THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2006-CP-10-4773

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5 Star, Inc., ... Respondent,

vs.

Ford Motor Company, ... Appellant.

Respondent's Final Brief

March 2, 2010

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STANDARD OF REVIEW

This is an appeal from a jury verdict upon a general verdict form. (R.O.A. p. 5) The appellant claims that the lower court erred in failing to direct a verdict or grant a new trial. In an action at law, on appeal of case tried by a jury, the jurisdiction of the Court extends merely to correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence that reasonably supports the jury's findings. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976); Reiland v. Southland Equipment Service, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998)

REPLY TO APPELLANT'S STATEMENT OF CASE

The respondent identifies one error in appellant's statement of the procedural case. On page 2, the appellant writes: "The Complaint's only cause of action was for negligent design of the truck to recover actual and punitive damages." As the complaint shows, R.O.A. p. 13, the respondent alleged in paragraph 6 of the complaint, that Ford Motor negligently designed and negligently manufactured the speed control deactivation switch—that is incorporated the switch into the plaintiff's truck in such a manner that it became unreasonably dangerous. This may seem like a minor point, but as discussed in more detail below, the defect with the Ford switch is that it is designed to carry a 2 amp electrical current, but it is incorporated in to the brake light circuit and therefore carries 15 amps of current at all times—even when the ignition is off and the key to the vehicle is removed. Therefore, the defect is both a design defect and a manufacturing defect.

REPLY TO APPELLANT'S STATEMENT OF FACTS

The lower court correctly submitted the case to a jury and gave a correct spoliation charge to the jury.

(including reply to Appellant's Argument I A and I B: The lower court correctly submitted the case to the jury and correctly charged spoliation of evidence.)

Stan Shelby owns and operates a lawn care service known as Five Star, Inc., a subchapter S corporation. (See R.O.A. p.517—520, 542) Because it is a subchapter S corporation and he is the only shareholder/officer, we use "Five Star, Inc." and "Stan Shelby" interchangeably throughout this brief. Shelby testified he makes no distinction between Five Star and himself (R.O.A. p. 542) It is located at 2340 Midland Park Road (R.O.A. p. 843, Exhibit 1 tax map) On Saturday, September 24, 2005, Stan parked his 1999 Ford F-250 pick up truck in the garage at 2340 Midland Park Road. The garage contained his office, his lawn equipment, and the Ford F-250. On Monday, September 26, 2005, Stan returned to the garage around 7:15 a.m., noticed smoke and called 911. (See R.O.A. p.522-523)

Several North Charleston fire trucks responded, opened the garage and extinguished the fire. Two of the firefighters on the scene, Captain Jonathan D. Sanders and Assistant Fire Chief Benjamin Norris testified at trial. Both testified that the origin of the fire was the engine compartment of the Ford F-250 pick up truck. Sanders said the origin of the fire was the engine compartment and that there were no other sources of ignition. (R.O.A. p. 249 and 250) Chief Norris testified further that he knew it was a speed control deactivation switch fire because of the evidence on the scene combined with his familiarity with such fires, and he notified Stan Shelby to preserve the

truck and notify his insurance company. (We emphasize "his insurance company" because that is exactly what Mr. Shelby did, and his company dispatched a loss adjuster. Normally, the loss adjuster notifies Ford pursuant to its rights of subrogation.) The plaintiff's independent expert, Leonard Greene, testified as to the runaway thermal effect that causes Ford speed control deactivation switches to overheat and burn. (R.O.A. p. 375-377) identifying 3 elements of the bad design and incorporation in to the truck:

> A. Well, it's a bad design. The way the switch is designed, it's got power on it all the time. It would have been inherently safer to have designed it so that it only had power on it when the ignition was on. And this is what a key-off/power-on design, and it has power on it all the time. That's number one.
>
> Number two is the fact that the protective device is not coordinated with the switch. The switch is rated for two amperes. The protective device is rated for 15 amperes. So the switch can really overheat and start a fire before the 15-ampere fuse would ever blow.
>
> Number three, the design of the switch has both an electrical and a flammable liquid, hydraulic brake fluid, together, separated by a thin membrane. And it's very foreseeable that this thin membrane will leak eventually, because when you apply the brakes on the vehicle, brake pressure increases dramatically and pushes against this membrane which, in turn, pushes the switch and opens the switch.
>
> So if you have a slight leak in this membrane, this flammable brake fluid

will get on the other side where the electrical switch is, and you have a source of ignition, and then you have enclosing a whole assembly of insulating plastic which keeps the heat in there and causes the temperature to rise until it can eventually reach the ignition point and start a fire, and you have then brake fluid freely coming out into the switch, or what was the switch assembly which is not burning, and the fire rapidly accelerates from that point on.

As discussed more fully below in connection with the analysis of the Silvestri case and then again with the analysis of Christopher Major's South Carolina Law Review article, Mr. Greene had the same information available to him on which to base his opinion as did Ford. Unlike the experts in Silvestri—and this is a critical distinction—Greene did not have an advantage over Ford's expert, Olson. Thus, in giving their testimony, all the experts reached conclusions from the same body of evidence. It was up to the jury to decide who to believe and who not to believe. "In considering a JNOV, the trial judge is concerned with the existence of evidence, not its weight. When considering a JNOV, 'neither [an appellate] court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.'" Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003). Thus, when Ford argues in its brief that it was prejudiced by its inability to test the switch, what it is really saying is: believe our expert's opinion about prejudice over the plaintiff's experts. The plaintiff's experts admit that Ford is prejudiced in a hypothetical case, but this is not an appeal from a hypothetical case. In this case there is sufficient evidence in the record to support a jury's decision to believe the plaintiff's experts' opinions:

Q. Mr. Greene, the photographs that you testified from earlier, is the speed deactivation control switch visible in those photographs?

A. No, sir.

Q. Why not?

A. It's been burned away, in my opinion.

. . .

Q. If the speed deactivation control is burned away, what happens to it at the time of its immolation?

A. It's composed of mostly combustible material, such as plastic composites, and it also has highly combustible liquid in there, the brake fluid. And it gets very hot, and what is burnable will burn. And the high melting temperature metal parts of the switch, which would primarily be the electrical parts, would remain, but they are normally very, very difficult to find.

Q. Okay. Now, so when Mr. Ott is asking you about Mr. Shelby, quote, destroying the truck, you wouldn't test the truck, would you?

A. No.

Q. You would test the switch?

A. If you could find the remains.

Q. Okay. And tell the jury how many of these fires have you personally investigated?

A. I've personally investigated four of them, and I've only found partial remains on one.

Q. What happened to the other ones?

A. The heat damage and burn damage was so extensive and there was so much fire debris, I just couldn't locate them.

R.O.A. pages 446-447

As regards Ford's lengthy experience with its speed control deactivation switch, this Court published a full explanation of the history of the Ford switch design, engineering, manufacture and recall in its August 12, 2009 opinion: Duncan v. Ford Motor Co., 385 S.C. 119, 682 S.E.2d 877 (Ct. App. 2009), which also includes a discussion of why the trial court should admit evidence of a recall: "The trial court did not abuse its discretion by allowing the 1999 recall of the panther platform line of vehicles into evidence. Ford concedes the recalled panther platform vehicles contained a switch with the same design and same component parts as the switch found in the Duncan's Expedition. . . . These facts demonstrate that the under-hood fires that prompted the 1999 recall of the panther platform line of vehicles were substantially similar to the under-hood fire in the Duncan's Expedition, which caused their home to be destroyed. See Whaley v. CSX Transp., Inc., 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005) (noting other incidents must be substantially similar to be relevant and admissible in a products liability action)." The lower court erred in partially excluding this evidence, although the lower court correctly admitted it for purposes of examining the basis of an expert's opinion. (R.O.A. p. 232)

Stan Shelby testified that he did exactly as Chief Norris instructed. He saved the truck, notified his insurance company, which in turn dispatched a loss adjuster. Counsel then wrote two letters to Ford's counsel, Trent Kernodle, on December 5, 2005, and January 17, 2006, a lawyer who formerly did work for Ford. (R.O.A. p. 915 and 916,

Exhibits 23 and 24) Stan Shelby testified further that approximately six months after the fire, North Charleston authorities told him he must remove the truck or face criminal prosecution. (See Record on Appeal page 517.) Unlike the G.M. defense in Silvestri, Ford offered no explanation for the cause or origin of the fire and relied entirely upon cross-examination, the spoliation of evidence doctrine, and other legal arguments to defeat Shelby's claim. Because of Ford's trial strategy, this appeal raises no challenge to the sufficiency of the evidence; rather, Ford asks this Court to overrule South Carolina law on spoliation—that the lower court has discretion to adopt such remedy as is just—and adopt a bright line test barring plaintiffs from asserting claims in cases where the physical evidence is no longer available. Stated simply, Ford urged the lower court to adopt a bright line spoliation rule at the directed verdict stage (pages 602—605 of the record on appeal and renewed the argument at the post trial application for judgment n.ov. (R.O.A. page 64). Ford argues the plaintiff should not be allowed to present his case because the fire consumed the switch and the plaintiff failed to preserve the burned truck.

As stated above, the respondent treats Ford's spoliation argument here in a combined reply because Ford begins its argument on page 4 of its brief in the Statement of Facts section under the heading "III. The Spoliation." This is the same argument Ford makes in Argument I A and B, and it is the central legal argument: that the lower court erred in permitting the plaintiff to have a trial because the plastic switch might have survived the fire and the photographs of the truck are legally insufficient. As will be discussed in more detail below, the likelihood of a small, plastic switch—smaller than a golf ball—and composed of 80% combustible material surviving a long burning

fire is remote. The facts relied upon by Ford in its statement of facts are highly contested and were highly contested below. The Appellate Court Rules permit contested facts in the appellant's statement of facts: "A party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and summarize the party's contentions." Rule 208 (b)(1)(D), and the same rule under subsection (b)(2) places a burden upon the respondent to controvert the facts or be bound by them on appeal. Although Ford repeats the same argument advanced in its Statement of Facts in Argument I A and B of its brief at pages 6—19, for the sake of brevity, Respondent treats Section III of the Statement of Facts and Argument I A and B as the same argument.

Ford's argument on spoliation is simple. It says that because Stan Shelby failed to preserve the speed control deactivation switch and the truck, that Ford did not receive a fair trial. Ford is not satisfied that both sides worked off the same body of evidence or with the trial judge's remedy in giving the spoliation jury charge it received at trial. (See pages 694, 809 for the jury charge on spoliation.) Rather, Ford wants this Court to change the law on spoliation of evidence and elevate it from a jury charge to an automatic bar to cases. No court has ever suggested spoliation of evidence results in an automatic bar to a trial on the facts; rather, courts have evolved a jury charge that permits the fact finder to draw an adverse inference from the loss of evidence. After the fire consumed the malfunctioning switch, the plaintiff's case became a partially circumstantial case, but South Carolina has a well-developed body of law on circumstantial evidence, and even ancient courts have recognized circumstantial

evidence. See Reiland v. Southland Equipment Service, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998): "Any fact in issue may be proved by circumstantial evidence as well as direct evidence, and circumstantial evidence is just as good as direct evidence if it is equally as convincing to the trier of the facts." St. Paul Fire & Marine Ins. Co. v. American Ins. Co., 251 S.C. 56, 59-60, 159 S.E.2d 921, 923 (1968). In 1992, this Court tackled a similar issue involving similar facts in Seaside Resorts v. Club Car, 308 A.C. 47, 416 S.E.2d 655 (Ct. App. 1992). There a defective battery charger switch malfunctioned and burned the clubhouse down. The insurance company paid the claim and brought a subrogation claim against the manufacturer of the switch. (As discussed below—this is the normal procedure in such cases and why Chief Norris told Stan Shelby to notify his insurance company.) After a verdict for the plaintiff, the defendants appealed, challenging the sufficiency of the evidence. This Court held:

> This evidence, together with other proof that need not burden this opinion, was sufficient to support an inference that the red and black plugs were defective at the time of sale. An article that will not operate or will not work because of a mechanical defect is not merchantable. [internal citations omitted] When an article catches fire during normal use, it may reasonably be inferred that it is defective. Rose v. Epley Motor Sales, 288 N.C. 53, 215 S.E.2d 573 (1975)
>
> *Cause of Oyster Bay fire.* The evidence recited above also sufficed to create a jury issue on the cause of the Oyster Bay fire. Causation may be proved by circumstantial evidence. See Fowler-Barham Ford v. Indiana Lumbermens Mutual, 45 N.C. App. 625, 263 S.E.2d 825 (1980); Rollins v. Wunda Weve Carpet Co., 255 S.C. 1, 177 S.E.2d 5 (1970).

Because it is not Shelby's fault the switch does not exist, as all the evidence establishes that the switch "probably" did not survive the fire, and any argument to the contrary is pure speculation, the remedy of dismissal is wholly inapplicable to this case.

According to Ford, the only remedy for the loss of the truck is outright dismissal.

In other words, Ford denies that the lower court possessed discretion to weigh the factors and fashion a remedy fair to both sides. Ford's theory is that the respondent and/or his counsel intentionally destroyed evidence, thereby forfeiting the right to make a claim, and that any instruction on spoliation of the evidence is insufficient as a matter of law to cure this loss. Ford concedes that state law on this issue is controlled by the Supreme Court's analysis in Kershaw County Bd. Of Educ. v. U. S. Gypsum, 302 S.C. 390, 396 S.E.2d 369 (1990), but argues that this Court should reject the discretionary standard of Kershaw and apply a bright line test it contends the Fourth Circuit adopted in Silvestri v. General Motors Corp. 271 F.3d 583 (4th Cir. 2001). (Ford cites cases from all over the country, but it is unnecessary to address each and every one because: (1) they all say the same thing, and (2) we have a well-developed body of law in our state and in our federal circuit.) A careful analysis shows that Silvestri and Kershaw are harmonious, and a careful analysis also shows that a divided Fourth Circuit dismissed Silvestri's claim on a factual basis that is not applicable to this case. Before we treat each case in detail, it is instructive to note at the outset that Ford's insistence on being crippled by its lack of examination of a burned speed control deactivation switch, which "probably" did not survive the fire (R.O.A. pps. 453, 479—480), is not only a red herring issue, but also the best fact going in favor of Ford's defense. Unlike Silvestri, in which the plaintiff claimed General Motors injured him by failing to design an adequate passive restraint system (air bags) to protect him from his own drunk driving, the speed control deactivation switch is a small device constructed of 80% combustible material (R.O.A. page 391) Whether the switch survives the fire or not depends on how long it burns. (R.O.A. p. 392): "In all the fires I've investigated involving these switches, I can think of

four offhand, I only found part of the remains of the switch in one fire. The other fires, the switch was consumed." Normally, fires are quickly detected and extinguished, and had that occurred in this case, the switch might survive the fire in some capacity. However, that is not what happened here. What happened here was that Shelby parked the Ford in a sealed garage at the close of business on Saturday afternoon. He did not return to the scene until Monday morning. As the photos demonstrate (R.O.A. p. 858-868), the fire damage is extensive. No one knows how long the truck burned, but it burned long enough to consume all the oxygen in the building so that the fire was reduced to a slow smolder. (R.O.A. p. 480) Under these facts, it is highly unlikely the switch survived the fire. Mr. Greene testified that the switch "probably" did not survive (R.O.A. p. 453), and that even if it did, it would be "very very difficult to find." (R.O.A. p. 447) quoted above on page 8 of this brief). Here is how Chief Norris described the scene:

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

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

Q. Dos the length of time the fire burns increase or decrease the likelihood of the speed control deactivation switch surviving the fire?

A. Yes, sir, it does.

Q. What happens? How does it?

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

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

A. Yes, sir. In fact, this case here, the entire master brake cylinder was either consumed or melted. It was not—no longer intact on the inside of the vehicle.

(R.O.A. p. 480)

Chief Norris based his opinion on his present sense impressions and his review of the photographs. Therefore, the basis of his opinion is equally available to the defendant as it is to the plaintiff. The only difference is that Ford chooses to ignore the evidence that does exist.

Moreover, a Ford speed control deactivation switch fire is a well-documented, well-known phenomenon to Ford and the subject of numerous peer reviewed studies and a nationwide recall. There is a well-developed body of technical literature on the subject. See respondent's Exhibit 3 "Analysis of a Ford Speed Control Deactivation Switch Fire," which the trial court would not admit as evidence despite being clearly admissible under Rule 803 (18) of the South Carolina Rules of Evidence. See also the analysis of this issue in Seaside Resorts v. Club Car, 308 S.C. 47, 416 S.E.2d 655 (Ct. App. 1992): "We hold that the bulletin was properly received as a party admission against interest. Llewellyn v. Atlantic Greyhound Corp., 204 S.C. 156, 28 S.E.2d 673 (1944)." The lower court incorrectly partially excluded the evidence of the recall, but of course, the lower court did not have the benefit of this Court's analysis in Duncan at the time. The lower court correctly allowed examination about the recall as it related to any expert's investigation in to the fire.

It is undisputed that Ford is aware of the propensity of these switched to fail and burn, and at trial, Ford admitted that it normally admits the recall notice in .9999997 %

of its switch cases, but did not do so in this case because the truck was unavailable. In other words, the absence of the truck became a windfall defense, even though there are detailed photographs of it. In Silvestri, the plaintiff's experts had an opportunity to investigate the Monte Carlo, and G.M. did not. However, the G.M. experts successfully tracked down the Monte Carlo and examined it, and then the plaintiff shifted his ground and asserted the module the G.M. experts were looking at was not the same one that was in the car at the time of the collision. In a colloquy with the trial judge on the second day of trial regarding use of the recall notice to question Ford's expert's method of forming his opinion, Ford told the court:

> We've tried other cases where we get in closing and let the jury know right off the bat that this part had been recalled, but it's only in .999999-you know 7 percent of all these vehicles never have a problem with the switch, it's a rare occurrence even within the recall population, and make them prove their case under these facts because they've destroyed their evidence.
>
> (R.O.A. p. 337)

As can be seen above, this statement is not true.

Moreover, Ford's assertion in its statement of the facts that Stan Shelby failed to notify Ford of the fire is false. At trial, Ford successfully convinced the trial judge to exclude Shelby's letters to Ford's former counsel following the fire (R.O.A. p. 915—916, plaintiff's exhibits 23 and 24). Moreover, Ford claims that it was denied an opportunity to investigate the scene or undertake any kind of investigation, which is not true. Ford

deposed the plaintiff's expert, the firefighters on the scene, examined the photos, and has more scientific evidence of speed control deactivation switches than any other entity on the planet. Thus when Ford says it "was unable to investigate the scene, which included multiple potential ignition sources," (Appellant's brief at page 12), it never asked to investigate the scene and it had access to the same evidence the plaintiff had—the firefighters on the scene, the photographs, the same body of scholarly literature, and its own expertise. For example, Ford makes a big deal out of the fact that there were other "potential ignition sources," but Ford's expert, John Olson, testified that the photographs of the other "potential ignition sources" were of no benefit to him in forming his opinion. This sentiment is sometimes expressed colloquially as: "Don't confuse me with the facts; I've made up my mind." Olson even testified that when he investigates a fire, he finds his photographs of other scenes more useful than being at the scene itself because he can see things he overlooked while at the scene. (R.O.A. p. 318) In every fire, there are always "multiple potential ignition sources" just as there are always "multiple potential answers" to any question. There is, however, only one right answer, and this record overwhelmingly establishes that the source of the fire was the speed control deactivation switch, and every witness drew this conclusion from the same body of evidence available to Ford. It is beyond question that all of the evidence of this fire clearly and convincingly establishes that the origin of the fire was the engine compartment at the point where the speed deactivation control existed before the fire. Here is how Chief Norris, a 35 year veteran firefighter, whose extensive training and education is summarized in the record on appeal at pages 460—464, described the scene:

> Normally, what we try to do – most case we can do this. Some cases we can't do this. We try to go from the mouth of the least amount of damage to that structure and follow the path back to the most extensive damage. I did that, and it was pointing me back to the engine compartment of the Ford pickup truck. (R.O.A. pps. 467—468)

The Court will review Captain Sanders' and Mr. Norris' testimony in detail (R.O.A. pages 241—261 and 459—508) and reach its own conclusion, but there are two incontrovertible points that demonstrate the lower court committed no error. The first is that Chief Norris was on the scene at the time of the event, an eyewitness—and his sense impressions are direct, not circumstantial evidence. The second important point is that Chief Norris' present sense impressions are just as available to Ford as he is to the respondent. Ford just chose to ignore him. In closing argument, Ford attacked Chief Norris' credibility at page 663. The significance of this decision cannot be easily gleaned from a cold record, but it had a palpable, negative impact on the jury precisely because Chief Norris is so obviously not only a disinterested witness, but also a disinterested expert in fire cause and origin.

Thus, for Ford to suggest that all the evidence of what occurred has disappeared is nonsense just as it is nonsense to argue that there were other potential ignition sources because Captain Sanders and Chief Norris were on the scene, carefully examined them all, and ruled them all out, which is confirmed by the photographs. Here is how Chief Norris described how he reached his conclusion:

Q. Do the burn patterns lead you to form any kind of conclusion as to where the origin of the fire was?

A. Yes, sir. I determined the origin of the fire was on the driver's side of the engine compartment directly in front of the steering wheel. That gives you a better idea of where it was, so . . .

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

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

(R.O.A. p. 470)

It is interesting to contrast Chief Norris' testimony with that of Ford's expert, John Olson who testified as follows:

Q. Mr. Olson, do you know what caused the fire on September 26th? If I say September 26th, that's the day the fire department got there. Do you know what caused the fire to Stan Shelby's truck?

A. I do not.

Q. Okay. If you wanted to know what caused the fire in Stan Shelby's truck, would you talk to the fire investigator who was on the scene and ask him what he thinks caused the fire?

A. I'm not sure if I would be able to speak to him directly. Certainly, I would be able to review information that he's provided, such as reports and

hopefully photographs, things of that nature.

Q. And would you rely on that information in arriving at your ultimate opinion?

A. I would include it. Absolutely.

Q. Okay. If there is—if there is a problem with the speed deactivation control switch in Mr. Shelby's truck in that it becomes over energized by carrying 15 amps through a switch that's design to carry two amps, wouldn't the obvious economical simple fix be to insert a two-amp fuse in that wiring circuit?

A. I believe that it would require more investigation, and I don't know it's a question I could answer right here.

(R.O.A. pps. 292—293)

In fact, Mr. Olson testified that he has investigated between 200 and 300 Ford vehicle fires, and he doing so, he routinely relies on photographs just as the plaintiff's expert did. He even opined that photographs are better than an on site investigation because photographs reveal details missed on the scene:

Q. You testified that in conducting an investigation it's very important to take detailed photos because, and I believe you said sometimes you go back to your office and you look and you see, darn, there's something in the photo I missed out on the scene. Isn't that right?

A. That happens.

Q. Okay. And you have digital photos right there on the table in front of you in this case, don't you?

A. I have – I don't' think they're digital. I think they're just four-by-six

prints.

Q. Okay. Well, how about plaintiff's exhibits—you don't have some more photos up there? There you go. Aren't those nice, clear, crisp, digital photos?

A. Well – there are some.

(R.O.A. pps. 323—324)

Thus Ford's complaint of being prejudiced by missing evidence is hollow when the record reflects it refuses to evaluate or even look at the evidence that does exist. In investigating between 200 and 300 Ford vehicle fires, he never once concluded a speed control deactivation switch caused the fire. See R.O.A. p. 322: "I don't know the precise number. I know that there were instances where I was able to look at the vehicle where I could not rule it out." (emphasis added) In short, the jury found his credibility lacking on this issue precisely because he applied shifting standards of evaluation, which are at variance with Ford's claim of prejudice. One cannot claim prejudice about what he cannot see when he refuses to look at what he can see. When he takes the photos, they are important; when someone else does they are not. When he interviews a witness on the scene, that information is important, but when someone else does, it is not. While there are "potential other ignition sources," the photographs of the area around the truck that rule them out are not important—even though they demonstrate the "potential other ignition sources" did not cause the fire. Mr. Olson's shifting methodology standards and testimony that he never once concluded a defective switch caused a fire destroyed his credibility and sealed Ford's fate with the jury. In light of the overwhelming evidence in this case, it is astonishing that Ford presses a

claim of prejudice.

All of this leads to one conclusion—the absence of the truck is a red herring. There is nothing to see on the truck that is not preserved in the photographs. Because the truck is missing, Ford asked the lower court—and now this Court—to disregard all the other overwhelming evidence that is available equally to both parties. Ford asks this Court to find that the lower court abused its discretion because she did not adopt a bright line test ending the case, even though Ford concedes there is sufficient evidence to submit the case to a jury. "If the evidence as a whole is susceptible of more than one reasonable inference, the trial judge must submit the case to the jury." Hurd v. Williamsburg County, 363 S.C. 421, 611 S.E.2d 488 (2005)

In short, Ford asks this Court to ignore all the available direct and circumstantial evidence because one piece of evidence is missing. Now that this factual background is as developed as it can be in a brief with page limitations, the Court can now evaluate these facts in light of the holdings of the two cases on which the appellant most heavily relies to assert the lower court abused her discretion by sending the case to go to the jury.

A.
Silvestri v. G.M

In Silvestri, the intoxicated plaintiff drove his landlady's Monte Carlo at a high rate of speed. Because he was drunk and speeding, he lost control of the car, crashed through a fence and "obliquely" struck a utility pole. Even though he wore his seat belt, he suffered severe facial injuries and sued General Motors, alleging that the airbags

failed to deploy. Silvestri hired two accident reconstructionists who examined the Monte Carlo and prepared written reports based on their examination of the vehicle. The court found these reports deficient in several critical areas, particularly in failing to take a "crush" measurement. After the plaintiff filed suit, General Motors tracked the vehicle down, examined it, and found no defect in the airbag module. The plaintiff then alleged that the airbag module had been replaced. G. M.'s expert further testified that because no one made a crush measurement, no one could apply standard physics calculations and derive the delta force at the time of impact. This calculation would have answered the question as to whether striking the utility pole obliquely generated enough force for the airbag sensor to deploy.

The district court dismissed the claim for spoliation, and a divided Fourth Circuit affirmed because the defendant was denied an opportunity to obtain proper crush measurements, and after G.M. found the car and examined it, the plaintiff then asserted the module had been changed since the wreck. The Fourth Circuit held "dismissal should be avoided if a lesser sanction will perform the necessary function." Silvestri at page 590. In fact, the Fourth Circuit went on to say dismissal "is severe and constitutes the ultimate sanction for spoliation. It is usually justified only in circumstances of "bad faith or other 'like actions.'" Silvestri at page 593.

To determine what sanction was appropriate, the Fourth Circuit focused on Siverstri's failure to give G.M. notice of the claim until he filed suit. This is unlike the present case where Shelby's counsel wrote two letters to Ford's former counsel attempting to give notice of the claim before suit. However, as discussed above, Ford successfully excluded these letters. Even though the jury did not get the letters, it is

indisputable that Shelby attempted to give notice to Ford's former counsel. To adopt a line from Silvestri, it would be "particularly unjust" to allow Ford to suppress evidence of Shelby's attempted notice and simultaneously claim that there is no evidence of attempted notice.

In short, the Silvistri Court in a 2-1 decision determined to uphold dismissal because "(1) the spoliator's conduct was so egregious as to amount to a forfeiture, and (2) the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend his claim." Silvestri at page 593 Neither factor applies in this case.

Here, the record demonstrates that Shelby did not intentionally or negligently dispose of the truck. He disposed of it only after the City of North Charleston threatened him with prosecution if he did not remove it. (R.O.A. p. 517). Moreover, he thought he notified everyone he needed to notify. Moreover, there is nothing to test on the truck. Lastly, as even Ford's expert conceded, Ford is not prejudiced because it has everything available to it that the plaintiff had and its expert, Olson, had everything available to him that he usually relies on in any of the other 200 – 300 cases he has investigated—the photographs and the eyewitnesses on the scene. Shelby's expert, Greene, did not have any advantage over Olson as Silverstri's experts had over G.M. Thus, there is nothing in Silvestri that suggests the lower court abused its discretion in submitting the case to the jury.

B.
Kershaw County Board of Education v. United States Gypsum

In Kershaw, the South Carolina Supreme Court took up the same issue in a case more factually similar to this case. In Kershaw, the trial judge entered an order requiring the County to notify the defendant prior to the County removing asbestos ceiling tiles. Thus the similarity with the present case is clear because once one has examined an asbestos ceiling tile, one has examined them all, and the same is true with the switch at issue in this case. Like ceiling tiles, they are all the same. Despite the trial judge's order, the County removed the tiles from Camden High, and thereafter, U. S. Gypsum moved for an order of dismissal based on spoliation. The trial judge refused, but did give an adverse inference spoliation charge, just as in this case. The Supreme Court affirmed, holding that the decision to dismiss is in the discretion of the trial judge and that a trial judge abuses her discretion only 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 the appellant, thereby amounting to an error of law." Kershaw at 372.

As discussed above in the analysis of the Silvestri case, Mr. Shelby did not voluntarily dispose of the truck, and prior to doing so, he attempted to give notice to Ford. He did not dispose of the switch—the fire consumed that. Ford can demonstrate no prejudice resulting from the loss of the switch because any long burning fire is going to consume a small, plastic switch filled with highly flammable brake fluid. Here, the evidence proves the switch probably was consumed in the fire, and Ford had the same

evidence available to it as did the plaintiff. The only difference is that Ford chose to ignore what does exist in favor of making a stand on what does not exist. Mr. Olson has the same information available that he uses in the other 200 – 300 fires he has investigated. Moreover, Ford possesses a wealth of information on the subject of the switch, which is not affected by missing Shelby's switch. The case is not like Silvestri where G.M. was deprived of an opportunity to calculate the critical delta force. Last, is the perplexing admission by Ford's expert, Mr. Olson, who testified that of the 200 – 300 fires he has investigated, he never identified a fire caused by the deactivation switch.

Thus, it is clear that whether Olson has the switch available for testing or not, he is going to conclude that the switch did not cause the fire.

As will be discussed more fully below when we turn to Ford's separate allegation in its Argument I C—that the spoliation charge was insufficient, Ford asked for and received a spoliation charge, and because—as will also be discussed more fully below—the evidence of the origin and cause of the fire is so overwhelming, the only argument that Ford has is the plaintiff's failure to preserve the switch. Ford cannot claim prejudice; it must demonstrate it, and this record does not support such an assertion. As Ford's appeal to this Court in the Duncan case demonstrates, even when Ford does have the speed deactivation control switch, it still does not pay the claims in spite of the fact that it (1) acknowledges the defect, (2) admits what the defect does, and some few cases in which the switch does survive the fire, (3) it still denies liability. Unlike the fire in the Duncan case, Five Star's Ford truck burned over an entire weekend and most probably consumed the switch in the fire. (See R.O.A. p. 453, 479—480), and thus Ford's complaint that Shelby failed to preserve the switch is not

only not supported by the record, but also the quintessential demand for proof of the negative—prove that it did not burn up in the fire.

In short, Ford does not take a consistent approach to the trial of speed control deactivation switch cases and adopts an *ad hoc* approach to its defense of switch fires. Ford's willingness to shift its position to meet whatever claim is then pending is no where more apparent than when Ford argues that each fire is different and the recall notice should be excluded (R. O. A. p. 193), but it tells the United States District Court the exact opposite—that each fire is so similar that the District Court should consolidate all the cases pending in federal court in the Eastern District of Michigan for disposition, and the District Court agreed, granting Ford's request. (See Order of Consolidation on Ford Multi District Litigation in Record on Appeal at pages 127—138.)

Before we turn to an analysis of the spoliation charge itself, which the appellant identifies as a separate issue on appeal in its heading 1 C, it is important to mention the Supreme Court's directive to courts to protect the integrity of the judicial process by preventing litigants from adopting inconsistent positions in related litigation. This principle of law has a significant bearing on the spoliation analysis in the present case. In Cothran v. Brown 357 S.C. 210, 592 S.E.2d 629 (2004), the Supreme Court adopted the test for the application of judicial estoppel. In adopting the test, the Court instructed that the principle of judicial estoppel is not available to a party to advance a cause, but rather is an independent function of the court itself to protect the integrity of the truth seeking process:

> We now adopt the following elements necessary for the doctrine [of judicial estoppel] to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or

related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Ford may use its reply brief to address why it tells the United States District Court that all the speed control deactivation switch fires are so similar that they should be consolidated in one court, and tells Judge Harrington that each fire is different to prevent the plaintiff from offering the recall as a stand alone exhibit. Ford may use its reply brief to address why the loss of the speed control deactivation switch is so important in this case when it makes no difference in its analysis of cases in which the switch is present. Ford may use its reply brief to address why the photographs of the scene are important when its expert takes them but not when someone else takes them. Ford may use its reply brief to address why when it interviews witnesses, it relies on the eyewitnesses on the scene to make a determination as to the cause and origin of a fire but will not do so here. All of these are shifting, inconsistent positions adopted for the expedient of trying to defeat a lawful claim for damages, and all of Ford's arguments on spoliation are not supported by this record.

Reply to Respondent's Argument 1 C
The trial judge's spoliation charge was the proper remedy.

Here, the appellant argues that the trial judge's spoliation charge, found at page 694 of the Record on Appeal, is insufficient to cure the loss of the switch and the truck. Here is the judge's charge:

When evidence is lost or destroyed by a party, you may infer that the evidence which was lost or destroyed by that party would have been adverse to that party.

Essentially, the appellant makes the same argument as addressed in the analysis of the Silviestri and Kershaw cases: that the charge is insufficient to overcome the prejudice flowing from the loss of the truck. (We have to limit ourselves to a discussion of the loss of the truck only because the plaintiff's testimony was that the fire destroyed the switch, and because this is a disputed fact, it was within the jury's province to find that the fire consumed the switch.) The only thing new here is that the appellant cites a 2002 South Carolina Law Review called "Where's the Evidence? Dealing With Spoliation by Plaintiffs in Product Liability Cases" by Christopher B. Major, 53 S. C. Law Review 415 (2002). Mr. Major reviews the law on the issue nationwide—which is exactly the same as that in the Silvestri and Kershaw cases—and posits three possible remedies for spoliation: (1) the adverse inference charge, (2) disqualification of the plaintiff's expert, and (3) outright dismissal. Here is his conclusion:

> The three sanctions for spoliation discussed above provide a framework which aims to allow a plaintiff his day in court without unfairly prejudicing the defendant. The sanctions provide a remedy whenever the defendant is unable to inspect relevant evidence, which was under the plaintiff's control, and as the level of misconduct rises, so does the severity of the sanction that is justified. The balancing act between these two considerations is the most difficult aspect of spoliation and requires a broad range of potential responses. It is insufficient to allow only the two extremes of dismissal and an adverse inference. Only when there is clear evidence as to the reasons, either malicious or inadvertent, why the plaintiff failed to preserve the evidence, are these remedies appropriate. In the normal case, the motives and circumstances surrounding the destruction are difficult to discern. To ensure fairness in these situations, the trial court must have a third sanction at its disposal, namely the power to exclude any testimony resulting from the plaintiff's investigation of the missing evidence. (emphasis

added)

Under Major's analysis, the lower court made the right call. There is no evidence in this record of Shelby's "malicious" intent to destroy evidence, especially where the scene is preserved in photographs and the likelihood of the switch surviving a slow burning fire over an extended period of time is pure speculation. Second, the plaintiff's expert drew his conclusions from the same body of evidence available to Ford—there is no unfair advantage in this case as there was in Silverstri. This brings us to Ford's allegation that the trial court's jury charge is insufficient as a matter of law. What Ford is really saying is: it was not emphatic enough. One thing it is—it is a correct statement of the law under Kershaw, and thus Ford has identified neither error nor prejudice. A jury charge is sufficient if it correctly states the law as a whole:

> "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion." Coel v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." Id. "A trial court must charge the current and correct law." Wells v. Halyard, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000). In reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial. Id. "Ordinarily, a trial [court] has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence." Fernanders v. Marks Constr. of S. C., Inc. 330 S.C. 470, 473, 499 S.E.2d 509, 510 (Ct. App. 1998). However, jury instructions should be confined to the issues made by the pleadings and supported by the evidence. Baker v. Weaver, 279 S.C. 479, 482, 309 S.E.2d 770, 771 (Ct. App. 1983).
>
> . . .
>
> To warrant reversal, the party seeking the requested jury charge must demonstrate error and prejudice, Cole v. Araut, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (208) ("An erroneous jury instruction, however, is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction.") "An alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." Wells, 341 S.C. at 237, 533 S.E.2d at 343.

Fairchild v. South Carolina Dept. of Transportation, 385 S.C. 344, 683 S.E.2d 818 (Ct. App. 2009.)

Here, Ford fails the test at every level. As reference to the record demonstrates, R.O.A. p. 694), there is no question but that the lower court gave a correct statement on spoliation. It is understandable that Ford feels the charge is not emphatic enough because: (1) it's Ford's entire defense, and (2) it is trying to stay consistent with its demand that the Court to adopt the ultimate sanction of dismissal, but the fact remains that the lower court gave a correct statement of South Carolina law, and Ford can identify no prejudice because the evidence of the cause and origin of the fire is so overwhelming. The evidence is so overwhelming that Ford never attempted to posit an alternative theory of the fire, but chose to stand on the spoliation issue and other legal arguments. Without some evidence in the record to support an alternative theory, Ford's argument that something other than the speed control deactivation switch caused the fire is pure speculation.

REPLY TO ARGUMENT II
The respondent proved each essential element to his claim.

The appellant's brief sets out the correct elements for a products liability case based on negligence. Ford breaks its argument into four subheadings:

A. Respondent failed to establish all of the elements

B. Respondent failed to prove Ford breached its duty for safe design

C. Respondent failed to prove the truck was in the same condition

D. The trial judge did not instruct the jury correctly

Subsection A is simply a statement of the law on the elements with which the respondent has no quarrel. As for B, there is abundant evidence in the record to show that Ford breached its duty to build safe trucks. See testimony of Leonard Greene quoted above on pages 6 and 7 of this brief and found on pages 375—377 of the record on appeal. Ford's own expert established that Ford has a duty to build a safe truck that will last for many years and not burst in to flames when left unattended with the ignition off:

> Q. Now you would agree with me as a loyal career employee of Ford that Ford's obligation its duty is to build safe automobiles.
>
> A. I believe that's true, and I believe we do.
>
> Q. Okay. And that duty to build a safe automobile includes even as the car ages, correct?
>
> A. Well, I'm not sure exactly what you mean by aging. But, certainly, yes, we hope – we hope and expect that our vehicles have long lives, that customers drive them for many years and they're happy with their experiences." (R.O.A. p. 267)

Olson also testified that as an expert investigating a fire, he would check to see if there

was a part involved that had been recalled, and that as a Ford engineer, he is in a better position to know about dangerous, defective parts: "Sometimes it's Ford engineers who know a little bit more about the vehicle than – than others might. So we have a little bit of an opportunity to use our knowledge, and I think that's why I'm in the position I'm in." (R.O.A. p. 359). As this Court is well aware as it has already visited this issue in the Duncan case, there is no question but that Ford knows the danger of its speed control deactivation switches and has requested that all owners of such vehicles so equipped bring them in to authorized dealers for retrofitting. The plaintiff's expert, Leonard Greene, testified in great detail about why the switch is defective and how it starts fires. His testimony is quoted verbatim at pages 6-7 of this brief. There is abundant evidence in this record upon which a jury can find for the plaintiff on each and every element identified by the appellant in Section II A of its argument. The only one mentioned in II A that we have not already discussed is Mr. Shelby's maintenance of the vehicle. As the photographs of the vehicle show, the engine is in the same condition—other than the burning—as it was when it left the factory. Mr. Shelby testified that there were no after market modifications to the truck (R.O.A. p 521) and that he maintained the vehicle for use in his business (R.O.A. p. 523) Thus, when the appellant writes on page 23 of its brief: "Because Respondent presented no evidence regarding the service or maintenance history of the vehicle . . .," the appellant is incorrect. What it is really saying is that there wasn't an abundance of evidence, but there certainly is enough to submit the disputed question of fact to a jury. The trial court is only concerned with the existence of evidence, not its weight. Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003) The appellant also contends that aftermarket parts may have played

a role in the fire. Once again, Ford stakes its defense on pure speculation, and there is no evidence in the record to suggest how an aftermarket part, which the appellant describes as "spark plugs, spark plug cables, lights, wiring, belts, fans, hoses, batteries, as well as possibly the engine or radiator" (appellant's brief at page 23) could play a role in the fire in this case. It is another example of Ford pinning its defense to speculation of the plaintiff's failure to prove the negative—to prove that a set of spark plugs did not cause the fire. The argument is nothing more than pure speculation that is not supported by the record. With all its expertise and resources, Ford did not offer a scintilla of evidence that a, for example, replacement radiator caused the fire because the facts of this case speak for themselves, and there is an abundance of evidence in this record to support the jury's verdict.

REPLY TO ARGUMENT II D
The trial court gave the correct jury charge on the condition of the truck

The appellant's argument here is refuted by its own brief in support of the argument. On page 25, the appellant quotes the lower court's instruction. (R.O.A. p. 699). The appellant admits that the lower court gave a correct statement of law, which it characterizes this way: "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." As discussed above on pages 10—22 of this brief in connection with the appellant's complaint about the spoliation charge, the parties are entitled to a correct statement of the law from the trial judge. Appellant acknowledges it received this.

Appellant claims that the trial court's charge does not comport with the law expressed by this Court in Small v. Pioneer Machinery, Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997). The appellant's reliance on this case is misplaced. Not only is the evidence in this case that Shelby's truck was unmodified, but also in Small, the plaintiff admitted that the skidder was significantly modified by removing a door and hand brake and that the foot brake and hand brake were both broken. Notwithstanding these modifications this Court upheld the jury verdict because the modifications had nothing to do with the accident:

> However, in a products liability case, liability may be imposed upon a manufacturer or seller notwithstanding subsequent alteration of the product when the alteration could have been anticipated by the manufacturer or seller, or when the alteration did not causally contribute to the damages or injures complained of. [internal citations omitted]
> Small v. Pioneer Machinery, Inc. at page 466

Because there is no evidence from Ford that it detected in modification in the photographs or how a replacement spark plug or radiator would impact the speed control deactivation switch, it can demonstrate no prejudice from the charge even if it had been erroneous.

The appellant has not identified a single case in South Carolina that holds a party is entitled to its particular wording. As long as the trial court gives a correct statement of law, that is all the parties can demand. If parties could demand their versions of jury charges, there would be no end to the process. Rather, it is the function of the trial court to act as a referee and give the law to the jury in a fair and impartial manner. The judge's instruction in this case is a correct statement of the law, and therefore, the appellant has no ground to complain. Moreover, the appellant was content to allow the

case to go to the jury on a general verdict form, and if it were concerned that the charge did not properly encompass all the elements of the cause of action, it could have requested special interrogatories to the jury. See Rule 49, South Carolina Rules of Civil Procedure. Here, the appellant was content to allow the issue to go to the jury on a general verdict form, and because the jury returned a verdict, the appellant must accept that the jury believed the testimony and the exhibits about the truck. See Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003): "Since the jury returned a general verdict, we need find only that there was evidence to support either the inadequate warning theory or the design defect theory in order to reinstate that verdict. Anderson v. South Carolina Dep't of Highway and Public Transportation, 322 S.C. 417, 472 S.E.2d 253 (1996)

REPLY TO ARGUMENT III
THE PLAINTIFF IS ENTITLED TO CLAIM 18 DAYS LOSS INCOME DUE TO THE FIRE

The appellant's argument here is groundless. All the respondent is required to do is testify as to what he lost. He cannot speculate on the damages, but he does not have to prove them to a mathematical certainty. Pearson v. Bridges, 337 S.C. 524, 524 S.E.2d 108 (Ct. App. 1999), affirmed in result at 344 S.C. 366, 544 S.E.2d 617 (2001); Proctor v. Dept. of Health, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006): ". . . the law does not require absolute certainty of data upon which lost profits are to be determined, but requires such reasonable certainty that damages are not based upon speculation and conjecture. It is sufficient if there is a certain standard or fixed method by which profits may be estimated and determined with a fair degree of accuracy." [internal

citations omitted]It is sufficient. At trial, the respondent testified the fire damaged his computer where his records are stored and shut him down for about a month. R.O.A. p. 532:

Q. Was the equipment in your office damaged by the fire?

A. Yes.

Q. And as a result of that, what did you have to do?

A. Replace everything.

Q. Did you make a list of everything you had to replace?

A. To the best of my ability, I did.

Q. Okay. We'll come to that in a minute. Now how many days was it before you could get up and running, get your business up and running?

A. I felt that it was probably about a month.

Q. Okay.

A. From where it was.

Q. Okay, Well, how many days was it from the date of the fire until you could get reasonable well going again?

A. About a week or two. About two weeks.

Mr. Shelby then goes on to explain how he calculated his loss, which is the "fixed method" he employed. Ford objected, but over its objection, Mr. Shelby testified in great detail about what he had to pay, what he had to rent, what he had to buy, and how his business was affected. The photos in evidence are time stamped October 3, 2005, 10 days after the fire, and the jury could easily determine that 10 days after the fire, Five Star, Inc. was in disarray. The lower court afforded Ford Motor a full and fair

opportunity to cross-examine Mr. Shelby on his income. Once again, Ford offered no evidence to refute Mr. Shelby's claim for damages, but chose to rely on cross-examination. As a trial strategy, it is a tough sell to a judge or a jury to burn someone's business down and then complain that they could not get it up and running fast enough. Ford has the chutzpah to argue that Mr. Shelby does not have a record of the jobs he lost when the fire destroyed his computer. (See photo of computer at R.O.A. p. 866—867 and the testimony at page 531: "Q. Did you have your business data on your computer? A. Yes, I did. Q. Did you lose all that data? A. I lost everything.") Mr. Shelby testified about all his efforts to restore his business and the fact that he had to pay his employees to restore his damaged business rather than sending them out on jobs to earn income for him. (See R.O.A. p. 538) Lastly, as pointed out by this Court in Proctor, Ford could have submitted special interrogatories to the jury on each element of Shelby's losses, but wisely decided not to submit special interrogatories. "DHEC did not request the trial court to submit a special verdict form to determine whether the actual damages were for lost profits, loss of good will, or some other measure. Without a special verdict form, it would be speculative for this Court to determine what portion of the award the jury attributed to lost profits as opposed to other tort damages."

In short, the record is full of specific testimony and documentation as to the respondent's loss. All the law requires of him is that he provide a sufficient basis for such a loss to prevent an award from being pure speculation:

> The standard for proving lost profits complies with the general rule for recovery of damages, which mandates that the fact finder determine the amount of damages with reasonable certainty from the evidence. Minter v. GOCT, Inc., 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996). The amount of damages cannot be left to conjecture, guess, or speculation; however mathematical

certainty is not required. Id.; see Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 646, 529 S.E.2d 764, 767 (Ct. Ap. 2000) ("The amount of damages need not be proved with mathematical certainty. The evidence, however, should be such that a court or jury can reasonably determine an appropriate amount."); Minter, 322 S.C. at 528, 473 S.E.2d at 70 ("While proof of mathematical certainty is not required, the amount of damages cannot be left to conjecture, guess, or speculation.")

Case law in South Carolina has defined "reasonable certainty":

> To warrant such recovery, loss of profits must be established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative. But it must be borne in mind that since profits are prospective they must, to some extent, be uncertain and problematical, and so, on that account or on account of the difficulties in the way of proof, a person complaint of breach of contract cannot be deprived of all remedy, and uncertainty merely as to the amount of profits that would have been made does not prevent a recovery. The law does not require absolute certainty of data upon which lost profits are to be estimated, but all that is required is such reasonable certainty that damages may not be based wholly upon speculation and conjecture, and it is sufficient if there is a certain standard or fixed method by which profits sought to be recovered may be estimated and determined with a fair degree of accuracy. Beck, 300 S.C. at 298-99, 387 S.E.2d at 684 (quoting South Carolina Fin. Corp. of Anderson v. West Side Fin. Co., 236 S.C. 109, 122-23, 133 S.E.2d 329, 336 (1960)) Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 Ct. App. 2004)

In light of the fact that Ford's negligence caused Shelby's business data to be lost, it can hardly blame him for resorting to historical data to calculate his loss. In coming up with his formula, Shelby did not include the value of his own contributions to the renovation of the building or for reimbursement of the wages paid to his employees to get his business up and running, which is why Ford adopted an adroit trial strategy in letting the verdict go to the jury on a general verdict form. Therefore, Mr. Shelby's estimate of his loss is very modest, based on historical data, and Ford has no basis to complain because his estimate lacks mathematical certainty.

REPLY TO ARGUMENT IV
The lower court properly denied Ford's request for a mistrial.

The appellant alleges that the lower court erred by failing to grant a mistrial for three reasons: (1) the spoliation issue, (2) violation of the Court's pre-trial order, and (3) violation of the "golden rule" in closing.

The spoliation issue is discussed above in detail, and there is no need to repeat the argument again here.

As for violation of the pre-trial order, the record reveals that there was no violation of the Court's pre trial order. The Court's oral order is found in the Record on Appeal at page 232. For the Court's convenience, here is the lower court's ruling:

Ford Motor Company's motion in limine to exclude evidence e of other accidents, incidents, lawsuits, and/or settlements involving Ford vehicles, I'm going to grant 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. (emphasis added) (This ruling is a partial error as this Court discussed in Section I D of the Duncan opinion, quoted above in this brief on page 9.) After the trial judge ruled that the recall notice was relevant as to an expert's basis for an opinion, Ford Motor Company qualified John Olson on the stand, who the Court qualified as an expert in "fire origin and cause and in particular as to vehicles" over respondent's objection. (R.O.A. p. 305) The appellant then asked Mr. Olson a series of questions about his expertise and what he did when investigating a engine fire. At that juncture, Ford opened the door for cross examination as to the expert's basis for his opinion, including, but not limited to, sources on which a

reasonable expert would rely in reaching a conclusion. See Rule 703 "Bases of Opinion Testimony By Experts," South Carolina Rules of Evidence:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

As the record demonstrates, the trial judge ruled pre-trial that this was fair inquiry for direct and cross examination, and even Ford concedes that any reasonable expert in investigating a Ford engine fire would consult the standard literature on the subject, including, but not limited to, plaintiff's exhibit 3, 4 and Court's Exhibit 1. Ford introduces the recall notice when it suits them. Once the Court qualified Olson, he could to be impeached on what he did or did not look at just as the plaintiff's expert is allowed to testify as to what he looked at in reaching his opinion. See Rule of Evidence 803(8): "Public Records and Reports" The lower court erred in partially excluding these exhibits under Rule 402 of the Rules of Evidence permit them to show notice: "In either federal or state court, evidence of prior accidents or injuries may be admissible in a proper case, however, under rule 402 as directly relevant to a claim or defense. Thus, for example, when a plaintiff's burden is to show that a defendant 'knew or should have known' of a dangerous condition, prior similar accidents are directly admissible under rule 402 to show notice." Chapter 19 "Other Similar Accidents and Injuries as Relevant to Liability or Causation in Tort Cases" E. Warren Moise, Credibility and Character Evidence, Book One (South Carolina Bar 2003), page 535 At this juncture, the lower court's partial error on this point is neither here nor there since the trial is over; however,

it could be an additional sustaining since this Court has previously held that the introduction of the recall is appropriate. Duncan v. Ford Motor Co., *supra*. The point is that the plaintiff obeyed the lower court's pre-trial ruling to the letter, and there is no basis on which to complain about the lower court's failure to grant a mistrial on such a basis.

Lastly, the appellant writes on page 32 of its brief: "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." (emphasis added). As reference to the above exhibits, 3, 4 and Court's Exhibit 1, this is simply not true. It is astonishing that Ford offers John Olson as an expert in vehicle fire origin and cause and then objects when respondent attempts to cross examine him on where he begins such an investigation. Ford's assertion that its own expert would not consult its own recall literature while investigating an engine fire speaks volumes about Ford's bad faith toward its customers unlucky enough to be driving a Ford vehicle with a defective speed control deactivation switch.

This brings us to the final point in appellant's brief: Ford's claim that counsel made an impermissible closing argument. First of all, there is nothing impermissible about the closing argument. Ford made a conscious decision to challenge the plaintiff's credibility in an aggressive manner making the plaintiff and his counsel responsible for the plaintiff's loss. Attacking the plaintiff is always a dangerous trial strategy. Ford made a conscious decision to ignore its own research and the research of other reputable scientific sources. The record is replete with Ford's aggressive posture

toward the plaintiff, all of which is characteristic of Ford's determination to deflect the jury's attention away from the overwhelming evidence. Putting a plaintiff to the test is one thing, but blaming the victim for the damage is another. Ford chose to blame the plaintiff. It:

(1) accused the plaintiff of destroying evidence

(2) refused to consider the plaintiff's evidence such as the photographs of the scene or the present sense impressions of the firefighters on the scene

(3) accused the fire fighters of being partial and untruthful

(4) complained about the lack of financial records after plaintiff lost his records in the fire.

In short, the defendant attacked the plaintiff on every front, and Ford's aggressive treatment of the plaintiff's evidence is fair comment in closing argument.

As to Ford's complaint about the comment on the length of the trial, the record reveals the comment is entirely proper. This case took three days to try with only five witnesses. Ford caused the litigation to be protracted due to voluminous filings, including hundreds of pages of filings the night before trial. During all of this dilatory activity, the jury remained sequestered, and lawyers know that the longer a jury sits and waits, the unhappier they become. Every trial lawyer pays proper deference to a jury under these circumstances. The comment in closing that Ford objects to is as follows:

> I know that you've paid careful attention, because we sat here and we watched you. And I also want to apologize to you. This case has gone on much longer than any of us anticipated.

This case, I think, sets a world record for objections. Nothing wrong with that. Mr. Ott is a zealous advocate for his client. He's doing the best he can for his client.

R.O.A. page 637 (emphasis added)

First of all, the comment about objections is not directed at Ford; it relates to both parties. Second of all, the comment read in its whole is complimentary of Ford's counsel, unlike Ford's *ad hominum* attack Ford unleashed on respondent's counsel:

There are rules, folks. Some people might not want to play by them in this courtroom, but there are rules. And that is the reason why those questions were improper, and that's the reason why there was no such communication.

R.O.A. p. 656 (emphasis added)

In short, the appellant's argument on this point is grasping at straws.

Next, the appellant contends that the plaintiff violated the "golden rule prohibition" in closing argument, citing criminal cases for its position. Of course, a solicitor is governed by far different rules in a criminal trial than a lawyer in a civil trial. Here is the comment that Ford claims justifies a mistrial (or at least contributes to the cumulative effect requiring a mistrial):

Look at these photos. Mr. Greene testified on plaintiff's exhibit 11 that you can see the hose right there where the speed deactivation control switch was located. Guess what? It ain't there. And neither is the master cylinder. Why? Because brake fluid is highly flammable. This fire burned Saturday, Sunday, till Monday morning. It burned a long time.

What is Ford's defense to all this? And this is why I say it probably ain't worth it. If you have a fire loss, you might think about it and it just ain't worth it. Ford's defense is: We don't know what caused the fire, we don't know what it is, we don't have an opinion, but you destroyed the evidence.

Now, if you find that Stan Shelby destroyed the evidence, your verdict shouldn't take five minutes. Y'all should be in and out of there in five minutes with a verdict for the defendant if you think Stan Shelby destroyed the evidence to deprive Ford of its right to inspect.

(R.O.A. p. 646)

The bias of the defendant is fair comment. See Rule 608(c) South Carolina Rules of Evidence: "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." If a party can admit evidence of bias, a party can certainly comment on that same bias in closing argument. The fact that Ford threw considerable resources at thwarting the plaintiff's claim and nothing toward arriving at a theory of the fire is powerful evidence of bias. When Mr. Olson was on the stand and dismissive of some of plaintiff's photographs because they were not digital, and then admitted the other photographs were digital, everyone in the room knew that Ford had not spent one second evaluating the evidence that is available. Instead, it limited itself to an attack on the plaintiff. This record shows that Ford was not content to put the plaintiff to the test of meeting his burden; rather, it turned its back on evidence that is available, and its refusal to evaluate the evidence is certainly fair comment. There is nothing remotely

akin to a violation of the "golden rule," which occurs when a party asks the jury to stand in the shoes of the plaintiff. In other words, a "golden rule" argument would have been something like: "Imagine that this was your Ford truck parked in your garage and your business was destroyed." This record demonstrates that the closing argument did not cross the line.

> The granting or denying of a motion for mistrial is within the sound discretion of the trial judge. Creighton v. Coligny Plaza Ltd. Partnership, 324 S.C. 96, 118, 512 S.E.2d 510, 521 (Ct. App. 1998) Absent an abuse of discretion, the decision of the trial judge will not be overturned on appeal. Id. The burden is on the moving party to show not only error, but also the resulting prejudice. Id. The granting of a motion for a mistrial is an extreme measure which should be taken only when an incident is so grievous that the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 310, 385 S.E.2d 39, 41 (Ct. App. 1989)
> Mishoe v. QHG of Lake City, Inc., 366 S.C. 195, 621 S.E. 2d 363 (Ct. App. 2005)

Ford even complains about closing remarks in reply to which it made no objection, citing page 677 of the transcript. That comment neatly sums up the entire case:

> He also says – and this will be my last point. He also says, you know, Ford could have chosen to not do anything. Ford could have chosen to just stay silent and not put up any evidence. That's what they did.
>
> They attacked everybody associated with this claim. They attacked Chief Norris. They attacked Lenny Greene. They attacked Stan Shelby. And just a moment ago, standing before you, they even fired a few salvos my way.
>
> He said to you in closing argument that it was disingenuous for me to suggest that Chief Norris was not biased. Disingenuous is a fancy word for lying, by the way.

He also told you that unlike some people in this courtroom, he plays by the rules. Well, you know who that was directed at. It was directed at me, that I don't play by the rules.

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.O.A. pps 676—677)

First of all, the above closing argument drew no objection and cannot serve as a basis for a mistrial now. Murray v. Bank of Am., N.A., 354 S.C. 337, 580 S.E.2d 194 (Ct. App. 2003). Second of all, the above comments are entirely fair comment on Ford's conduct. Third, the employment of the 2nd personal pronoun "you," does not mean a violation of the golden rule. The 2nd personal pronoun "you" is a stand-in for any hypothetical antecedent, and is used colloquially in American English in place of the more formal British use of "one." In England, one might say: "one could say. . . ." In America, one is much more likely to say: "You could say. . . " Thus, the employment of the colloquial "you" is not a violation of the golden rule which invites the jurors to look through the eyes of the plaintiff and substitute their point of view for the view of the plaintiff. Plaintiff's closing argument did not come close to such a violation, but rather was a fair comment on Ford's aggressive strategy to blame Stan Shelby for his own loss.

Even if the alleged improper remarks violated the golden rule, the appellant can show no prejudice. The jury's verdict was modest, less than the actual damages

sought. The jury returned no punitive damage verdict. In light of the overwhelming evidence of Ford's culpability in light of the modest verdict, it is impossible to see how Ford meets the second prong of the test.

ADDITIONAL SUSTAINING GROUND

IV THE JURY'S VERDICT SHOULD BE AFFIRMED ON THE ADDITIONAL SUSTAINING GROUND THAT THE JURY RETURNED A VERDICT ON A GENERAL VERDICT FORM AND MUST BE AFFIRMED IF THERE IS ANY EVIDENCE IN THE RECORD TO SUPPORT A FINDING ON EITHER THEORY OF NEGIGENT DESIGN OR MANUFACTURE.

As stated above, the plaintiff alleged a defect in the design and manufacture of the offending switch. Since there is no dispute that Ford admits it has a duty to build safe automobiles and that it installed the speed control deactivation switch in the model owned and operated by Five Star, and since the evidence is overwhelming as to the cause and origin of the fire, the verdict must be affirmed on either design or manufacture. See Curicio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003).

CONCLUSION

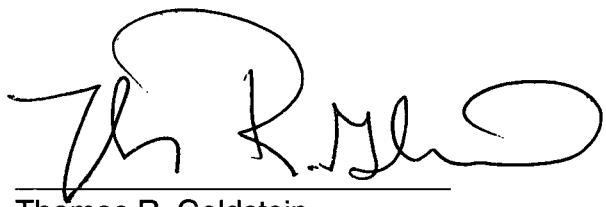
For the reasons set forth above, there is abundant direct and circumstantial evidence in this case to support the jury's finding that Ford negligently designed and negligently incorporated the speed control deactivation switch in the Ford truck belonging to 5 Star Inc. The appellant does not contest the sufficiency of the evidence, especially where Ford offered no alternative theory, but chose to stand on spoliation even though the fire consumed the switch. As this record demonstrates, Ford has all the evidence available to it that the plaintiff's expert had. In fact, the record shows that

Ford turned a blind eye to the available evidence and chose to make its stand on spoliation. The trial judge evaluated the facts and chose to adopt the remedy of the adverse inference charge. There is nothing in this record to suggest that she abused her discretion.

The plaintiff proved all the elements of his claim by a preponderance of the evidence, and there is sufficient evidence in this record on which a jury could make a determination. The appellant's complaint that Shelby adopted an unfair formula for arriving at his loss is not supported by the record especially where Ford's negligence destroyed his business records. As for Ford's claim that the lower court erred in not granting a mistrial, the record reveals that Ford has little to complain about.

Ford received a fair trial. The jury returned a modest verdict, and this Court should affirm the verdict .

Respectfully submitted,



March 1, 2010

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Kristi L. Harrington, Circuit Court Judge

Case No. 06-CP-10-4773

Five Star, Inc., Respondent,

-vs-

Ford Motor Co., Appellant.

CERTIFICATE OF COUNSEL

I certify that this brief complies with Rule 211(b) S.C.A.C.R.

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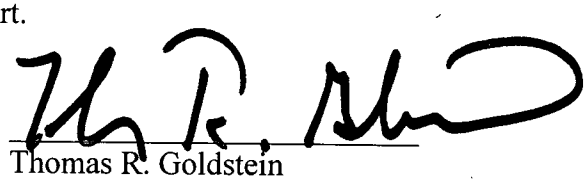
CERTIFICATE OF COMPLIANCE

I certify that the Respondent's Final Brief in this case is in compliance with the August 13, 2007, order of the South Carolina Supreme Court.



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CERTIFICATE OF SERVICE

I certify that I have served one copy of the Respondent's Return to Appellant's Motion to Exclude matter from the Record on Appeal by depositing a copy in the United States Mail, postage prepaid, on March 5, 2010, addressed to David Marshall, Turner Padgett, at P.O. Box 1473, Columbia, S.C. 29202.

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