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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

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5 Star, Inc., ...Respondent,

v.

Ford Motor Company, ...Appellant.

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

INTRODUCTION

Appellant Ford Motor Company ("Ford") submits this reply brief to address certain arguments and misstatements of fact and law contained in Respondent 5 Star, Inc.'s ("5 Star") initial brief.

ARGUMENT

I. 5 STAR'S ARGUMENT THAT IT DID NOT SPOLIATE ANY EVIDENCE BECAUSE THE TRUCK'S SPEED CONTROL DEACTIVATION SWITCH WAS CONSUMED OR DESTROYED IN THE FIRE IS PURE SPECULATION AND UNSUPPORTED BY THE RECORD.

5 Star claims it did not spoliate any evidence in this case and that Ford "chose" not to offer any alternate explanations of the origin and cause of the fire; however, this argument is unsupported—and in fact contradicted—by the evidence. As the record makes clear, 5 Star's spoliation of every piece of physical evidence that existed after the fire without first notifying Ford denied Ford the opportunity to investigate the origin and cause of the fire or develop any defenses to 5 Star's allegations.

For instance, Plaintiff's expert Leonard Greene testified the allegedly defective switch was not visible in any of the only seven photos of the vehicle after the fire. (R. p. 858-p. 868) However, only one or two of these photos actually show the engine compartment of the vehicle where the switch would be located, and there are no photos of the fire scene or debris under the vehicle after the fire. Based on these limited photos, Greene opines that the switch is not visible in any of the photos because it was "burned away." (R. p. 446, lines 13-18) 5 Star wrongly concludes this testimony supports its argument that the switch is completely burned and destroyed in the fire. This testimony merely demonstrates that the switch is not visible in the photos because it has been

burned away from its usual location in the engine compartment. When Greene attempted to give an opinion that the switch was destroyed by the fire, the Court properly sustained Ford's objection that such a conclusion is pure speculation:

> THE WITNESS: The photograph in exhibit 11 shows the area where the switch was – and I say was, because there's no evidence of it there now – is the top photograph.
>
> The top right part of the photograph shows this cylindrical round object, and that's called the brake booster. It's connected to the brake pedal. And what it does it, when you mash on the brakes or you push on your brake pedal, it increases the pressure of the brake fluid. So it helps operate the brakes and stop the car faster.
>
> The switch was located at the end of this little piece of metal tubing that I'm pointing to that comes out of the brake booster. The connector is still present, but the switch has been destroyed.
>
> MR. OTT: Objection, your honor. That's pure speculation.
>
> THE COURT: Sustained.

(R. p. 388, line 25-p. 389, line 18)

Further contradicting 5 Star's argument that the switch was destroyed in the fire, Greene **contemplated testing the switch remains** to confirm whether or not the switch failed. (R. p. 404, lines 8-12) In fact, Greene advised 5 Star's attorney of this option in his initial correspondence:

> Q. All right. And, in fact, in your report to Mr. Goldstein on January 31, 2008 – and we're talking about the post-fire examinations that you wanted to have done, the post-fire test. Do you see that in your report?
>
> A. Yes.
>
> Q. So you're talking about there are tests out there that can be done on switch remains?

A. Correct.

Q. So you're contemplating doing that type of tests that we've talked about right, right?

A. Right. If the remains are available.

Q. And you're assuming they're available, right?

A. I was assuming in this report, that's correct. And that was dated January 31st which I guess was some time after the vehicle had been disposed of.

***

Q. **I assume you weren't telling Mr. Goldstein to do tests on evidence that didn't exist?**

A. **Well, some of the switch is noncombustible. The metal contacts, if they still could be located, would not have been burned in the fire. And that would have been the – the – I guess the item of interest to me would be to look at those contacts.**

Q. And you can test those contacts?

A. Well, you could visually inspect them, you could test them, you could – yes.

Q. And those tests would help us to determine whether this fire in fact was caused by that switch or not, right?

A. Possibly. Possibly the contacts were so badly heat damaged that there couldn't be any testing done. You don't know until you actually have them in your possession and see how damaged they are.

(R. p. 421, line 24-p. 422, line 16) (R. p. 430, line 21-p. 431, line 14) (emphasis added)

Based on these admissions, Greene assumed the switch remains were available for examination and testing after the fire. Furthermore, because the vehicle and all

remaining parts and debris were disposed of by 5 Star after the fire, Greene admits he is unable to say whether or not the switch survived the fire:

Q. **Is there any way to know with any certainty as to whether or not this missing speed control deactivation switch was or was not in sufficient condition for testing?**

A. **Probably not.**

(R. p. 453, lines 17-21) (emphasis added) Again, 5 Star mischaracterizes this testimony to argue that the switch was in such a badly damaged condition that it could not be tested. However, this testimony merely establishes the prejudice to Ford resulting from 5 Star's spoliation—there is "probably not" a way of knowing whether the switch was suitable for testing following the fire. Greene confirmed this conclusion on cross-examination:

Q. You don't know what happened to the switch in this fire, do you?

A. No.

***

Q. And it's important to give somebody in a lawsuit the opportunity to actually inspect the part that you claim is defective, right?

A. If it's available, yes.

Q. It was available at one point before they destroyed it, right?

A. Yes.

(R. p. 425, lines 18-24; p. 439, lines 1-3) Therefore, 5 Star's argument that the switch was destroyed in the fire is unsupported, and in fact contradicted, by Greene's testimony.

5 Star's reliance on the testimony of the former fire chief Benjamin Norris, who was also retained by 5 Star as an expert witness in this case, is likewise misplaced. Again, 5 Star mischaracterizes Norris's testimony in arguing the switch was destroyed in

the fire. Norris did not offer any opinion as to whether or not the switch survived the fire, but instead merely opined that it was **possible** that it consumed in the fire:

> Q. Okay. Is it possible that the switch was completely consumed in the fire?
>
> A. Yes, sir. In fact, this case here, the entire master brake cylinder was either consumed or melted. It was no – no longer intact on the inside of the vehicle.

(R. p. 480, lines 17-22) 5 Star's citation to this testimony to argue the switch was completely destroyed in the fire is misplaced. While it is **possible** that the switch was consumed in the fire, it remains pure speculation whether or not the switch remains survived the fire, as later admitted on pages 12 and 31 of 5 Star's brief.

5 Star's repeated argument that the evidence supports the conclusion that the switch and its remains were completely consumed in the fire is an egregious mischaracterization of the evidence presented at trial. Again, like Greene, Norris initially assumed the switch remains were present after the fire, and so advised 5 Star's owner, Stan Shelby, to preserve the scene and evidence:

> A. Because at that point in time my responsibility as far as investigating that fire was not to disturb that scene and dig through the debris to find or try to find the remains of that switch.
>
> I informed Mr. Shelby that day that, you know, this was a possible problem and there had been problems in prior other vehicles similar to this and that he needed to secure the vehicle and upon – immediately, as soon as possible, contact his insurance company and make them aware of the fact that this was a potential problem.

(R. p. 477, lines 4-15) However, given 5 Star's spoliation of the only physical evidence in this case, including the fire scene, truck and switch, Norris simply could not given any opinion as to whether or not the switch survived the fire:

Q. Did you look down in the remains of the fire to see if the remains were there?

A. I saw some debris down underneath the vehicle. I did not disturb any of that debris to see if any of the parts of that switch were there.

Q. So you didn't even make the – bother to make the effort to go down and see if those switch remains were there or not; is that right?

A. That's correct. And so there again, it was beyond my scope of responsibility that day.

Q. And thus you cannot tell us exactly what the condition of the switch was after the fire, can you?

A. No, sir.

Q. That's a correct statement?

A. I cannot tell you if the switch was still there or not.

Q. You don't know one way or the other?

A. No, sir.

Q. You've investigated switch fires –

A. Yes, sir.

Q. -- where the switch remains are there?

A. Yes, sir.

Q. Even badly burned switches could still be tested, right?

A. It depends on how badly they're burned. That would be, again, depending on the damage, the amount of damage.

***

A. Now, well as far as the switch goes, I don't know whether the switch was even – any of the remains of the switch were there, talking about the – the debris underneath the truck where the remains of the switch could have been.

Q. You don't know one way or the other?

A. No, sir. I don't know whether any remains of the switch was there or not.

Q. And now we'll never know?

A. Yes, sir.

(R. p. 491, line 7-p. 492, line 11; p. 503, lines 16-25)

As with 5 Star's retained expert witnesses, Ford engineer Jon Olson could not give an opinion as to the condition of the switch after the fire:

Q. And is it a fair, reasonable inference to deduce that it was consumed in the fire?

A. Not necessarily.

Q. Okay.

A. There are other options.

Q. There are other options?

A. Sure. If you look – it could be down below the vehicle.

(R. p. 349, lines 8-15) This is entirely consistent with Greene's and Norris's testimony that the switch could have been burned away from its original location in the engine compartment, but still been intact post-fire in the debris below the vehicle.

As the record reveals, 5 Star's argument that it did not spoliate any evidence because the switch was consumed or destroyed in the fire is wholly unsupported by the evidence and without merit. To the contrary, it is pure speculation whether or not the switch and its remains survived the fire because 5 Star cleaned the fire scene and unilaterally disposed of the vehicle and debris without properly documenting their condition and providing notice to Ford.

II. 5 STAR'S SPOLIATION OF EVIDENCE IS SO EXTREMELY PREJUDICIAL TO FORD AS TO REQUIRE DISMISSAL.

All three expert witnesses in this case agree that the prejudice to Ford resulting from 5 Star'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) The physical evidence following the fire includes not only the allegedly defective switch and its remains, but also the fire scene and truck, both of which have burn patterns that are extremely relevant to an origin and cause analysis. *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 69 (Minn. Ct. App. 1998) ("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").

Despite being advised by Norris to preserve the fire scene and evidence, 5 Star did not. (R. p. 501, line 21-p. 502, line 11) Instead, Shelby cleaned the fire scene and removed the truck, debris and other potential ignition sources, and months later—even **after** hiring its attorney—had the truck removed from his property and crushed at a steel mill prior to providing any notice to Ford. Although, 5 Star argues it did not make a decision to destroy the truck, but rather only wanted it off the property to comply with the city's request, Shelby personally contacted the salvage company to remove the truck, knowing it was not going to be preserved and not expecting to ever see it again. (R. p. 570, lines 3-13; p. 571, lines 4-18; p. 572, lines 10-20; p. 576, lines 14-16; p. 577, lines 7-10; p. 581, lines 12-16) Nothing prevented Shelby or his attorney from notifying Ford after the city requested the vehicle be moved from its location to advise that the vehicle would be disposed of or asking Ford for assistance in arranging storage accommodations

to have it preserved for inspection. (R. p. 577, line 15-p. 578, line 13) Further, 5 Star did not even document, by photograph or otherwise, the fire scene as it existed immediately following the fire. Given these circumstances, Ford was totally deprived of the opportunity to inspect the scene or physical evidence and extremely prejudiced in its ability to defend this lawsuit.

Although 5 Star admits that Ford is prejudiced "in a hypothetical case," 5 Star argues Ford is not prejudiced under the facts of this particular case. However, such an argument is unsupported by the record, and contradicted by all three expert witnesses:

> 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)

> 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. 428, lines 11-18) (emphasis added)

> 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) There is absolutely no dispute among the experts as to whether or not Ford was disadvantaged or prejudiced by 5 Star's actions in disposing of the truck and switch in this case. Accordingly, 5 Star's argument that

there is a battle of the experts on this point is wholly unsupported by the record.

Additionally, 5 Star's argument that its attempt to provide notice to Ford redresses any claim of prejudice is as nonsensical as it is erroneous. First, the two letters referenced by 5 Star were properly excluded from evidence based upon lack of foundation and hearsay, and neither were addressed or mailed to anyone at Ford. Although 5 Star may have attempted to provide notice to Ford by mailing the letters to a local attorney whom 5 Star thought represented Ford, the record is devoid of any evidence or testimony establishing that actual notice to Ford was obtained. Furthermore, neither of the letters indicate that the vehicle will be destroyed or disposed of, and the record reveals that Ford was **not** first notified of the fire or potential claim, or given the opportunity to inspect the available physical evidence before the truck was destroyed. (R. p. 311, lines 10-25; p. 935, at ¶ 4)

In this same regard, 5 Star's argument that Ford is not prejudiced because it never asked to inspect the fire scene is nonsensical given that 5 Star never actually notified Ford of the fire before the scene was cleaned and physical evidence destroyed. Likewise, 5 Star mistakenly argues that photographs exist of the other potential ignition sources inside the warehouse and that the photos demonstrate none caused the fire, when in reality, there are no photos of the fire scene or the other potential ignition sources as they existed immediately after the fire, including the numerous lawn mowers, pressure washers, tractors, weed eaters, as well as office equipment and kitchen appliances. 5 Star's argument on pages 17 and 20-21 of its brief that Olson testified that the photos of the other potential ignition sources were of no benefit to him is unfounded because no such photos exist.

Regarding the photographs that do exist following the fire, all three expert witnesses agree that the photographs alone are insufficient for an investigator to formulate an opinion about the origin or cause of the fire in this case. (R. p. 315, lines 12-20; p. 416, line 13-p. 418, line 10; p. 500, lines 21-24) This, coupled with the lack of physical evidence, is the underlying basis of the undisputed prejudice to Ford. Because all experts agree on this issue, 5 Star's repeated argument that Ford chose to turn a blind eye on the photographs is inaccurate because the photos alone are insufficient.

Undoubtedly attempting to muddy the water regarding the photographs, 5 Star mischaracterizes Olson's testimony on pages 17, 20-21, and 24 of its brief regarding the role of photos in a fire investigation. In no way did Olson testify that "he finds his photos of other scenes more useful than being at the scene itself because he can see things he overlooked while at the scene" or "that photographs are better than an on site investigation because photographs reveal details missed on the scene." Rather, Olson testified: "It's not unusual for me **when I go inspect a vehicle** to take a hundred or more photos, and that allows, especially with digital cameras these days, to really provide a lot of information. And sometimes it's not unusual to even see things in those photos when you get back that you might not have observed when you're at the scene." (R. p. 318, lines 16-23) (emphasis added) Although he also testified that it is very important to take photos when investigating a fire scene (R. p. 323, lines 18-24), Olson did not concede that "Ford is not prejudiced because ... [he] 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" as 5 Star argues on pages 24 of its brief. Rather, Olson testified Ford was "severely disadvantaged" in its defense of this case given the

absence of the truck and allegedly defective part, and the inability to inspect them, or at least sufficient photographs documenting the scene. (R.p. 318, lines 9-15)

Although 5 Star may be astonished at Ford's claim of prejudice in this case, its two retained experts are not. Greene and Norris both testified as to the standard practice and fairness of allowing all interested parties the opportunity to inspect the physical evidence so each can conduct their own investigation and arrive at their own conclusions. (R. p. 421, lines 20-23; p. 424, lines 8-20; p. 425, lines 12-24; p. 426, line 8-p. 427, line 21; p. 504, lines 7-21; p. 505, lines 12-22) Olson also confirmed this standard practice of the industry. (R. p. 316, line 22-p. 317, line 7)

In this same respect, 5 Star's argument that Ford was not prejudiced because both parties were working from the same body of evidence is incorrect because Ford did not have access to the same evidence as to the origin and cause of the fire, and was therefore at a disadvantage to 5 Star because it spoliated the evidence. The only opinion presented at trial as to the origin of the fire was given by the only expert that actually had the opportunity to inspect the fire scene—Norris.[1] Because Norris personally inspected the fire scene and was later retained by 5 Star as an expert witness, 5 Star had the benefit of his knowledge as to the origin of the fire that Ford never had. Norris's knowledge came from his inspection of the scene and physical evidence that existed after the fire but was later destroyed. This knowledge was subjective to him and incapable of being tested, confirmed or refuted by Ford. (R. p. 497, lines 6-17) Ford was deprived of obtaining the knowledge Norris acquired as to the origin of the fire because Ford was never notified of

[1] Greene ultimately deferred to Norris as to the origin of the fire because "[h]e was there." (R. p. 416, line 17-p. 417, line 22)

the fire or potential claim, or given the opportunity to inspect the fire scene or evidence as Norris did. Moreover, Norris admitted that the photos are insufficient to overcome this disadvantage to Ford, and testified he would expect Ford to conduct its own investigation into the origin and cause of the fire if given the opportunity:

> 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.
>
> ***
>
> Q. Would you expect a manufacturer 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.

(R. p. 500, lines 21-24; p. 505, lines 12-22)

Lastly, 5 Star's argument that Ford is asking the Court to overrule prior precedent set forth in *Kershaw County Bd. of Educ. v. U.S. Gypsum*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990), and adopt a bright line test in favor of spoliation is inaccurate. Ford is asking the Court to enforce the sanction of dismissal in this case because a mere jury charge on spoliation was insufficient to redress the undisputed disadvantage and extreme prejudice to Ford under these particular facts. *Kershaw County* recognizes that the severe sanction of dismissal is appropriate under certain circumstances when a party spoliates evidence, but held that it was inapplicable under the facts of that case because there was no evidence that the defendant was "unduly prejudiced" by the spoliation or that dismissal "would serve to protect the rules of discovery." *Id.* at 395, 396 S.E.2d at 372.

Here, however, the prejudice to Ford is demonstrated by the testimony of all three expert witnesses, and, therefore, dismissal is not only appropriate, but also the only remedy to protect the rules of discovery. The analysis set forth in *Kershaw County* will remain unchanged, but under that analysis, given the record establishing the prejudice to Ford resulting from 5 Star's spoliation of evidence in this case, dismissal is the only appropriate remedy.[2] Whether or not dismissal is appropriate in future cases will remain on a case-by-case analysis considering the factors set forth in *Kershaw County.*

III. 5 STAR'S ARGUMENT THAT FORD TAKES INCONSISTENT LEGAL POSITIONS IN DIFFERENT CASES IS INACCURATE AND ALL MATTERS NOT PRESENTED BEFORE THE TRIAL COURT SHOULD BE DISREGARDED.

5 Star's argument that the Court's recent opinion in *Duncan v. Ford Motor Co.*, 2009 WL 2488160 (S.C. Ct. App. August 12, 2009), controls any matter at issue in this lawsuit is inaccurate because the legal issues in *Duncan* are not applicable to the issues presented in this appeal. For instance, 5 Star misinterprets the *Duncan* opinion, which primarily concerns a 1999 Ford recall on different model and model year vehicles, to argue that the 2006 recall of 5 Star's truck should have been admissible at the trial of this case. In addition to being wrong, any argument regarding the underlying facts or evidence presented during the *Duncan* trial, including the 1999 recall and other facts concerning the history of Ford's speed control deactivation switches, is not preserved for review because no such evidence was presented to the trial court in this case.

[2] Likewise, 5 Star's argument that dismissal is inappropriate because there is no evidence that the spoliation was intentional or malicious is misguided as such proof is not a requirement to justify dismissal. *See, e.g., Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) (holding that "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"). Additionally, it is impossible to know 5 Star's motives.

Lastly, 5 Star's argument regarding multidistrict litigation involving other allegations concerning Ford's speed control deactivation switches is inaccurate. 5 Star argues that the existence of the multidistrict litigation is an admission by Ford that all switch fires are similar. However, the creation of multidistrict litigation merely recognizes that cases involving the same defect allegations will have similar pre-trial issues:

> On the basis of the papers filed and hearing session held, the Panel finds that these five actions involve common questions of fact, and that centralization under Section 1407 in the Eastern District of Michigan will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. These actions are putative class actions that share factual questions regarding whether certain Ford vehicles were equipped with defective or defectively-installed speed control deactivation switches. Centralization under Section 1407 is necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings (especially with respect to questions of class certification), and conserve the resources of the parties, their counsel and the judiciary.

In re Ford Motor Co. Speed Control Deactivation Switch Products Liability Litigation, 398 F.Supp.2d 1365, 1366-67 (Jud. Pan. Mult. Lit. Oct. 28, 2005) (No. MDL 1718).

However, contrary to 5 Star's argument, the creation or existence of multidistrict litigation does not recognize or concede that each alleged fire incident is similar. In fact, multidistrict cases will not be tried together because (1) there are multiple potential ignition sources in every vehicle fire, and (2) the facts surrounding each fire incident are different. The experts in this case recognized these basic principles. (R. p. 284, lines 9-15; p. 319, line 22-p. 320, line 5; p. 352, lines 10-13; p. 434, lines 20-25; p. 496, lines 10-24). Simply stated, there is no inconsistency in Ford's position by the mere creation or existence of multidistrict litigation concerning other cases involving similar allegations of defectiveness.

IV. FORD IS ENTITLED TO JUDGMENT BECAUSE THERE IS NO EVIDENCE OF NEGLIGENT CONDUCT.

The record is devoid of any evidence or testimony that Ford was negligent in adopting the design of the allegedly defective truck and switch. In fact, 5 Star does not specifically address this argument in its brief other than generally stating on page 33: "There is abundant evidence in the record upon which a jury can find for the plaintiff on each an every element identified by the appellant in Section II A of its argument." Despite this contention, 5 Star cites no testimony or evidence in the record supporting its claim that Ford was negligent.

South Carolina law is clear that a product liability plaintiff must establish both that the product was defective **and** that the defendant manufacturer breached its duty to adopt a safe design for the product. *See 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); *Small v. Pioneer Mach., Inc.*, 329 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); *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 nor does it establish that the product was defective." *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) ("The mere fact a product malfunctions does not demonstrate the manufacturer's negligence nor tend to establish the product was defective."); *Campbell v. Robbins Tire & Rubber Co.*, 256 S.C. 230, 234, 182 S.E.2d 73, 75 (1971) ("The burden was on the respondent to show that the tube was defective and such resulted from the negligent manufacture thereof by the

appellant. The mere fact that the tube exploded does not demonstrate the manufacturer's negligence nor tend to establish that the tube was defective.").

Therefore, under South Carolina law, these are two distinct and separate elements of proof that are both required before a plaintiff can recover. 5 Star's argument that Ford's negligence is proven in this case by circumstantial evidence and citation to *Seaside Resorts, Inc. v. Club Car, Inc.*, 308 S.C. 47, 416 S.E.2d 655 (Ct. App. 1992), is misleading and does not support its argument. Although not disclosed by 5 Star in its initial brief, the Court in *Seaside Resorts* was applying the substantive product liability law of North Carolina because the incident at issue occurred in North Carolina. *Id.* at 50, 416 S.E.2d at 659 ("the action was governed by the substantive law of North Carolina"). This law differs drastically from South Carolina law that has repeatedly refused to recognize the doctrine of *res ipsa loquitur*, which would otherwise allow the 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"). The fact remains that there is no record evidence on this required element of proof, and therefore, Ford is entitled to judgment.

V. FORD IS ENTITLED TO JUDGMENT BECAUSE THERE IS NO EVIDENCE THAT THE TRUCK WAS IN ESSENTIALLY THE SAME CONDITION AT THE TIME OF FIRE AS WHEN IT LEFT FORD'S CONTROL OVER TEN YEARS AND 225,000 MILES PRIOR.

In addition to the other elements, a product liability plaintiff must prove 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. As with the issue of negligent conduct, 5 Star broadly argues there is evidence that the truck was in essentially the same condition at the time of fire as it was when it left Ford's control, but is unable to pinpoint any specific testimony supporting its argument. Instead, 5 Star cites testimony that Shelby was unaware of any after-market modifications to the vehicle and that he did not make any modifications to the vehicle in the ten-month period he owned it before the fire. (R. p. 521, lines 13-18) However, given that the vehicle had been in operation for over nine years and 225,000 miles **before** 5 Star's purchase, Shelby admitted he had no knowledge of the maintenance or service history of the vehicle:

> Q. You don't have any personal knowledge as to the vehicle history, the maintenance records of the vehicle prior to your purchase?
>
> A. No.

(R. p. 565, lines 8-11) The experts all confirmed they too did not have any knowledge as to the vehicle's maintenance or service history. (R. p. 321, lines 6-12; p. 408, lines 3-8; p. 488, lines 7-25) Additionally, the vehicle's former owners did not testify as to these issues. Therefore, 5 Star is correct on page 34 of its brief that it is pure speculation whether or not the vehicle was in essentially the same condition as when it left Ford's control because there is no evidence on this element of proof. Accordingly, Ford is entitled to judgment because 5 Star failed to carry its burden of proof.

VI. 5 STAR'S CALCULATION OF ALLEGED LOST PROFITS BEARS NO RELEVANCE TO THE PROPER MEASURE OF RECOVERY AND SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE.

"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 v. Dept. of Health and Environmental Control*, 368 S.C. 279, 315-16, 628 S.E.2d 496, 515-16 (Ct. App. 2006).

In this case, 5 Star only presented evidence of its 2004 gross revenue and calculated $18,000.00 of "lost profits" by dividing its 2004 gross revenue by the total number of working days in 2004, and multiplying that daily revenue by 15—the estimated number of days the 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, 5 Star presented no evidence of lost profits, but only an estimate of lost gross revenue, which is not the legally recoverable measure of damages. Moreover, 5 Star's initial brief neither addresses Ford's argument nor cites any legal authority that the jury's consideration of gross revenue, as opposed to lost profits, was proper.

VII. 5 STAR'S PROPOSED ADDITIONAL SUSTAINING GROUND IS INAPPLICABLE TO THIS CASE BECAUSE THIS CASE ONLY INVOLVES A CLAIM FOR NEGLIGENT DESIGN DEFECT.

A product can be defective in either design or manufacture, and these are

mutually exclusive theories of recovery.[3] In cases alleging manufacturing defects, the plaintiff must prove that the product, as manufactured by the defendant, did not conform to the manufacturer's own design specifications. The plaintiff must prove how the particular product at issue differed from the manufacturer's specifications and other products manufactured by the defendant, and prove that the manufacturing defect proximately caused his injuries. Manufacturing defects only affect one or a limited number of products, rather than all products manufactured by the defendant. On the other hand, in cases alleging design defects, the plaintiff must prove the manufacturer failed to adopt a reasonable safe design for the product, thereby rendering the product defective and unreasonably dangerous. Unlike manufacturing defects, design defects render all products with the same design defective. Accordingly, the elements of proof and scope of relevant evidence differs depending on whether a case involves an allegation of defective design or manufacture. *See, e.g., Reed v. Tiffin Motor Homes, Inc.*, 697 F.2d 1192, 1196-97 (4th Cir. 1982) (applying South Carolina law).

Contrary to 5 Star's argument, 5 Star's only allegation in its Complaint and at trial was a negligence claim for defective design. Indeed, the only evidence presented at trial was that the speed control deactivation switch was defectively designed. There was absolutely no evidence presented that the specific manufacture of the truck or switch in this case failed to conform to Ford's intended design specifications for that model or model year. Indeed, 5 Star's primary argument at trial was that the switch was defective because it was designed to (a) remain energized at all times, and (b) carry 2 amps of

[3] A product may also be defective for containing inadequate warnings, although not alleged in this case.

electricity but attached to a protective device rated for 15 amps. (R. p. 375, line 20-p. 377, line 19; p. 648, lines 5-11)

Given that this case only involves a design defect, 5 Star's reliance on *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272 (2003), is misplaced. Unlike this case, *Curcio* involved two separate and distinct theories of recovery under one claim: design defect and inadequate warning. *Id.* at 318, 585 S.E.2d at 272-73 ("Petitioner alleged two bases for her strict liability claim: (1) a design defect theory and (2) an inadequate warning theory."). Since the jury returned a general verdict on the overall strict liability claim in *Curcio*, and did not distinguish between the design defect and inadequate warning theories, the Court upheld the verdict. Because this case differs in this critical aspect, 5 Star's citation to *Curcio* and argument that the verdict should be upheld in this case are without merit.

CONCLUSION

For these reasons, the trial court erred in not dismissing the case based on 5 Star's spoliation of evidence and failure to prove the essential elements of its claim for negligent design defect.

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March 17, 2010

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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

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5 Star, Inc., ...Respondent,

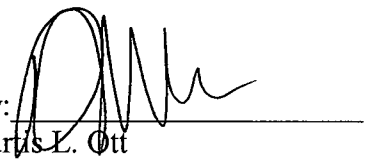
v.

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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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 & Goldstein, P.A., P.O. Box 71121, Charleston, SC 29415-1121.

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