . the people are then justified in abandoning support for the system." *Id.*

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

instruction allowing the jury to infer that the missing evidence would be adverse to the spoliating party's case. *See, e.g., Stokes v. Spartanburg Regional Medical Center*, 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006) (reversing trial court for not giving a jury charge on spoliation of evidence). In this case, dismissal is the only appropriate sanction for Respondent's spoliation of the scene, the vehicle, and the switch; merely instructing the jury that it may draw an adverse inference, which the jury obviously ignored, does nothing to redress the extreme prejudice to Ford.¹

South Carolina law recognizes that the severe sanction of dismissal is appropriate under certain circumstances when a party spoliates evidence. In *Kershaw County*, the supreme court held that 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." 302 S.C. 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. Unlike *Kershaw County*, Ford undoubtedly "was unduly prejudiced" in this case and only dismissal "would serve to protect the rules of discovery." *Id.*

The considerations in *Kershaw County* are nearly identical to those other courts utilize when fashioning appropriate sanctions for a party's spoliation of evidence. Courts focus not only on the conduct of the spoliator, but also on the prejudice resulting from the destruction of the evidence. "At bottom, to justify the harsh sanction of dismissal, district

¹ Exclusion of the spoliated evidence in this case would essentially result in dismissal because without testimony regarding the condition of the fire scene or truck, Respondent would have been unable to satisfy its burden of proof.

courts must consider both the spoliator's conduct and the prejudice caused and be able to conclude **either** (1) that the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, **or** (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim." *Silvestri*, 271 F.3d at 593 (emphasis added).

The fourth circuit also recognized that dismissal is severe and constitutes the ultimate sanction for spoliation. *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)). However, "even when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case." *Id.* As one commentator recently noted:

It is easy to imagine circumstances where bad faith or malicious behavior has occurred, but the defendant is unable to present any evidence regarding the plaintiff's state of mind or the circumstances surrounding the destruction of the evidence. Any cunning plaintiff would make sure of this. Even if the plaintiff did not destroy the evidence intentionally, the prejudice to the defendant is still the same and must be redressed.

Comment, Christopher B. Major, *Where's The Evidence? Dealing With Spoliation By Plaintiffs in Product Liability Cases*, 53 S.C. L. Rev. 415, 435 (Winter 2002). Furthermore, sometimes "the inadvertent, albeit negligent, loss of evidence will justify dismissal because of the resulting unfairness: 'The expansion of sanctions for the inadvertent loss of evidence recognizes that such physical evidence often is the most eloquent impartial 'witness' to what really occurred, and further recognizes the resulting unfairness inherent in allowing a party to destroy evidence and then to benefit from that conduct or omission.'" *Silvestri*, 271 F.3d at 593 (quoting *Kirkland v. New York City Housing Auth.*, 236 A.D.2d 170, 173, 666 N.Y.S.2d 609 (N.Y. App. Div. 1997)).

Silvestri is factually indistinguishable. The fourth circuit reviewed a district court's dismissal of a product liability lawsuit against an auto manufacturer based on the plaintiff's spoliation of the vehicle. Regarding the underlying facts, the court noted that "[i]t is readily apparent, therefore, that [the plaintiff], his attorneys, and his expert witnesses anticipated filing suit against [the defendant] and were fully aware that the vehicle was material evidence in that litigation. Yet, they failed to take any steps to ensure that [the plaintiff] discharged his duty to prevent the spoliation of evidence." *Silvestri*, 271 F.3d at 591-92. Even though the plaintiff did not own the vehicle, the court ultimately held that the plaintiff "failed to preserve material evidence in anticipation of litigation or to notify [the defendant] of the availability of this evidence, thus breaching his duty not to spoliolate evidence." *Id.* at 592. The court further held that the spoliation was so "highly prejudicial" to the defendant because it "denied [the defendant] access to the only evidence from which it could develop its defenses adequately." *Id.* Therefore, the court held that "the court's order dismissing this case, although severe, was not an abuse of discretion." *Id.* at 595.

The court based its holding, in part, on the fact that the plaintiff's "level of culpability" was "at least negligent, and may have been deliberate" because the record was clear that his attorney "knew that the vehicle was a central piece of evidence in his case against [the defendant] and that he had been reminded that this piece of evidence should be preserved or that [the defendant] should be notified." *Id.* at 593-94. However, in addition to evaluating the plaintiff's conduct, the court focused more on the level of prejudice to the defendant: "To require [the defendant] to rely on the evidence collected by [the plaintiff's] experts in lieu of what it could have collected would result in

irreparable prejudice.” *Id.* at 594.

The present facts are more egregious than *Silvestri* because Respondent actually owned the truck, and the “irreparable prejudice” described in *Silvestri* is just as clear in this appeal. Ford was unable to investigate the scene, which included multiple potential ignition sources. Respondent then destroyed the vehicle and allegedly defective part. (R. p. 934-p. 935, at ¶¶ 1-6) Thus, Respondent denied Ford the ability to develop its own conclusions regarding the origin and cause of the fire or defend against Respondent’s defect allegations. Importantly, there are tests that could be conducted on the switch, or even its remains if the fire engulfed or severely damaged the switch, to determine conclusively whether or not the switch failed. (R. p. 317, line 8-p. 318, line 8; p. 404, lines 8-12; p. 421, line 24-p. 422, line 16; p. 422, line 23-p. 423, line 21; p. 430, line 17-p. 431, line 14; p. 437, line 25-p. 439, line 14; p. 492, lines 7-11; p. 497, lines 2-5) Ultimately, Respondent’s conduct eliminated the only evidence from which Ford could adequately develop its defenses.

In fact, every expert agreed Ford was extremely prejudiced by Respondent’s spoliation of evidence. First, Ford’s design engineer, Jon Olson, testified that Ford was severely disadvantaged by not being able to inspect or test the truck or its component parts:

Q. Has the absence of the truck and the part they claim caused this fire, has the absence of those two things disadvantaged our defense of this case?

A. I believe it’s a **severe disadvantage** in the sense that we can’t look at it, we can’t feel or touch wires.

(R. p. 318, lines 9-15) (emphasis added)

Moreover, Plaintiff’s proffered electrical engineering and defective product

expert, Leonard Greene, testified that because of the “significant disadvantage” to Ford, he would never have allowed Respondent to knowingly dispose of the vehicle as it did in this case:

Q. If you had been hired from the git-go, Mr. Greene, would you ever have allowed them to destroy this crucial piece of evidence?

A. No.

Q. Why not?

A. Well, as you said, it’s a **crucial** piece of evidence, and you need to reclaim it so that everyone will have an opportunity to inspect it and examine it. All of the interested parties **need** that opportunity.

Q. And that’s standard practice in the fire investigation industry, correct?

A. Yes, sir.

Q. Or even in forensic engineering that you also do, correct?

A. **Those are the fair rules we play by.** Correct.

Q. Now, is there any dispute, though, Mr. Greene, that Ford Motor Company has been extremely disadvantaged in its defense of this case by the fact that 5 Star destroyed this truck before giving notice to Ford that it was going to destroy the truck?

A. That would be a **significant disadvantage** to Ford, I agree.

(R. p. 426, lines 8-24; p. 428, lines 11-18) (emphasis added)

Lastly, Norris, who Respondent also hired, confirmed the extreme disadvantage and prejudice to Ford resulting from Respondent’s disposal of the evidence:

Q. And will you agree that Ford has been **extremely disadvantaged, even prejudiced** in its defense of this case by the destruction of this evidence?

A. Yes, sir. **I probably would have to agree with that.**

(R. p. 504, line 22-p. 505, line 2) (emphasis added) Like Greene, Norris confirmed that he would not have allowed the destruction of such crucial evidence:

Q. Now in your role as a fire investigator, Mr. Norris, would you ever let a client dispose of such crucial evidence in a case like this without notifying the manufacturer?

A. No, sir. If it was -- if I had control of that.

Q. Why wouldn't you allow that to happen?

A. There again, we want to put the possible responsible party on notice and give them an opportunity to look at it.

Q. It's just basic fairness --

A. Yes, sir.

Q. -- in the legal system, isn't it? Is that right?

A. Yes, sir.

(R. p. 504, line 7-21)

Furthermore, Norris admitted he would expect a manufacturer to conduct its own investigation to arrive at its own conclusions, but that the only evidence available following respondent's spoliation was insufficient to do so:

Q. Would you expect a manufacturer in a situation like this to hire their own experts?

A. Yes, sir.

Q. Would you expect those experts to do their own investigation and arrive at their own conclusions?

A. Yes, sir.

Q. And you understand that Ford did not get that opportunity to do that in this case; isn't that right?

A. That's what I understand.

Q. Do you consider those five photographs of the scene sufficient for someone to make an origin determination?

A. No, sir, not just based on the photographs.

(R. p. 505, lines 12-22; p. 500, lines 21-24) Greene and Olson also agreed that the photos alone were insufficient for an investigator to formulate opinions regarding the origin and cause of the fire. (R. p. 315, lines 12-20; p. 416, line 13-p. 418, line 10)

This undisputed testimony clearly demonstrates the “extreme prejudice” and “substantial disadvantage” to Ford as a result of Respondent’s spoliation. Additionally, all experts described the inherent unfairness to Ford by having to defend this lawsuit under these circumstances. Based on the facts and testimony presented at trial, all of the considerations of both the *Kershaw County* case and *Silvestri* case are satisfied.

To defend its spoliation and the resulting extreme prejudice to Ford as admitted by Respondent’s own experts, Respondent argued the switch did not survive the fire. (R. p. 645, line 14-p. 646, line 6; p. 646, lines 22-25) However, that suggestion is pure speculation, and because of Respondent’s actions, no one will ever know the condition of the switch following the fire. (R. p. 349, lines 8-15; p. 439, lines 1-3; p. 453, lines 17-24; p. 491, line 19-p. 492, line 6) Even if the switch was severely damaged in the fire, the conclusive tests Greene wanted to perform before Respondent’s attorney advised him of the spoliation could have been conducted on the switch remains. (R. p. 317, line 8-p. 318, line 8; p. 404, lines 8-12; p. 421, line 24-p. 422, line 16; p. 422, line 23-p. 423, line 21; p. 430, line 17-p. 431, line 14; p. 437, line 25-p. 439, line 14; p. 492, lines 7-11; p. 497, lines 2-5) Moreover, the fire did not completely consume the truck or the scene and

its other potential ignition sources, but Respondent also failed to preserve or document them.

In *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66 (Minn. Ct. App. 1998), the court recognized the importance of preserving, not only the product at issue, but also the fire scene itself:

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

Id. at 69. As in *Hoffman*, the trial court “heard testimony that a fire investigation is a process of elimination whereby possible specific ignition and heat sources are located, inspected and ruled in or out.” *Id.* at 69. Similarly, the trial court also heard the experts testify that Ford was “totally deprived of the opportunity to investigate the many possible ignition sources in the garage.” *Id.* at 69-70. Given that the “scene was of unquestionable relevancy” Respondent had the duty to document and preserve it in addition to the truck. However, Respondent failed to do so. Respondent’s culpable conduct created this situation, and Respondent alone should bear the consequences.

C. The adverse inference jury instruction was insufficient to redress the unfairness and extreme prejudice to Ford.

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 Respondent, which the jury obviously chose not to infer, improperly allowed Respondent to profit from its owner’s admitted wrongdoing without any consequence, sanction or penalty.

Despite all of the testimony concerning the effect of Respondent’s spoliation of

evidence, the entire instruction given to the jury on this topic consisted of one sentence: “[w]hen evidence is lost or destroyed by a party, you may infer that the evidence which was lost or destroyed by that party would have been adverse to that party.” (R. p. 694, lines 6-9) Such an instruction is weak and meaningless:

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

Major, *supra*, 53 S.C. L. Rev. 415, 424 (internal footnotes omitted). Likewise, this one-sentence jury instruction was not a “meaningful deterrent” to other potential litigants contemplating similar conduct. *Downey*, 294 S.C. at 45, 362 S.E.2d at 318; *see also Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 946 (11th Cir. 2005) (applying Georgia law) (“Finally, destruction of the vehicle leaves potential for abuse in this case.”). The potential implications on other product litigation of allowing a plaintiff represented by counsel to destroy a product and still recover a verdict are beyond alarming.

Numerous other courts recognize that merely giving an adverse inference jury instruction regarding spoliation is inadequate to remedy the prejudice to the opposing party under certain circumstances. *See, e.g., King v. American Power Conversion Corp.*, 181 Fed.Appx. 373, 378 (4th Cir. 2006) (unpublished) (“we cannot conceive of how such an [adverse inference jury] instruction would adequately level the playing field under the

circumstances of this case.”). In *Flury*, the plaintiff failed to preserve an allegedly defective vehicle in a crashworthiness case against the manufacturer. The court noted that the vehicle was “the most crucial and reliable evidence available to the parties at the time plaintiff secured representation.” *Flury*, 427 F.3d at 943. The trial court, rather than imposing a sanction for the plaintiff’s spoliation, merely instructed the jury on the issue of spoliation and on the presumptions which could be raised against a spoliator. *Id.* at 945. Following a verdict for the plaintiff, the United States Court of Appeals for the Eleventh Circuit reversed, holding that the “resulting prejudice to the defendant was incurable, and dismissal necessary.” *Id.* The court reasoned:

Moreover, the district court’s instruction regarding spoliation was insufficient to cure the resulting prejudice to defendant. The instruction was weak and allowed the jury to balance the conduct of the parties. The record makes evident that only one party was at fault for the vehicle’s spoliation—the plaintiff! Defendant could not have prevented spoliation, nor could any such action have been expected, because defendant was never informed of the vehicle’s location and plaintiff did not file suit until years after the vehicle’s removal. *Id.* at 945.

The court weighed the degree of the spoliator’s culpability against the prejudice to the opposing party, and held that “the plaintiff was the only party in a position to preserve the vehicle and failed to do so. Prejudice to the defendant was great, and culpability rested solely upon the plaintiff.” *Id.* The court ultimately concluded that “the district court erred in concluding that a simple jury instruction could cure the resulting prejudice to defendant.” *Id.* at 946.²

² See also *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

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

II. FORD WAS ENTITLED TO JUDGMENT BECAUSE RESPONDENT FAILED TO PROVE THE ESSENTIAL ELEMENTS OF ITS CLAIM FOR NEGLIGENT DESIGN DEFECT.

A. Respondent did not establish all of the essential elements of its claim.

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

did not abuse its discretion in its decision to sanction the plaintiff by dismissing its action.”); *Citizens Ins. Co. of America v. Juno Lighting, Inc.*, 635 N.W.2d 379, 382-83 (Mich. Ct. App. 2001) (“In the present case, only after the trial court carefully considered the possibility of lesser sanctions did it decide that lesser sanctions would not remedy the harm plaintiff caused by failing to preserve the 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*, 587 N.W.2d at 72 (“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.”); *King*, 181 Fed.Appx. at 378 (“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.”).

S.C. 448, 462, 494 S.E.2d 835, 843 (Ct. App. 1997); *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 538, 462 S.E.2d 321, 325 (Ct. App. 1995). However, Respondent chose to plead only a cause of action for negligence alleging the switch was defective and unreasonably dangerous.

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. Mach. Co., Ltd.*, 363 S.C. 209, 215, 609 S.E.2d 565, 569 (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).

Moreover, “the mere fact that a product malfunctions does not demonstrate the manufacturer’s negligence or the product’s defectiveness.” *Bragg*, 319 S.C. at 543, 462 S.E.2d at 328; *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); *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.”). This conclusion necessarily follows from South Carolina’s continuous and repeated rejection of 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, 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”).

B. Respondent failed to prove Ford breached its duty to exercise reasonable care to adopt a safe design for the truck and its component parts.

Ford was entitled to judgment because Respondent failed to present any evidence that Ford was negligent in designing or manufacturing the truck or switch at issue. Just recently, this Court affirmed dismissal based on a plaintiff’s inability to prove the required elements of his product liability claim. *See Jackson v. Bermuda Sands, Inc.*, 2009 WL 1037043 (S.C. Ct. App. April 14, 2009) (slip opinion) (holding the plaintiff’s allegations “fail every part of the test for establishing liability in a products liability claim”). In doing so, this Court affirmed the unwavering principle that “liability for negligence requires proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design.” *Jackson* at *2.

Importantly, a plaintiff must offer proof of the manufacturer’s negligence **at the time of manufacture**. *Bragg*, 319 S.C. at 539, 462 S.E.2d at 326. At trial, Respondent presented absolutely no evidence that Ford failed to exercise reasonable care in adopting the design utilized for the truck at issue. Likewise, Respondent did not introduce any evidence that Ford was negligent for utilizing the switch as built by component part manufacturer Texas Instruments. (R. p. 270, lines 16-22) Respondent’s expert Greene admitted Ford was not aware of any problems when it manufactured the truck in 1995:

Q. Certainly, you don’t have any information at the time Ford manufactured and sold this vehicle that they were aware of fires in any of their vehicle lines, do you?

A. Not when they manufactured and sold it. I think that the switch fires really became more prevalent later on.

(R. p. 433, line 21-p. 434, line 19) Additionally, Olson testified in Plaintiff's case in chief that Ford satisfied its duty to build safe automobiles. (R. p. 267, lines 4-8)

Therefore, the only possible inference that Ford was negligent in designing the truck was the fire itself; however, that evidence cannot establish Ford's negligence. *Sunvillas*, 301 S.C. at 333-34, 391 S.E.2d at 870 ("the mere fact that a product malfunctions does not demonstrate the manufacturer's negligence or the product's defectiveness"). The record is absolutely devoid of any evidence tending to establish that Ford failed to exercise reasonable care in the design or manufacture of the truck or its component parts, and in fact, shows the opposite. Respondent's failure to prove this essential element is fatal to its case, and the trial court erred by not entering judgment for Ford.

C. Respondent failed to prove the truck was in essentially the same condition at the time of fire as when it left Ford's control in 1995.

Ford likewise was entitled to judgment because Respondent failed to introduce any testimony or evidence to establish that "the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant." *Small*, 329 S.C. at 462-63, 494 S.E.2d at 842; *Bragg*, 319 S.C. at 539, 462 S.E.2d at 326. The truck left Ford's control in November 1995 when it was sold to the original purchaser. (R. p. 23, at ¶ 3) The truck was nearly ten years old when Respondent purchased it and had been driven over 227,000 miles since its manufacture and initial sale. (R. p. 563, line 23-p. 564, line 6; p. 857) Shelby testified he had no knowledge regarding the vehicle's service or maintenance history prior to Respondent's purchase seven months before the

fire. (R. p. 565, lines 8-11) Likewise, none of the experts knew the vehicle's maintenance or service history, and none of the former vehicle owners testified to it. (R. p. 321, lines 6-12; p. 408, lines 3-8; p. 488, lines 7-25) However, given the vehicle history consisting of over nine years of reliable use, each expert witness testified that they would expect numerous items to have been replaced prior to the fire, including, but not limited to, spark plugs, spark plug cables, lights, wiring, belts, fans, hoses, batteries, as well as possibly the engine or radiator. (R. p. 320, lines 16-p.321, line 5; p. 408, lines 12-21; p. 489, line 18-p. 490, line 21)

Because Respondent presented no evidence regarding the service or maintenance history of the vehicle, the jury was left to speculate whether the vehicle was in essentially the same condition at the time of fire as when it left Ford's control in 1995—after ten years of use by third parties who did not testify. Moreover, Respondent spoliated the truck before any examination or inspection could be conducted to determine what parts, including the switch, may have been replaced after Ford initially sold the vehicle. Respondent's conduct made it impossible for either party to present evidence as to the condition of the truck prior to the fire or establish what parts were or were not replaced over time. *See Flury*, 427 F.3d at 946 (“without examining the vehicle, defendant could not determine whether it remained in its ‘condition when sold’ at the time of the accident”). Likewise, Respondent's spoliation made it impossible for anyone to determine if the switch was original Ford equipment on the truck when it was designed, manufactured and sold in 1995. Thus, Respondent failed to satisfy its burden of proof as to these essential elements of its claim for negligent design defect, and the trial court erred by not dismissing the case.

D. Ford is entitled to a new trial based on error in the trial court's jury instructions.

Ford is entitled to a new trial because the trial court erred by failing to instruct the jury on Ford's proposed request to charge number 11 that "the product, at the time of the accident, [must be] 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. "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, 63, 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)). Indeed, the trial court agreed that Ford's requested charge constitutes a proper statement of the law, but mistakenly thought that it gave the charge as Ford requested:

Mr. Ott: Your Honor, I can hand up the cases, but ...

The Court: I'm not disputing that that's not – what I'm disputing is the fact whether or not I read it.

Mr. Ott: Okay.

The Court: I'm not disputing that that's not the law.

(R. p. 719, lines 6-13) Ultimately ruling that it included Ford's request to charge in its instruction to the jury, the trial court overruled Ford's exception. (R. p. 721, line 21-p. 722, line 17) This was error.

Rather than instructing the jury that the product, at the time of the accident, must be in essentially the same condition as when it left the hands of the defendant, the trial court instead charged the jury that "[t]he plaintiff must prove that the product was expected to and did reach the ultimate user without a substantial change in the condition

in which the defendant sold it.” (R. p. 699, lines 19-22) While the trial court’s charge is also a correct statement of the law, it is a different statement than the one requested by Ford, which the trial court recognized was a required element of Respondent’s burden of proof. This distinction is critical.

First, the elements of a claim for product liability design defect 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 has to reach the ultimate user, which the jury could wrongly interpret as the original purchaser rather than Respondent, without a substantial change in condition. Therefore, the charge given by the trial court does not take into consideration the fact that the purchaser or any subsequent 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 from the way it was when it left the defendant’s control. This distinction is crucial in this case, where the product is a ten-year old vehicle with over 227,000 miles and there is no record of its maintenance or service history. The jury obviously had concerns on this issue as indicated in their handwritten notes and question-mark on the written jury instructions provided to them during their deliberations. (R. p. 819) This resulted in prejudice to Ford. Therefore, the trial court erred by not charging the correct and complete law to the jury in this case, and Ford at a minimum is entitled to a new trial.

III. THE TRIAL COURT ERRED BY ALLOWING RESPONDENT TO INTRODUCE TESTIMONY AND EVIDENCE REGARDING AN IMPROPER MEASURE OF DAMAGES FOR LOST PROFITS.

The trial court erred in allowing testimony and evidence regarding Respondent’s improper calculation of “lost profits” resulting from business interruption. As with all damages, Respondent 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). “When the tortious conduct of a defendant causes a plaintiff to lose prospective profits, the plaintiff may recover such profits when he can prove: (1) it is reasonably certain that such profits would have been realized except for the tort; and (2) such lost profits can be ascertained and measured from the evidence produced with reasonable certainty.” *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (2008). “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.” *Proctor*, 368 S.C. at 315-16, 628 S.E.2d at 515-16 (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)). A plaintiff must prove “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)).

Rather than attempting to calculate and describe the actual lost profits resulting from the fire, Respondent focused on the general interruption of business activities. Specifically, Respondent calculated \$18,000.00 of “lost profits” by dividing its 2004 gross revenue (approximately \$290,000.00) by the total number of working days in 2004 (241), and multiplying that daily revenue by 15—the estimated number of days Respondent’s business was interrupted following the fire. However, Shelby did not deduct expenses, overhead or taxes from the calculation to arrive at a net profit figure, and he could not identify any projects, calls or jobs lost because of the fire. (R. p. 532,

line 21-p. 534, line 17; p. 567, lines 10-20) Thus, Respondent presented no evidence of lost profits, but only an estimate of lost gross revenue, which is not recoverable.

In no way does Respondent's calculation of "lost profits" satisfy its legal burden of proof on damages—much less to the reasonable certainty standard. *Vortex*, 378 S.C. at 208, 662 S.E.2d at 450. Rather, the jury was allowed to speculate as to the relationship of Respondent's 2004 gross receipts to actual lost profits resulting from the fire in September 2005. Without the proper deductions of expenses and taxes to arrive at a true net profit, rather than gross revenue, the \$18,000.00 Respondent requested as damages had no relevance or probative value. *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."). The introduction of this testimony prejudiced Ford because the jury's verdict necessarily included some amount of "lost profits" under this improper calculation.³

The trial court erred by allowing Respondent to introduce evidence and testimony regarding its improper method of calculating "lost profits" over Ford's objection. The court further erred by not directing a verdict for Ford on Respondent's claim for business interruption or lost profits. At the very least, Ford is entitled to new trial, but Ford also is entitled to judgment on this particular item of damages.

³ Plaintiff sought \$14,041.00 in damaged office and lawn equipment, \$5,000.00 in building repair, \$8,000.00 for the loss of the truck, \$3,121.70 for rental equipment, and \$18,000.00 in "lost profits" for a total amount of \$48,162.70. (R. p. 529, line 14-p. 530, line 12; p. 538, lines 15-22; p. 540, line 17-p. 541, line 4; p. 546, lines 1-4; p. 651, line 14-p. 652, line 20) Therefore, at a minimum, the jury's verdict of \$41,000.00 included approximately \$11,000.00 of "lost profits," although it could have included the entire \$18,000.00 requested if the jury reduced the alleged value of the truck from \$8,000.00 to \$1,500.00 based on Respondent's purchase price of the used vehicle.

IV. THE TRIAL COURT ERRED BY NOT GRANTING FORD'S MULTIPLE MOTIONS FOR MISTRIAL BASED ON THE CUMULATIVE PREJUDICE MOUNTING FROM IMPROPER CONDUCT OF RESPONDENT AND RESPONDENT'S COUNSEL.

The trial court abused its discretion by not granting Ford's multiple motions for mistrial and denying its post-trial motion for new trial. A party's conduct 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); *Ryan v. United Parcel Serv.*, 205 F.2d 362, 365 (2nd Cir. 1953)). "[T]he aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal." *Id.*

Ford is entitled to a new trial based on the cumulative effect of Respondent's owner's and Respondent's counsel's improper conduct and argument. The first evidence of Respondent's improper conduct was the spoliation of the only physical evidence in this case after retaining counsel but before notifying Ford. The undisputed prejudice and disadvantage to Ford was so extreme that it alone deprived Ford of its right to a fair trial. However, the prejudice to Ford was exacerbated by the conduct at trial, when Respondent's counsel, Respondent's expert, and Respondent's owner all violated the court's pre-trial ruling that excluded evidence of Ford's recall of the truck nearly one year after the fire. (R. p. 35, at ¶ 7)

On Ford's motion *in limine*, the trial court excluded Ford's August 2006 recall of

the truck because the recall constituted an inadmissible subsequent remedial measure under Rule 407, SCRE, and inadmissible post-manufacture evidence under *Bragg*. 319 S.C. 531, 462 S.E.2d 321. Under this ruling, the court excluded all evidence, testimony and reference of the recall for the truck, and the parties began trial with that understanding. (R. p. 231, line 19-p. 232, line 1) Additionally, on Ford's separate motion *in limine* seeking to exclude evidence of other similar incidents ("OSI"), the court granted that motion "with the exception to narrowly allow the expert or experts to testify as to experience, skill, or education as it relates to the speed control deactivation switches which are the subject matter of this lawsuit." (R. p. 232, lines 2-10)

Respondent's counsel, with Shelby sitting at the same table, stated he understood the court's rulings. (R. p. 235, lines 1-17) The procedure discussed before trial required, at a minimum, that Respondent's counsel first approach the bench before asking a question that might violate the court's ruling. (R. p. 233, line 8-p. 234, line 11; p. 235, line 18-p. 238, line 11) Respondent called Ford's engineer and corporate representative Olson as the second witness in its case in chief and, given the court's ruling, proffered evidence of the recall outside the presence of the jury upon completion of his direct examination. (R. p. 296, line 22-p. 299, line 7) On cross examination, Olson was qualified as an expert in fire origin and cause and opined that the origin and cause of the fire was undetermined based on the limited information and evidence available after Respondent's spoliation. (R. p. 315, line 12-p. 316, line 21)

On re-direct, Respondent's counsel completely disregarded the court's procedure and, without first approaching the bench, asked Olson whether "a reasonably trained expert in fire cause and origin [would] determine whether or not there was a nationwide

recall on the switch that you were looking at?” (R. p. 325, lines 12-18) Before any answer was given, Ford objected and moved for a mistrial based on the court’s pre-trial ruling. (R. p. 325, line 19-p. 341, line 23) The court reviewed its pre-trial rulings on Ford’s two separate motions *in limine* and simply confused the recall ruling and the OSI ruling.⁴ The court incorrectly summarized the recall ruling by stating the recall could be admitted if it goes to the experience, skill, or education of the experts regarding the switch. (R. p. 330, line 12-p. 331, line 22; p. 334, lines 5-25; p. 342, line 5-p. 343, line 9)⁵ This completely contradicted the court’s actual pre-trial ruling. Ford argued Olson did not refer to the recall when discussing his investigation because Ford’s counsel admonished Olson to adhere to the court’s pre-trial ruling; nevertheless, the court denied Ford’s motion for mistrial. (R. p. 342, line 5-p. 343, line 9) However, the court apparently recognized its confusion because when the jury returned, Respondent’s counsel again asked Olson if an “investigator is supposed to [] check to determine if there are any recalls for that vehicle,” and the court sustained Ford’s objection. (R. p. 356, lines 10-18) The court’s subsequent numerous rulings on the recall issue remained consistent with her *in limine* ruling for the remainder of the trial, and the recall never came into evidence at any point.

However, Respondent’s witnesses continued to push the excluded recall in front of the jury and without Respondent’s counsel first approaching the bench. Minutes after the recall issue was argued and ruled on by the court during Olson’s re-direct

⁴ Respondent’s counsel seemingly also confused the two pre-trial rulings, as demonstrated in his argument in response to Ford’s motion for mistrial. (R. p. 327, line 15-p. 328, line 12; p. 339, line 6-p. 340, line 7)

⁵ Whether a manufacturer recalls a product, as opposed to familiarity developed through OSI investigations, could never bolster an expert’s experience, skill or education.

examination, and after sitting through its entirety, Greene testified on direct examination that during his investigation of this case, he “did a recall search and found out that there were --” (R. p. 373, lines 15-18) Again, Ford objected and moved for a mistrial. The trial court sustained Ford’s objection, but denied the motion for mistrial and instructed the jury to disregard Greene’s response. (R. p. 374, lines 1-15) The next morning, Shelby, after sitting through the entirety of the trial and in a completely nonresponsive answer to a question about whether anyone performed any inspections of the vehicle before it was destroyed, testified that an insurance adjuster told him: “The fire started in the engine. If you don’t know, there’s a recall on it. It might be that. You might want to try and --” (R. p. 579, line 25-p. 580, line 2). Again, the court instructed the jury to disregard the statement concerning the recall, but denied Ford’s motion for mistrial.

Additionally, Respondent’s counsel repeatedly asked questions of witnesses that were repetitive and attempted to illicit testimony in violation of the Court’s rulings, causing Ford to object. For instance, Respondent’s counsel attempted to back-door the recall into evidence on multiple occasions by repeatedly asking the various experts about a particular periodical concerning switch fires in Ford vehicles that the court ruled would be excluded from evidence because the article was directly related to the recall. (R. p. 353, lines 9-24; p. 355, line 8-p. 356, line 3; p. 378, lines 17-25; p. 379, line 9-p. 381, line 9; p. 448, line 22-p. 449, line 8) The court sustained all of Ford’s objections to this evidence. As with numerous other improper questions, Respondent’s counsel seemingly asked these questions simply to draw repeated objections from Ford as evidenced by Respondent never proffering the periodical or testimony from the various witnesses Respondent sought to have testify about the article. While that tactic alone may not be

prejudicial in and of itself, the prejudice to Ford intensified when Respondent's counsel, just minutes after participating in an off record jury charge conference wherein the court stated it would reiterate its instruction that the jurors should disregard objections of counsel, began his closing argument by improperly commenting on the number of objections: "This case, I think, sets a world record for objections." (R. p. 637, lines 17-20) Again, Ford objected and the court instructed Respondent's counsel to move on.

Respondent's counsel continued his closing argument by improperly commenting on the "three or four hundred pages of documents" Ford filed in the case, and even asked the jurors to think about what they learned in this case if they should suffer a vehicle or house fire, blatantly violating the Golden Rule and drawing yet another sustained objection. (R. p. 639, lines 24-p. 640, line 14) *See State v. Rice*, 375 S.C. 302, 334, 652 S.E.2d 409, 425 (Ct. App. 2007) ("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."). Such an argument was 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.* Even after the court sustained Ford's objection, Respondent's counsel later blatantly disregarded the court's ruling by resuming the same argument: "If you have a fire loss, you might think about it and it just ain't worth it." (R. p. 646, lines 9-10) He returned to it again in reply: "That's why I said to you in my very beginning remarks if you have a fire loss like this you might ought to think about just letting it go. Because what Ford is going to do is going to blame you,

it's your fault, you did everything wrong, you destroyed the evidence even though it was consumed in a fire." (R. p. 677, lines 17-23) These improper arguments 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).

Ford concedes that each item of conduct identified may not individually warrant the granting of a new trial. However, the cumulative effect of Respondent's presentation of this case, including the spoliation, conduct and argument of Respondent's owner, counsel and expert, collectively deprived Ford of its right to a fair trial. Accordingly, the trial court erred in denying Ford's multiple motions for mistrial and motion for new trial.

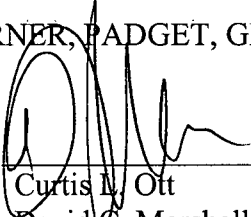
CONCLUSION

For the reasons set forth herein, the trial court erred in not dismissing the case based on Respondent's spoliation of evidence and failure to prove the essential elements of its claim for negligent design defect. Ford respectfully requests judgment in Ford's favor, or, at a minimum, a new trial based on the prejudicial legal error committed at trial.

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

March 17, 2010

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THE STATE OF SOUTH CAROLINA
In the 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,

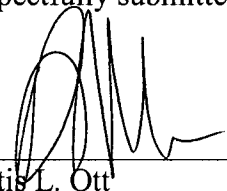
v.

Ford Motor Company, Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this brief complies with Rule 211(b)
S.C.A.C.R..

Respectfully submitted,


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SC Court of Appeals

Case No: 2006-CP-10-4773

5 Star, Inc.Respondent,

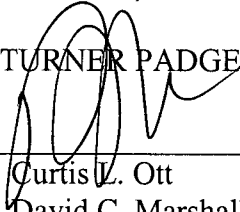
v.

Ford Motor Company.....Appellant.

PROOF OF SERVICE

I certify that I have served the Record on Appeal via mail on February 25, 2010,
addressed to Respondent's attorney of record, Thomas R. Goldstein, Belk, Cobb, Infinger
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