

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM ORANGEBURG COUNTY  
Circuit Court of Common Pleas

Hon. James C. Williams, Jr., Circuit Court Judge

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Case No. 08-CP-38-826

SC Court of Appeals

KAREEM J. GRAVES and TARA GRAVES, individually  
and as duly appointed personal representatives of the  
ESTATE OF INDIA IYANNA GRAVES, ..... Plaintiffs/Appellants,

vs.

CAS MEDICAL SYSTEMS, INC., ..... Defendant/Respondent.

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**BRIEF OF *AMICUS CURIAE* LAW PROFESSORS  
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**INTRODUCTION, IDENTITY AND INTEREST OF  
AMICUS CURIAE, AND SUMMARY OF ARGUMENT**

*Amicus curiae*—John F. Vargo, Paul J. Zwier, II, Richard W. Wright, Frank J. Vandall, Stephen A. Saltzburg, Jay M. Feinman, Thomas A. Eaton, and Carl T. Bogus—are law professors who research, teach, and write about torts, products liability, evidence, and constitutional law.<sup>1</sup> Their *curriculum vitae* are provided in Appendix A to this brief and summarized in their attached Motion for Leave to File this brief.

*Amici* have no stake in the outcome of the lawsuit at bar and have not been compensated for their work on this brief. They do, however, have a strong interest in the proper development, exposition, and application of legal principles, rules, and precedents regulating the use and development of tort and evidence law in state and federal courts, an interest that they expressed long before this case commenced.

The appeal before this Court arises from a strict products liability case in which the Circuit Court granted summary judgment for the defendant after concluding that the plaintiffs should not be able to use circumstantial evidence to prove their case. Although South Carolina courts always have held that circumstantial evidence may be used in every kind of civil and criminal case, this case raises a question of first impression because neither this Court nor the Supreme Court has determined if such evidence may be used to prove a product is defective in a strict liability cause of action.

The Circuit Court's conclusion was based on assumptions that do not withstand scrutiny, including the evident views that circumstantial evidence is no different from *res ipsa loquitur* and is much weaker (in reliability and probative value) than direct evidence. The Circuit Court

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<sup>1</sup> The views expressed in this brief are those of the individual *amici* and their law school affiliations are included for identification purposes only.

also ignored the fact that circumstantial evidence is admissible and routinely used in every other kind of case—civil, administrative, and criminal—in South Carolina. The Circuit Court’s decision also is contrary to the decisions of courts of the forty-seven (47) States that have considered the question—decisions that expressly hold that circumstantial evidence may be used in products liability cases.

As detailed below, these decisions are based on the crucial distinction between circumstantial evidence and *res ipsa*: while both depend on inferences, they differ on the nature and bases of the inferences being drawn. Thus, *res ipsa* is widely disdained in products cases because it allows the existence of negligence or a defect, as well as causation, to be inferred in the particular case from abstract hypotheses about what “usually” or “generally” may occur in an “ordinary” or “typical” case, without requiring any evidence specific to the particular case. On the other hand, circumstantial evidence is universally accepted in products cases as in all others, because it allows inferences of a defect and causation only if such inferences are reasonably based on concrete evidence, that is, on facts specifically moored to the unique circumstances of a particular case.

Lastly, the Circuit Court mischaracterized and therefore discounted the plaintiffs’ concrete, circumstantial evidence—the testimony of four eyewitnesses who recounted what they specifically saw and heard in this case, that an infant apnea/heart monitor never sounded an alarm—as nothing but *res ipsa* conjectures regarding the non-sounding of the alarm, due to a defect, while the Circuit Court inexplicably credited the defendant’s equally circumstantial evidence—the testimony of two lay witnesses who interpreted the apnea/heart monitor’s “own record,” the machine’s internal computer event log, as “indicat[ing]” the monitor had performed perfectly by sounding on this occasion, despite evidence of imperfect performance on other

occasions (log indications of activation of the alarm but not of hearing its sounding). Accordingly, *amici* respectfully suggest that this Court should reverse the grant of summary judgment and hold that, once all of evidence in this case is considered—including both the plaintiffs’ circumstantial evidence and the defendant’s own circumstantial evidence—a genuine dispute of material fact exists regarding whether the apnea/heart monitor failed (and, if so, how and why), a dispute that a jury should resolve.

Section I of this brief submits that this Court should reverse the decision below because the Supreme Court of South Carolina, like the United States Supreme Court, has long recognized that there are critical differences between circumstantial evidence and *res ipsa loquitur*. Both Courts consistently have held that, unlike *res ipsa*, circumstantial evidence is just as reliable, just as probative, and “just as good” as direct evidence.

Section II contends that this Court should reverse the decision below because South Carolina law does not distinguish between the weight or value given to direct and circumstantial evidence, and because the State Supreme Court invariably has allowed the use of circumstantial evidence in all kinds of cases—criminal, administrative, and civil (including in the kinds of negligence and breach of warranty causes of action the plaintiffs have asserted in this case).

Section III argues that this Court should reverse the decision below because the State Supreme Court pays extremely close attention to the decisions of other state courts on novel questions of law and rarely adopts a position that is outside the mainstream. That is significant in this case because courts in each of the 47 States that have considered whether circumstantial evidence should be admissible in causes of action for strict products liability expressly have held that plaintiffs may use circumstantial evidence to prove defects in such cases. Conversely stated, no State rejects the use of circumstantial evidence in strict products liability causes of action.

Section IV demonstrates that this Court should reverse the decision below because barring the use of circumstantial evidence to prove a strict products liability cause of action in products liability cases will confuse juries and burden courts. This is because plaintiffs already are allowed to use circumstantial evidence to prove their negligence and breach of warranty claims in products liability cases, which are often pleaded along with strict liability claims, as in fact they were pleaded by the plaintiffs in this case.

Section V suggests that the Circuit Court's decision is constitutionally problematic. Although the plaintiffs in this case have not challenged the constitutionality of the Circuit Court's rulings, *amici* articulate why categorically precluding plaintiffs from using circumstantial evidence in products liability actions violates the federal and state constitutional guarantees of access to the courts and equal protection of the laws.

Finally, Section VI contends that the Circuit Court erred in granting summary judgment for the defendant because the circumstantial evidence put forward by the plaintiffs clearly conflicts with the circumstantial evidence introduced by the defendant and therefore establishes a genuine dispute regarding material facts, the resolution of which is constitutionally entrusted to juries, not the courts.

## STATEMENT OF THE ISSUE ON APPEAL

This case presents a question of first impression:

Should South Carolina allow litigants to use circumstantial evidence to prove (or defeat) strict products liability claims, just as civil litigants are allowed to do in negligence, wrongful death, breach of warranty, and every other type of civil claim in the State, just as prosecutors and defendants are permitted to do in every criminal case in the State, and just as parties are allowed to do in products liability cases in every one of the forty-seven (47) States that have considered the question?

## STATEMENT OF THE CASE

This appeal arises from a lawsuit filed on April 7, 2006 in the Circuit Court of Common Pleas for Orangeburg County by Plaintiffs/Appellants Kareem J. Graves and Tara Graves, individually and as representatives of the Estate of India Iyanna Graves (their infant daughter) against Defendant/Respondent CAS Medical Systems, Inc. ("CAS"). The Graves seek compensatory and punitive damages pursuant to four causes of action: (1) products liability/strict liability; (2) negligence; (3) breach of implied warranties of fitness and merchantability; and (4) wrongful death. Each of these claims is based on the Graves' allegations that their infant daughter, India, died because of defects in an AMI Plus Model 9700 Apnea/Heart Rate Monitor (the "Monitor") that CAS designed, manufactured, marketed, and sold.

The Graves allege these defects caused the Monitor to fail in its essential purpose: to sound an alarm loud enough to wake them when India suffered several separate respiratory and cardiac "patient events" between 2:00 and 3:00 a.m. on the morning of April 11, 2004, events which worsened, lengthened, and cumulatively caused her breathing to cease and her heart to stop. India Graves was four months old when she died.

The Graves relied on both lay and expert witnesses to establish that the CAS Model 9700 Monitor was defective, and thus to meet part of their burden of proof on all four causes of action. First, they relied on the direct testimony of four eyewitnesses: Mr. and Mrs. Graves, Mrs.

Graves' sister, and Anita R. Kelly, an Orangeburg County Emergency Medical Services ("EMS") paramedic who was the "first responder" on the morning India died. The essence of their testimony and the reasonable inferences from that testimony was that at all relevant times: (1) the Monitor's respiratory and cardiac electrodes were properly attached to India's chest; (2) the electronic cables connecting the electrodes to the Monitor were properly plugged in; (3) the Monitor was adequately powered; (4) no one altered or misused the Monitor; (5) the Monitor detected India's respiratory and cardiac distress (as evidenced by the fact that at least one of the Monitor's emergency alert LED lights was illuminated) but nonetheless failed in its fundamental task of sounding an audible alarm when India stopped breathing properly and her heart stopped beating properly; and (6) the Monitor's failure resulted from a product defect.

Second, in addition to and as an alternative to this lay testimony, the plaintiffs relied on the expert testimony of two computer scientists and a biomedical engineer, who found the Monitor had timely detected India's repeated bouts of respiratory and cardiac distress but had failed to sound the alarm (or failed to do so adequately) because of flaws in the "structure" and "lines" of code in the Monitor's computer software.

CAS moved to exclude the Graves' expert testimony as unreliable, pursuant to Rule 702, South Carolina Rules of Evidence. By Order dated April 8, 2009, the Circuit Court granted that motion and barred the testimony of all of the Graves' experts, stating that the "experts' methodology does not meet the tests of reliability set forth in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999)." April 8<sup>th</sup> Order at 6.<sup>2</sup>

CAS also moved for summary judgment, pursuant to Rule 56(e), South Carolina Rules of Civil Procedure. The Circuit Court's April 8<sup>th</sup> Order granted that motion, too, and dismissed all

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<sup>2</sup> Although this brief does not take issue with that ruling, *amici's* silence should not be construed as agreeing with the Circuit Court's decision or the Court's reasoning.

causes of action on the grounds that the Graves needed to “identify the specific defect” in the CAS Monitor, April 8<sup>th</sup> Order at 9 (citations omitted), and to prove the viability of an “alternative design” for an infant apnea/heart monitor. *Id.* at 10-11 (citations omitted). The Circuit Court concluded that “[w]ithout testimony from their computer and biomedical experts, plaintiffs cannot carry their burden of proof that a defect in the monitor caused the injury.” *Id.* at 10. The Circuit Court’s April 8<sup>th</sup> Order did not mention the Graves’ circumstantial evidence.

The Graves then moved the Circuit Court to reconsider its April 8<sup>th</sup> Order, pursuant to Rule 59(e), South Carolina Rules of Civil Procedure, asking it not only to reverse its Rule 702, SCRE ruling excluding the testimony of their expert witnesses but also to address their contention that they could prove their case solely with circumstantial evidence, *i.e.*, even if the court refused to overturn its Rule 702 ruling.

By Order dated April 23, 2010, the Circuit Court denied the Graves’ Rule 59(e) motion. Of particular importance, the Circuit Court held: (1) “Plaintiffs have not shown that a product defect can be proved by circumstantial evidence in South Carolina,” April 23<sup>rd</sup> Order at 1; (2) “[a]llowing these Plaintiffs to proceed only on untested, circumstantial evidence would leave the question of defect to mere ‘surmise, conjecture, or speculation,’” *id.* at 2 (citations omitted); and (3) the “Plaintiffs’ approach also conflicts with our Supreme Court’s recent rulings on expert testimony, including *Watson v. Ford Motor Co.*, Op. No. 26786 (March 15, 2010),”<sup>3</sup> which stated that “expert testimony is required ‘where a factual issue must be resolved on scientific, technical or other specialized knowledge,’” which the Circuit Court regarded as “required” here because “[t]he factual issues presented in this case concerning the writing, testing, and operation of computer software are clearly beyond the experience of the typical juror . . . .” *Id.* at

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<sup>3</sup> On September 13, the Supreme Court replaced its March 15 slip opinion with a revised opinion. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010).

2. Lastly, the lower court held that the plaintiffs' circumstantial evidence "argument is essentially one of *res ipsa*," which simply "is not the law in this state." *Id.* at 3.

The Plaintiffs' appeal followed.

### STATEMENT OF THE FACTS

India Graves died in the early morning hours of April 11, 2004. She was 16 weeks old. She had been born, prematurely, on December 30, 2003, along with her triplet sisters, Asia and Paris. Premature infants are smaller, weaker, and more vulnerable than full-term babies. They are especially susceptible to apnea of prematurity, *i.e.*, breathing stoppages associated with premature, not fully developed brains. Because of the high risk that premature infants like India might stop breathing without anyone noticing and thus might die before medical personnel could provide simple but effective stimulation to restart their breathing or hearts, India and her sisters were not sent home within days of her birth (like most newborns are nowadays) but instead were placed in a hospital Neonatal Intensive Care Unit ("NICU") until February 17, 2004, when India and her sisters were released to their parents, who drove them to their Orangeburg home.

Because the risk of apnea in premature infants is so commonplace and because the dangers of undetected apnea are so grave, NICU physicians ordered that India and her sisters be electronically monitored while in the hospital by a complex medical device that could detect respiratory or cardiac distress and, if distress was detected, summon timely help for the patient by simultaneously illuminating bright Light Emitting Diode ("LED") lights and sounding ear-piercing audible alarms. These lights and alarms were intended to alert caregivers and summon aid by shining and blaring continuously until turned off.

NICU staff selected CAS AMI Plus Apnea/Heart Rate Monitors (Model 9700) for each child, which were attached to the infants throughout their stay in the NICU. The triplets'

physicians also ordered that the Model 9700 Monitors be sent home with India and her sisters and that their parents receive simple but completely adequate training on how to use the Monitors and how to quickly stimulate and revive an infant if its breathing or cardiac rates fell below acceptable limits and thus was in danger of dying.

Tara and Kareem Graves testified that they properly attached the CAS Monitor to their children each night before they went to bed, and that they had done so throughout the period from February 17 to April 11, 2004. Mrs. Graves testified that on April 11, at approximately 2:00 a.m., she placed the Model 9700 Monitor around India's chest, checked to see if the cables linking her child to the Monitor were securely plugged in and attached, and that the Monitor was fully powered and working properly. Mrs. Graves lay India in her bassinet and then went to sleep in her own bed, just a few feet away from the bassinets of her three babies. The Graves had placed all three bassinets in their own bedroom to ensure they could hear any alarm and thereby assure that they could quickly stimulate a baby or call for backup emergency aid if necessary. NICU physicians had advised the Graves to expect breathing or heart rate problems, to rely on the Monitors to warn them if a baby's life was endangered, and, if necessary, to trust the training they had received to stimulate the baby and save its life.

Mrs. Graves testified that she awoke less than an hour later and got up to see if the fragile infants responded to her touch. Paris and Asia immediately "jumped" when Mrs. Graves touched them. India did not move at all and was completely non-responsive. Mrs. Graves screamed, rousing Mr. Graves from his sleep in their bed, and shouted for him to call 911 while she tried to stimulate her baby and then to administer CPR.

Neither of the Graves heard the Monitor sound an alarm. This was unprecedented to each of them because they were within easy earshot of the alarm, because the alarm was sharp, high-

pitched, and extremely loud (at 85 decibels it was designed to shock babies into breathing and to awaken slumbering caregivers), and because each parent had heard the alarm sound several times over the preceding two months. The Monitor's silence also seemed very abnormal to them because the Monitor's LED alert lights, the visual counterpart to the Monitor's audible alarm, were shining bright red.

April Simmons (Mrs. Graves's sister, who had been sleeping in an adjacent bedroom and was startled awake by Mrs. Graves' screams) testified that she, too, did not hear the Monitor's alarm, either before or after Mrs. Graves' cries split the night. This seemed very odd to her as well because she had heard the alarm several times in the past two months and because she was well positioned to hear the alarm if it had sounded.

Finally, Paramedic Kelly, who arrived at the Graves' home at 4:01 a.m., testified that although she saw that one of the Monitor's LED alert lights was illuminated and remained red, she never heard the Monitor sound an alarm. Paramedic Kelly testified that she found India in her bassinet in the Graves' bedroom, that India was not breathing and had no heart rate, that she tried and failed to resuscitate the child, and that she then carried India's body outside to the EMS truck, where a summoned coroner pronounced her dead. An autopsy concluded that India had died of Sudden Infant Death Syndrome ("SIDS").

The Graves' theory of the case is that India died because the Model 9700 Monitor failed to sound the alarm and wake them up and that if they had awoken they would have stimulated India and kept her alive until they had a chance to summon emergency aid and have her rushed to a hospital. The Graves' offered several types of evidence to support their claims. First, their own direct, eyewitness testimony, combined with the eyewitness testimony of Ms. Simmons and Ms. Kelly, established that the Monitor had detected India's problems (as demonstrated by the

Monitor's glowing red LED alert lights) but had completely failed to emit any audible sound, as it was designed and marketed to do.

This direct testimony was confirmed by the testimony of the Graves' three computer software and biomedical experts, who found evidence of previous failures in the Monitor's internal computer "event log." The experts read the event log as showing the Monitor had detected problems in India's respiration and cardiac rates at least fifteen times in the two months prior to her death but had failed to sound an alarm each time. They opined the Model 9700 Monitor had failed these times and during the early morning hours of April 11 (and they inferred that this model generally was prone to failure) because of "bugs" and "structure" failures in the Monitor's internal computer software, specifically electronic wiring and schematic "lines" of instruction that were overly complex, poorly written, and poorly made and "maintained."

These experts also noted that identical Model 9700 CAS Monitors had failed under similar circumstances in other cases, as further evidenced by a federal Food and Drug Administration ("FDA") report that CAS had "voluntar[ily]" recalled all of the Model 9700 Monitors, *i.e.*, the same model India had used, that had been manufactured during the five-year period between 1997 and 2001, all because (as discussed below) the Model 9700 "infant apnea monitor might shut down and the audible alarm might fail to sound." Finally, the Graves' experts eliminated alternative reasons why the Monitor could have failed, and then concluded it was unreasonably dangerous and that its flaws were the proximate cause of India's death.

CAS's theory of the case is straightforward: there simply were no problems with their Model 9700 Monitors, in general, or with the Model 9700 Monitor that had been attached to India Graves, in particular. Citing the testimony of two lay witnesses—"Scott Lambert, one of the creators of the AMI" Monitor, CAS Brief, at 5-6, and Steve Elliott, a salesman for "Ashby

Medical, the company that leased the monitors to the Graves,” *id.* at 7—CAS asserts: “Simply put, the machine’s own record indicates it was functioning properly at the time of India’s death.” *Id.* at 3 (emphasis added); “[t]he monitor worked properly before and after India’s death.” *Id.*; “[t]he monitor records or ‘logs’ patient events, equipment events, and alarm activity.” *Id.* at 5; “[t]he log of India’s decline does not reflect” any failures, “only that the alarm sounded properly.” *Id.* at 6; “Elliot’s company had approximately 100 AMI monitors. He has had no other complaint of an alarm not sounding . . . .” *Id.* at 8. Thus, CAS’s evidence confirms that the Monitor detected a pulmonary problem. At bottom, the factual dispute at the heart of this case concerns who saw and heard what, specifically whether the Monitor’s alarm sounded. The plaintiffs rely on the direct testimony of four eyewitnesses, who swore the Monitor did not sound an alarm, while CAS offers testimony from the Monitor’s computer record that it did. A jury should have resolved this classic factual dispute.

To substantiate Elliot’s testimony that “[h]e has had no other complaint of an alarm not sounding,” *id.*—and, impliedly, that no one else ever had heard a “complaint of an alarm not sounding”—CAS boasted that the Model 9700 was a well-designed, well-tested, and government-sanctioned machine inasmuch as it had been “approved for marketing by the [FDA], after a review of extensive documentation, including documentation of the AMI software development and testing. *See* Model 9700 Summary Verification Test Plan (listing the extensive number and the variety of tests of the software).” *Id.* at 3 (emphases added; citation omitted).

Although CAS’s brief does not mention it, the FDA later reported that CAS:

voluntarily recalled three models of Infant Apnea Monitors. The firm initiated the recall on December 17, 2001, because the infant apnea monitor might shut down and the audible alarm might fail to sound. Monitors effected (sic) in the recall were: AMI 9700 Apnea Monitor, AMI 9700A Apnea Monitor, and AMI Plus 9700B Infant Central Apnea/Heart Rate Monitor. The devices were manufactured between 1997 and 2001.

FDA, *Recall of Infant Apnea Monitor: Possible Failure of Infant Monitoring Device Results in Class I Recall*. <http://www.fda.gov/ICECI/EnforcementActions/EnforcementStory/EnforcementStoryArchive/ucm103360.htm> (“Last Updated: 01/13/2010”) (website last visited May 8, 2011) (emphasis added)).<sup>4</sup> A Class I recall is the most serious kind, and is reserved for “situation[s] in which there is a reasonable probability that the use of ... a violative product will cause serious adverse health consequences or death.” 21 C.F.R. § 7.41(1) (2009). *See In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, 623 F.3d 1200, 1204 (8th Cir. 2010).

CAS also retained its own expert in computer software, who testified the Graves’ experts were wrong in concluding the Model 9700 Monitor was defectively designed. He did not, however, testify regarding his interpretation of the event log of the Monitor that India’s parents used or his reaction to the FDA recall of the Model 9700 Monitor.

Regarding India’s own Monitor, “CAS does not dispute the monitor was set up properly and that it had power.” CAS Def. Br. at 47. Nor does CAS attribute any problems or failures to that Monitor’s age, contend that the Monitor had been subject to excessive use, maintain that the Graves had altered their product, or assert that anyone had misused or abused the Monitor in any fashion.

CAS’s lay and expert witnesses asserted that, in general, Model 9700 Monitors were not designed or manufactured to fail and that none ever had failed; they also asserted, in particular, that India’s Monitor did not fail in this case, either before, during, or after her death. According to CAS, the most telling testimony was provided by the Monitor’s computerized event log.

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<sup>4</sup> Although the FDA’s recall report is not part of the record, this Court is empowered to take judicial notice of official reports of the federal and state governments. *See Meier v. Meier*, 208 S.C. 520, 528, 38 S.E.2d 762, 767 (1946) (judicial notice of orders published in the Federal Register); *State v. Life Ins. Co. of Ga.*, 254 S.C. 286, 297, 175 S.E.2d 203, 208 (1970) (“official reports of [the State] Comptroller General.”).

“Simply put, the machine’s own record indicates it was functioning properly at the time of India’s death.” CAS Brief. at 3. In other words, the machine not only spoke for itself (or *machina ipsa loquitur*) but spoke more accurately, more infallibly than any human witness did or could.

In sum, in CAS’s view, there was nothing wrong with the Monitor. It could not fail and it did not fail (perhaps leaving the implication that something must have been wrong not only with the Graves and with Ms. Simmons, but also with Paramedic Kelly, and that that each of them should have heard—perhaps must have heard—the Monitor’s alarm).

### **THE APPROPRIATE STANDARDS OF REVIEW**

#### **A. THE STANDARD OF REVIEW FOR QUESTIONS OF FIRST IMPRESSION**

This Court reviews trial court decisions regarding legal issues of first impression *de novo*. “In a case that raises a novel question of law, [appellate courts] are free to decide the question with no particular deference to the Circuit Court.” *Camp v. Camp*, 386 S.C. 571, 574, 689 S.E.2d 634, 636 (2010).

#### **B. THE STANDARD OF REVIEW FOR GRANTS OF SUMMARY JUDGMENT**

This Court also reviews grants of summary judgment *de novo*, “‘apply[ing] the “same standard that governs the trial court under Rule 56(c), SCRCP,” and “‘review[ing] all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.”” *USAA Property & Casualty Insurance Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008).

### **ARGUMENT**

The Circuit Court’s predicate decision that circumstantial evidence is and should be inadmissible in causes of action for products liability in South Carolina, and the court’s ultimate grant of summary judgment for CAS, were erroneous as those rulings were based on that court’s

misreading of *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169, 180 (2010), the Circuit Court’s misunderstanding of the nature and relative value of direct and circumstantial evidence, and that court’s failure to appreciate the status of circumstantial evidence in South Carolina, in particular, and in products liability cases throughout the nation, in general.

First, although the Circuit Court regarded *Watson* as dispositive on all matters, *see* April 23<sup>rd</sup> Order at 2, and although CAS likewise contends that *Watson* is controlling, *see, e.g.*, CAS Br. at 16 (“our Supreme Court held recently in *Watson* . . . a defect must be proven, and cannot be shown by circumstantial evidence”); *id.* at 45-46 (*Watson* “rejected the circumstantial evidence argument”), *Watson* never mentioned “circumstantial evidence” at all. Instead, all *Watson* said was: “the mere occurrence of an accident or existence of an alleged product malfunction does not establish the liability of a product manufacturer.” *Watson v. Ford Motor Co.*, 389 S.C. at 455, 699 S.E.2d at 180.<sup>5</sup> That constitutes a “reject[ion]” of a *res ipsa* argument, not a circumstantial evidence one. Most important, *Watson* actually considered the circumstantial evidence the plaintiffs had presented in that case—noting that “[e]vidence of similar accidents, transactions, or happenings is admissible . . . where there is some special relation between the accidents tending to prove or disprove some fact in dispute”—but ultimately decided that the

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<sup>5</sup> Neither of the other two cases CAS relies on actually supports its argument. *Shelton v. LS & K, Inc.*, 374 S.C. 294, 648 S.E.2d 307 (Ct.App.2007), never mentions, much less “reject[s],” as CAS claims, the proposition that plaintiffs may use circumstantial evidence to prove a product defect in a strict liability case. *Sunvillas Homeowners Ass’n, Inc. v. Square D Co.*, 301 S.C. 330, 391 S.E.2d 868 (Ct.App.1990), is even less helpful. There, in a negligence case, this Court said the plaintiff “[wa]s correct in its assertion [that] negligence may be proved by circumstantial evidence,” and merely upheld a directed verdict for a defendant manufacturer because the circumstantial evidence in that case did not prove that defendant had been negligent. *Id.*, 301 S.C. at 334, 391 S.E.2d at 870.

*Watson* plaintiffs' circumstantial evidence should have been excluded because they had "failed to show that the incidents were substantially similar." *Id.*, 699 at 179.<sup>6</sup>

Second, contrary to the Circuit Court's assumptions, direct evidence is not better, more reliable, or more probative than circumstantial evidence and circumstantial evidence is not the same thing as or equivalent to *res ipsa loquitur*. Indeed, the *res ipsa* doctrine is invoked in cases in which there is no concrete, case-specific circumstantial evidence as to defect or causation but where the overall probabilities associated with the event suggests likely defectiveness and causation. That presumption, by itself, is enough to establish a *prima facie* case under the *res ipsa loquitur* doctrine. Of course, when circumstantial evidence exists, the *res ipsa loquitur* doctrine is unnecessary. *See* 2 Stephen A. Saltzburg, Michael M. Martin, and Daniel J. Capra, FEDERAL RULES OF EVIDENCE MANUAL § 301.02[2] at 301-6 (9th ed. 2006).<sup>7</sup>

Third, contrary to the Circuit Court's evident belief, circumstantial evidence is used in every type of case in South Carolina and circumstantial evidence is used in products liability actions in 47 States, *i.e.*, in 100 percent of the States whose courts have had a chance to decide if such evidence should be admissible in products liability actions.

Finally, because the Circuit Court should have admitted and considered circumstantial evidence in this case, it should not have granted summary judgment against the Graves, as that

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<sup>6</sup> As the Pennsylvania Supreme Court recently noted in a strict products liability case, "similar accidents involving the same product" are among the classic "types of circumstantial evidence." *Barnish v. KWI Bldg. Co.*, 980 A.2d 535, 542 (Pa.2009). *See DeWitt v. Eveready Battery Co., Inc.*, 565 S.E.2d 140, 149-50 (N.C.2002); *Dorn v. BMW of North America, LLC*, --- F.Supp.2d ---, 2010 WL 3913226, \*9 (D.Kan.2010); *Smith v. Central Admixture Pharmacy Services, Inc.*, 2010 WL 1137507, \*5 (D.Md.2010). *See* 2 Saltzburg, Martin & Capra, FED. RULES OF EVID. MANUAL, § 403.03[78][g].

<sup>7</sup> *See also* Richard W. Wright, *Liability for Possible Wrongs: Causation, Statistical Probability, and the Burden of Proof*, 41 LOY. L.A. L. REV. 1295, 1334-42 (2008); 1 Dan B. Dobbs, LAW OF TORTS § 154, at 372 (2001) & 102 (2010 Supp.).

evidence undermines CAS's claim that there is no genuine issue as to any material fact and that CAS thus was entitled to judgment as a matter of law.

**I. THE CIRCUIT COURT ERRED IN REFUSING TO CONSIDER THE PLAINTIFFS' CIRCUMSTANTIAL EVIDENCE BECAUSE THE COURT MISUNDERSTOOD THE DIFFERENCES BETWEEN DIRECT AND CIRCUMSTANTIAL EVIDENCE AND BETWEEN CIRCUMSTANTIAL EVIDENCE AND *RES IPSA LOQUITUR***

**A. CIRCUMSTANTIAL EVIDENCE IS "JUST AS GOOD" AS DIRECT EVIDENCE**

Direct evidence and circumstantial evidence certainly are quite different in form— "[d]irect evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness," while "[c]ircumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact," *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 337, 534 S.E.2d 672, 680 (2000) (citations omitted), but these differences in form are immaterial in substance because "[t]he law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence." *Id.* Nor is there any reason to regard circumstantial evidence as less trustworthy than direct evidence, or as having less probative value.

It is simply untenable to assume that circumstantial evidence is less reliable than is direct evidence. In short, whether direct evidence or circumstantial evidence is more trustworthy and probative depends upon the particular facts of the case and no generalizations realistically can be made that one class of evidence is per se more reliable than is the other class of evidence. [Both] inherently possess the same probative value.

*State v. Cherry*, 361 S.C. 588, 600, 606 S.E.2d 475, 481 (2004) (emphases added; citations and internal quotation marks omitted).<sup>8</sup>

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<sup>8</sup> See *State v. Wright*, 140 S.C. 363, 138 S.E. 828, 830 (1927) ("there is no practical difference between circumstantial and direct evidence" and "nothing in the nature of circumstantial evidence . . . renders it any less reliable than other classes of evidence") (citations

Circumstantial evidence involves, in addition to witnesses' testimony regarding what they saw or heard (or did not see or hear), a process of reasoning, or inference by which a conclusion is drawn. Like all other evidence, it may be strong or weak; it may be so unconvincing as to be quite worthless, or it may be irresistible and overwhelming.

While generally direct evidence is to be preferred, *e.g.*, the witness sees A stab B, yet in some situations circumstantial evidence seems to be no less trustworthy if not superior, *e.g.*, "There is still no man who would not accept dog tracks in the mud against the sworn testimony of a hundred eye-witnesses that no dog has passed."

William Lloyd Prosser, *LAW OF TORTS*, 212 (4th ed. 1971). The gist of circumstantial evidence, and the key to it, is the inference, or process of reasoning by which the conclusion is reached. This must be based on the evidence given, together with a sufficient background of human experience to justify the conclusion. *Id.*

Accordingly, "[a]ny 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) (emphasis added). *See Donahue v. Donahue*, 299 S.C. 353, 357, 384 S.E.2d 741, 744 (1989). As the U.S. Supreme Court unanimously explained, "[t]he reason for treating circumstantial and direct evidence alike is . . . deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (emphasis added; citation omitted).<sup>9</sup>

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omitted); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("juries are routinely instructed that '[t]he law makes no distinction between the weight or value to be given to either direct or circumstantial evidence.'") (citations omitted).

<sup>9</sup> *See Rogers v. Mo. Pac. R. Co.*, 352 U.S. 500, 508, n. 17 (1957); *The Wenona*, 86 U.S. 41, 58 (1873). Scholars agree that direct evidence is not superior to circumstantial evidence. *See* 1A John Henry Wigmore, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS*

B. CIRCUMSTANTIAL EVIDENCE IS DIFFERENT THAN *RES IPSA LOQUITUR*

It is beyond dispute that “South Carolina does not follow the doctrine of *res ipsa loquitur*” in tort cases, *Watson*, 699 S.E.2d at 179, and, indeed, *res ipsa* “is not applicable” in any kind of case in this State. *Merchant v. Columbia Coca-Cola Bottling Co.*, 214 S.C. 206, 207, 51 S.E.2d 749, 750 (1949) (citing *Eickhoff v. Beard-Laney, Inc.*, 199 S.C. 500, 20 S.E.2d 153 (1942)). Significantly, though, as *Merchant* took pains to explain in the next sentence: “[r]ejection of this [*res ipsa*] rule of evidence does not mean, however, as is pointed out in the *Eickhoff* case, and many others, that negligence may not be established by circumstantial evidence as well as by direct evidence.” 214 S.C. at 207, 51 S.E.2d at 750. (Emphasis added).

*Eickhoff* provides the definitive exposition of how circumstantial evidence differs from *res ipsa loquitur*, and why South Carolina courts bar *res ipsa loquitur* in every case but do not preclude the use of circumstantial evidence in any case. There, writing for unanimous Court, then-Justice (and later Chief Justice) Taylor Hudnall Stukes explicated:

It is important in considering the *res ipsa loquitur* doctrine and its application and effect in given cases, to distinguish that doctrine from the principle that negligence may be established by circumstantial evidence. Failure to observe this distinction has led to some uncertainty . . . .

In other words, in the situation to which *res ipsa loquitur* as a distinctive rule applies, there is no evidence, circumstantial or otherwise, at least none of sufficient probative value, to show negligence, apart from the postulate, which rests on common experience and not on specific circumstances of the instant case, that physical causes of the kind which produced the accident in question do not ordinarily exist in the absence of negligence, that is, in the absence of a breach of

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AT COMMON LAW §26 (P. Tillers rev.ed. 1983) (the idea that “circumstantial evidence may be as persuasive and as compelling as testimonial evidence, and sometimes more so, is now generally accepted.”); 2 Saltzburg, Martin & Capra, FED. RULES OF EVID. MANUAL, § 401.02[3] at 401-7 (“in some cases, circumstantial evidence ... may indeed have more weight than direct evidence”) (citing cases); Charles T. McCormick, HANDBOOK OF THE LAW OF EVIDENCE 317 (1954). An 1850 decision by Lemuel Shaw, the Chief Justice of the Massachusetts Supreme Judicial Court and one of the nineteenth century’s most eminent jurists, is especially illuminating, as reflected in the fact that Wigmore quoted it at great length. See *Commonwealth v. Webster*, 59 Mass. 295, 311-12 (Mass.1850) (Shaw, C.J.), cited in 1A Wigmore, EVIDENCE § 26, at 959-60.

duty such as defendant owed to plaintiff. Rejection of the doctrine of *res ipsa loquitur* does not mean that negligence may not be established by circumstantial evidence as well as by direct evidence.

*Eickhoff*, 20 S.E.2d at 155 (citation omitted; emphasis added.)<sup>10</sup>

The Supreme Court of South Carolina always has appreciated the distinction between liability based on *res ipsa*—*i.e.*, liability based solely on “common experience and not on specific circumstances of the instant case,” *id.*—and liability based on concrete particularized, case-specific circumstantial evidence. Thus, on the one hand:

[e]xperience shows that ordinary machines and appliances often fail or break, when reasonable care, and sometimes when even extreme care, has been exercised in selecting or constructing and maintaining them; and hence the negligence of the master cannot with safety be assumed from the mere fact that they failed or broke in the use.

*Edgens v. Gaffney Mfg. Co.*, 69 S.C. 529, 48 S.E. 538, 538 (1904) (emphasis added).

On the other hand, however—indeed, in the same case—the *Edgens* Court noted the flaw in the plaintiff’s case was not one of doctrine but of fact. Thus, in affirming a nonsuit for the defendant, *Edgens* stressed that “[n]o evidence, either direct or circumstantial, was offered from which the jury might find the defendant liable for operating defective and unsafe machinery....” *Id.* (emphasis added). The implication was clear: if the plaintiff had offered some relevant and credible “evidence, either direct or circumstantial,” dismissal would have been unwarranted.

For these reasons, the Supreme Court repeatedly has stressed: “While our decisions uniformly state that the so called doctrine of *res ipsa loquitur* does not apply in this State, they

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<sup>10</sup> *Byrne v. Boadle*, 159 Eng. Rep. 299 (Exch.Div.1863), provides the original and still classic exposition of the *res ipsa* doctrine. There a barrel of flour fell out of a shopowner’s second-story window and struck a passing pedestrian. The court allowed the plaintiff to recover despite the fact that he had not proffered even a “scintilla” of evidence regarding the shopowner’s fault, *e.g.*, that the shopowner had stored the flour barrel inappropriately or had been moving it in an unsafe manner, or any other allegation that might indicate specific negligent conduct. *Id.* at 301. Yet, the court explained the accident “spoke for itself” and thus held the defendant must have been negligent (in some unknown, unspecified, and perhaps unspecifiable manner). *Id.*

have with equal uniformity recognized that negligence may be proved by circumstantial evidence as well as direct evidence.” *McQuillen v. Dobbs*, 262 S.C. 386, 392, 204 S.E.2d 732, 735 (1974) (quoting *Chaney v. Burgess*, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965)). Indeed, the Supreme Court often has held, since at least 1876, that negligence may be established entirely on circumstantial evidence.<sup>11</sup>

Echoing *Eickhoff*, *Edgens*, and *McQuillen*, modern scholars have clarified the crucial distinction between *res ipsa* and circumstantial evidence cases: with *res ipsa*, a plaintiff no longer need satisfy the traditional requirement of proving every element of his cause of action with particularized, case-specific evidence, that is, of proving that the defendant’s tortious conduct caused the plaintiff’s injuries. Rather, *res ipsa* allows “[a]n inference of negligence on the particular occasion based merely on abstract aggregate statistics” regarding what occurs in an “ordinary” case. Richard W. Wright, *Liability for Possible Wrongs: Causation, Statistical Probability, and the Burden of Proof*, 41 LOY. L.A. L. REV. 1295, 1337 (2008) (citations omitted). Indeed, as *Watson* explained, *res ipsa* “is a rebuttable presumption that the defendant was negligent where an accident is one which ordinarily does not occur in the absence of negligence.” *Watson*, 699 S.E.2d at 179 n.7 (emphasis added).<sup>12</sup> That probabilistic presumption

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<sup>11</sup> See *Hicklin v. Jeff Hunt Mach. Co.*, 226 S.C. 484, 492, 85 S.E.2d 739, 742 (1955) (“It is well settled that negligence may be established by circumstantial evidence as well as direct evidence, and that . . . the law does not require proof to a certainty. We think the circumstances reasonably warrant the inference either that the cotter pin was not in place when the machine left the shop or was in a defective condition and should not have been used. Negligence in causing the fall of the sheave could be based on either fact.”) See also *Caldwell v. Pullman Co.*, 132 S.C. 321, 128 S.E. 504, 505 (1925); *Steele v. Atl. C.L.R. Co.*, 103 S.C. 102, 87 S.E. 639, 642 (1916); *Green v. Southern R. Co.*, 72 S.C. 398, 52 S.E. 45, 47 (1905); *Rowe v. Greenville & C.R. Co.*, 7 S.C. 167, 179 (1876).

<sup>12</sup> “Some courts have tended in the past, and some few still tend, to give *res ipsa loquitur* the effect of a presumption, which requires a directed verdict for the plaintiff if the defendant offers no evidence to rebut it.” RESTATEMENT (SECOND) OF TORTS, § 328D, Comment m (1965). See W. Page Keeton, PROSSER & KEETON ON TORTS 258 (5th ed. 1984 & Supp.1988). Thus, some

regarding what “ordinarily does not occur in the absence of negligence,” *id.*, may be enough, by itself, to establish a *prima facie* case in jurisdictions that accept the *res ipsa* doctrine. See Wright, *Liability*, 41 LOY. L.A. L. REV. at 1337 n.146 (citing Dan B. Dobbs, LAW OF TORTS § 154, at 372 (2001), for “noting, correctly, that *res ipsa loquitur* cases differ ‘overwhelmingly’ from ordinary circumstantial evidence cases by allowing an inference of negligence without any particularistic evidence of negligence on the particular occasion.”).

Circumstantial evidence is very different, as it consists of “concrete evidence specific to the particular occasion about the network of . . . causal relationships leading to and flowing from the particular factual issue being litigated.” Wright, *Liability*, 41 LOY. L.A. L. REV. at 1337 (emphasis added). Significantly, although South Carolina courts reject *res ipsa*, they recognize that concrete, case-specific circumstantial evidence may be appropriate, admissible, and probative in a civil proceeding, such as in a car accident case in which the particularistic testimony of an independent witness “‘contained circumstantial evidence that support[ed] P[laintiff]’s testimony that an unknown driver contributed to her accident;” the witness’

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jurisdictions may allow cases to be submitted to juries under an extreme form of *res ipsa*, *i.e.*, with “no evidence” at all. See *Brown v. Racquet Club of Bricktown*, 471 A.2d 25, 36 (N.J.1984) (Clifford, J. dissenting) (protesting decision that submission of a negligence case to the jury on a theory of *res ipsa loquitur* appropriate despite the fact that “plaintiff introduced no evidence of any specific acts,” noting that “[t]his is the kind of case that could give *res ipsa loquitur* a bad name.”). See also *Judson v. Camelot Food, Inc.*, 756 P.2d 1198, 1201 n.4 (Nev.1988). Nevertheless, “the great majority of the courts . . . treat *res ipsa loquitur* as creating nothing more than a permissible inference, which the jury may draw or refuse to draw,” depending on the evidence in its entirety. REST. (SECOND), § 328D, Comment m. Thus, “the great majority” implicitly embrace (even if they do not formally adopt) the RESTATEMENT (SECOND)’s *res ipsa* formulation—which requires a plaintiff to adduce at least some evidence supporting his claim—as it provides: “(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant’s duty to the plaintiff.” *Id.*, Comment l. See Marshall S. Shapo, PRINCIPLES OF TORT LAW ¶ 45.01 at 248-51 (2d ed.2003); 1 Dobbs, TORTS, § 154.

“testimony that she saw the lights of an unknown car that was turning around and fleeing the scene of the accident sufficiently corroborates [the plaintiff]’s testimony creating a question of fact as to causation for the jury.” *Shealy v. Doe*, 370 S.C. 194, 204, 634 S.E.2d 45, 50 (Ct.App.2006) (quoting *Gilliland v. Doe*, 357 S.C. 197, 202, 592 S.E.2d 626, 629 (2004)). Numerous examples abound of admissible circumstantial evidence.<sup>13</sup>

In these kinds of cases, where direct evidence may be nonexistent, weak, or nearly impossible to obtain, a plaintiff or prosecutor utilizes specific circumstantial evidence to prove that the defendant engaged in particular acts. 1 Dobbs, TORTS, § 154; Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, LAW OF TORTS § 19.3, at 7 (2d ed. 1986).<sup>14</sup>

## II. ALLOWING PARTIES TO USE CIRCUMSTANTIAL EVIDENCE IN PRODUCTS LIABILITY CASES IS CONSISTENT WITH SOUTH CAROLINA PRECEDENT IN EVERY OTHER AREA OF THE LAW: CIVIL, ADMINISTRATIVE, AND CRIMINAL

It is precisely because “[t]he law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence,” *Moriarty*, 341 S.C. at 337, 534 S.E.2d at 680 (citations omitted), that the Supreme Court never has “distinguished between the two types of evidence in numerous cases,” *id.*, and invariably has allowed litigants to use circumstantial evidence in every kind of case, be it civil, administrative, or criminal. Put

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<sup>13</sup> See, e.g., *Coleman v. Shaw*, 281 S.C. 107, 113 n.3, 314 S.E.2d 154, 157 n.3 (Ct.App.1984) (quoting Prosser, TORTS § 41 at 242-43). In the criminal context, a defendant’s “apparent attempt to conceal the body and his flight from the scene constitute substantial circumstantial evidence,” *State v. Al-Amin*, 353 S.C. 405, 413, 578 S.E.2d 32, 37 (Ct.App.2003), as does a defendant’s possession of the weapon which fired the shot that killed the victim, *State v. Freiburger*, 366 S.C. 125, 136-37, 620 S.E.2d 737, 743 (2005), or finding a defendant’s blood on the victim’s body. *State v. Cooper*, 334 S.C. 540, 552, 514 S.E.2d 584, 590 (1999). These pieces of evidence properly would be considered “circumstantial evidence” insofar as each of them, if taken as true, would still require an inference to be drawn in order to resolve the ultimate issue. See MCCORMICK ON EVIDENCE §185, at 308 (K. Broun ed., 6th ed. 2006). See also 2 Saltzburg, Martin, & Capra, FED. RULES OF EVID. MANUAL, § 401.02[3].

<sup>14</sup> In the same vein, “[s]trict liability does not eliminate the necessity . . . to prove a products case,” either directly or “circumstantially.” Marshall S. Shapo, PRODUCTS LIABILITY 114 (1993).

differently, neither this Court nor the Supreme Court ever has held that circumstantial evidence is unsuitable for a particular type of case. (The U.S. Supreme Court has honored the same principle in all types of cases.)<sup>15</sup>

On the civil side, “it is axiomatic in this State that issues of negligence and proximate cause may be resolved by direct or circumstantial evidence.” *Mahaffey v. Ahl*, 264 S.C. 241, 247, 214 S.E.2d 119, 122 (1975) (emphasis added).<sup>16</sup> Thus, South Carolina courts follow this principle in a variety of common law tort actions, such as for:

- medical malpractice, *see, e.g., Green v. Lilliewood*, 272 S.C. 186, 190, 249 S.E.2d 910, 912 (1978); *Cox v. Lund*, 286 S.C. 410, 417-18, 334 S.E.2d 116, 120 (1985);

- toxic/environmental torts, *see, e.g., Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007);

- libel, *see, e.g., Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 513, 506 S.E.2d 497, 503 (1998);

- civil conspiracy, *see, e.g., Pye v. Estate of Fox*, 39 S.C. 555, 567, 633 S.E.2d 505, 511 (2006); *First Union Nat’l Bank of South Carolina v. Soden*, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct.App.1998);

- civil fraud, *see, e.g., Thompson v. Bass*, 167 S.C. 345, 166 S.E. 346, 350 (1932); and

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<sup>15</sup> *See, e.g., U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) (“in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence.”); *Desert Palace*, 539 U.S. at 100 (“The adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the [use or] sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required” to obtain a conviction); *Holland v. United States*, 348 U.S. 121, 140 (1954) (noting that, in criminal cases, circumstantial evidence is “intrinsicly no different from testimonial evidence”); *Allentown Mack Sales & Service, Inc. v. N.L.R.B.*, 522 U.S. 359, 369-72 (1998) (agency cannot bar circumstantial evidence).

<sup>16</sup> *See Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006) (in a negligence case “[t]he question of proximate cause ordinarily is one of fact for the jury, and it may be resolved either by direct or circumstantial evidence.”); *Baggerly v. CSX Trans. Co., Inc.*, 370 S.C. 362, 368-69, 635 S.E.2d 97, 101 (2006) (same). *See also Mack v. West*, 275 S.C. 453, 455, 272 S.E.2d 631, 631 (1980); *Merchant, supra*; *Eichkoff, supra*; *Edgens, supra*; *McQuillen, supra*.

- civil suits for sexual abuse and assault, *see Moriarty*, 341 S.C. at 337-38, 534 S.E.2d at 680-81.

Circumstantial evidence also is employed in tort causes of action created by statute, such as actions for:

- workers' compensation, *see, e.g., Tiller v. National Health Care Center of Sumter*, 334 S.C. 333, 341, 513 S.E.2d 843, 846 (1999); or

- wrongful death, *see, e.g., Legette v. Smith*, 265 S.C. 573, 577, 220 S.E.2d 429, 430 (1975); as well as in

- quasi-tort, quasi-contract actions, such as lawsuits for breach of the implied warrant of merchantability, *see, e.g., Doty v. Parkway Homes Co.*, 295 S.C. 368, 369, 368 S.E.2d 670, 671 (1988).

South Carolina courts routinely permit parties to use circumstantial evidence in non-tort civil actions, such as in

- contract disputes, *see, e.g., Ex parte Bland*, 380 S.C. 1, 12, 667 S.E.2d 540, 546 (2008); *Brown v. Allstate Ins. Co.*, 344 S.C. 21, 25, 542 S.E.2d 723, 725 (2001); *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 108, 594 S.E.2d 485, 492 (Ct.App.2004);

- divorce and alimony proceedings, *see, e.g., Brown v. Brown*, 379 S.C. 271, 280, 665 S.E.2d 174, 179 (Ct.App.2008); *Anders v. Anders*, 285 S.C. 512, 515, 331 S.E.2d 340, 342 (1985);

- disputes regarding the disposition of estates, *see, e.g., In re Last Will and Testament of Smoak*, 286 S.C. 419, 428, 334 S.E.2d 806, 811 (1985); *Mock v. Dowling*, 266 S.C. 274, 276, 222 S.E.2d 773, 774 (1976);

- to establish the value of disputed property, *see, e.g., Hughes v. Palatine Ins. Co.*, 130 S.C. 383, 126 S.E. 125, 125 (1924); *Beasley v. Swinton*, 46 S.C. 426, 24 S.E. 313, 323-24 (1896); and

- to appraise the value of corporate stock, *see, e.g., Santee Oil Co., Inc. v. Cox*, 265 S.C. 270, 277, 217 S.E.2d 789, 793 (1975).

Moreover, State administrative agencies frequently rely on circumstantial evidence. *See Waters v. South Carolina Land Resources Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996) (holding circumstantial evidence may be relied on by administrative agencies in decision-making and by reviewing courts in upholding agency findings of fact). *See also Bilton*

*v. Best Western Royal Motor Lodge*, 282 S.C. 634, 642, 321 S.E.2d 63, 68 (Ct.App.1984); *Burse v. Dept. of Health and Environmental Control*, 360 S.C. 135, 142, 600 S.E.2d 80, 84 (Ct.App.2004).

Finally, and perhaps most importantly, it is equally well-established that in criminal cases “[i]f there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury.” *State v. Freiburger*, 366 S.C. 125, 136, 620 S.E.2d 737, 743 (2005) (upholding conviction for murder) (emphasis added; citations omitted). Consequently, South Carolina courts have upheld convictions in a variety of prosecutions solely on the basis of circumstantial evidence. *See State v. Frazier*, 386 S.C. 526, 533, 689 S.E.2d 610, 614 (2010) (upholding a conviction for murder and armed robbery because “[t]he totality of the evidence, viewed as a whole, establishes substantial circumstantial evidence of the elements of armed robbery.”).<sup>17</sup> Indeed, the Supreme Court frequently has “held that a conviction and sentence of death based upon circumstantial evidence is not improper.” *State v. Williams*, 321 S.C. 327, 338, 468 S.E.2d 626, 632 (1996) (emphasis added). *See State v. Winkler*, 388 S.C. 574, 588-89, 698 S.E.2d 596, 603-04 (2010).

Ten years ago, the *Moriarty* Court surveyed a much smaller list of civil, administrative, and criminal cases, determined that circumstantial evidence had been appropriately used in all of them, and ultimately “[f]ound no reason to draw a distinction between the use of direct or circumstantial evidence in a repressed memory” sexual abuse/sexual assault case. *Moriarty*, 341 S.C. at 337-38, 534 S.E.2d at 680-81. This Court should apply the same standard and methodology and reach the same result in this case.

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<sup>17</sup> *See also State v. Odems*, 385 S.C. 399, 406, 684 S.E.2d 573, 576 (Ct.App.2009) (burglary); *State v. Bennett*, 328 S.C. 251, 264, 493 S.E.2d 845, 851 (1997) (kidnapping); *State v. Huggins*, 325 S.C. 103, 110, 481 S.E.2d 114, 118 (1997) (criminal conspiracy); *State v. Harry*, 321 S.C. 273, 279-80, 468 S.E.2d 76, 80 (Ct.App.1996) (arson).

**III. ALLOWING CIRCUMSTANTIAL EVIDENCE TO BE USED IN PRODUCTS LIABILITY CASES IS CONSISTENT WITH THE PRACTICE “EMPLOYED BY AN OVERWHELMING MAJORITY OF THE JURISDICTIONS IN THIS COUNTRY.”**

**A. THE SUPREME COURT CLOSELY FOLLOWS TRENDS IN OTHER STATES**

Earlier this year the Supreme Court decided to adopt the “risk-utility test” in strict products liability design-defect cases after finding that thirty-five (35) States “utilize some form of risk-utility analysis in their approach to determine whether a product is defectively designed,” *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 14 n.11 (S.C.2010), a number which constituted “an overwhelming majority of the jurisdictions in this country.” *Id.* at \*8. *Branham* also noted the risk-utility test has been embraced in and recommended by § 2(b) of the American Law Institute’s (“ALI”), RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) (the “PRODUCTS RESTATEMENT”), finding the ALI’s “guidance in this area is instructive.” *Id.*<sup>18</sup>

Although South Carolina courts certainly are not required to follow the decisions of courts in other States (or to follow the ALI’s “guidance”), the Supreme Court pays very close attention to decisions of other courts and almost invariably is “persuaded by the reasoning of those courts” whose careful analyses persuade a majority of States to agree. *Boan v. State*, 388 S.C. 272, 276, 695 S.E.2d 850, 852 (2010). Indeed, the Supreme Court has elected to follow the majority rule seventeen (17) times in the last five years alone, including in *Boan* and *Branham*.<sup>19</sup>

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<sup>18</sup> For an extensive discussion of both the history of products liability and the development of the ALI’s Restatements regarding products liability, see Richard W. Wright, *The Principles of Product Liability*, 26 REV. LITIG. 1067 (2007); Marshall S. Shapo, *THE LAW OF PRODUCTS LIABILITY* (3d ed. 1994 & Supp.1999).

<sup>19</sup> See also *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 698 S.E.2d 773, 783 (2010); *Fowler v. Hunter*, 388 S.C. 355, 362, 697 S.E.2d 531, 535 (2010); *Todd v. Joyner*, 385 S.C. 421, 425, 685 S.E.2d 595, 597 (2009); *State v. Edwards*, 383 S.C. 66, 72, 678 S.E.2d 405, 408 (2009); *Blackburn v. Dausfuskie Is. Fire Dist.*, 382 S.C. 626, 632, 677 S.E.2d 606, 609 (2009); *State v. White*, 382 S.C. 265, 272, 676 S.E.2d 684, 687, (2009); *Gissel v. Hart*, 382 S.C. 235, 243, 676 S.E.2d 320, 324 (2009); *Kiriakides v. School Dist. of Greenville Cty.*, 382 S.C. 8,

More telling still, the Supreme Court never has departed from the majority path during this period.

**B. COURTS IN FORTY-SEVEN (47) STATES ALLOW LITIGANTS TO USE CIRCUMSTANTIAL EVIDENCE IN PRODUCTS LIABILITY CASES, I.E., COURTS IN EVERY STATE THAT HAS CONSIDERED THE QUESTION**

Applying the majority-approach yardstick to the question of whether this Court should allow circumstantial evidence to be used in products liability cases leads to the inexorable conclusion that this Court ought to do so because an examination of the law in other jurisdictions demonstrates (as detailed in accompanying Appendix B) that courts in 47 of the other 49 States that recognize products liability claims as a separately cognizable cause of action expressly have held that plaintiffs may use circumstantial evidence to prove defects. The list includes all of South Carolina's neighbors.<sup>20</sup> (Courts in Alaska and Maine have not ruled on the issue, at least

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18, 675 S.E.2d 439, 444 (2009); *Davie v. State*, 381 S.C. 601, 609, 675 S.E.2d 416, 420 (2009); *ATC South, Inc. v. Charleston Cty.*, 380 S.C. 191, 197-98, 669 S.E.2d 337, 340 (2008); *Sloan v. Dept. of Transp.*, 379 S.C. 160, 170, 666 S.E.2d 236, 241 (2008); *Spoone v. State*, 379 S.C. 138, 143, 665 S.E.2d 605, 607 (2008); *McKnight v. State*, 378 S.C. 33, 49, 661 S.E.2d 354, 362 (2008); *Hurst v. East Coast Hockey League, Inc.*, 371 S.C. 33, 38, 637 S.E.2d 560, 562 (2006); *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 12, 633 S.E.2d 722, 726 (2006).

<sup>20</sup> See, e.g., *DeWitt v. Eveready Battery Co., Inc.*, 565 S.E.2d 140, 151 (N.C.2002) ("the burden sufficient to raise a genuine issue of material fact in case may be met if the plaintiff produces adequate circumstantial evidence of a defect.") (strict products liability/breach of warranty case); *Rose v. Figgie Intern., Inc.*, 495 S.E.2d 77, 81 (Ga.App.1997) ("circumstantial evidence is particularly appropriate in product liability cases"); *Miller v. Allstate Ins. Co.*, 650 So.2d 671, 672 (Fla.App.1995) ("a products liability plaintiff may establish a prima facie case . . . on circumstantial evidence"); *Perkins v. Trailco Mfg. & Sales Co.*, 613 S.W.2d 855, 857 (Ky.1981) ("the existence of a defect in the product itself may be established by a sufficient quantum of circumstantial evidence"); *Meadows v. Coca-Cola Bottling, Inc.*, 392 So.2d 825, 827 (Ala.1981) ("circumstantial evidence of similar defects in other units of the product in litigation is competent to show that a product is defective"); *Browder v. Pettigrew*, 541 S.W.2d 402, 405 (Tenn.1976) ("a defect in a product, as well as any other material fact, may be proven by direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence."). For additional representative cases, see Appendix B.

not decisively, although multiple appellate decisions in each State strongly suggest that these States would join every other one if a suitable case presented the opportunity to do so).<sup>21</sup>

Strikingly, the 47 States that allow circumstantial evidence in products liability actions do so despite the fact that “the vast majority of courts have held that [*res ipsa*] is not applicable in strict liability cases” Terrence F. Kiely & Bruce L. Ottley, UNDERSTANDING PRODUCTS LIABILITY LAW § 8.02 at 227 (2006).<sup>22</sup>

The Reporters for the PRODUCTS RESTATEMENT, Professors James A. Henderson, Jr., of Cornell Law School and Aaron D. Twerski of Brooklyn Law School, found that “[a] huge body of case law supports th[e] proposition” that circumstantial evidence is very often used—and

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<sup>21</sup> For example, as highlighted in Appendix B, although Alaska courts have not expressly held that circumstantial evidence may be used in products liability cases, those courts often have quoted with approval California Supreme Court decisions that have so held. *See, e.g., Clary v. Fifth Ave. Chrysler Center, Inc.*, 454 P.2d 244, 246-47 (Alaska 1969) (“The facts before us are similar in many respects to those considered by the Supreme Court of California in *Vandermark v. Ford Motor Co.*,” 391 P.2d 168, 170 (Cal.1964), where California’s high “court held that products liability plaintiffs ‘were entitled to establish the existence of a defect . . . by circumstantial evidence . . . .’”).

<sup>22</sup> *See* J. Gregory Marks, *Determining the Indeterminate Defect*, 36 ST. MARY’S L.J. 237, 245 & n.55 (2005) (citing *Welge v. Planters Lifesavers Co.*, 17 F.3d 209, 211 (7th Cir.1994); *Brooks v. Colonial Chevrolet-Buick, Inc.*, 579 So.2d 1328, 1333 (Ala.1991); *Tresham v. Ford Motor Co.*, 275 Cal.App. 2d 403, 407 (Cal.App.1969); *Ford Motor Co. v. Reed*, 689 N.E.2d 751, 754 (Ind.App.1997); *Brothers v. Gen’l Motors Corp.*, 658 P.2d 1108, 1110 (Mont.1983); *Myrlak v. Port Auth. of N.Y. & N.J.*, 723 A.2d 45, 54 (N.J.1999); *Fulton v. Pfizer Hospital Products Group, Inc.*, 872 S.W.2d 908, 912 (Tenn.App.1994)). *See also Rutledge v. Harley-Davidson Motor Co.*, 364 Fed.Appx. 103, 107, 2010 WL 445498, \*4 (5<sup>th</sup> Cir.2010) (“The doctrine of *res ipsa loquitur* is inapplicable in any action predicated upon the theory of strict liability.”) (citations omitted). *Cf. Hughes v. Stryker Sales Corp.*, --- F.Supp.2d ---, 2010 WL 1961051, \*4 (S.D.Ala.2010); *Show v. Ford Motor Co.*, 697 F.Supp.2d 975, 984 (N.D.Ill.2010); *Freeman Family Ranch, Ltd. v. Maupin Truck Sales, Inc.*, 2010 WL 908665, \*8 (W.D.Okla.2010); *Mohammad v. Toyota Motor Sales, U.S.A., Inc.*, 947 A.2d 598, 608 (Md.App.2008); *Park v. Bay Crane, Inc.*, 854 N.Y.S.2d 154, 155 (N.Y.App.2008); *Miller v. Ford Motor Co.*, 653 S.E.2d 82, 84 (Ga.App.2007).

should be used—in products liability cases. PRODUCTS RESTATEMENT, § 3, Reporters' Note, Comment b. (Emphasis added).<sup>23</sup>

The ALI synthesized this “huge body of case law” into § 3 of the PRODUCTS RESTATEMENT, which provides, in full:

It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff: (a) was of a kind that ordinarily occurs as a result of product defect; and (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution.

Although this may seem similar to the inference of negligent causation under the *res ipsa* doctrine, the ALI intended a much narrower interpretation. Section 3, Comment b states that such an inference is permissible if, and only if, the harm is caused by the product's failure “to perform its manifestly intended function” in a specific situation in which there must have been a

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<sup>23</sup> Like the official texts of the RESTATEMENTS themselves, which often are regarded as “authoritative guides,” Hon. Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute*, 1995 WIS. L.REV. 1, 3 (1995), see Hon. Herbert P. Wilkins, *Process, Partisanship, and the Restatements of Law*, 26 HOFSTRA L.REV. 567, 567 (1998), the official Comments and Reporters' Notes frequently are cited as persuasive authorities in their own right, see, e.g., *Branham*, at 390 S.C. at 220, 701 S.E.2d at 14 & n.10; *Samantar v. Yousuf*, --- U.S. ---, 130 S.Ct. 2278, 2285, n.6 (2010), perhaps not least because of the caliber of ALI members and the lengthy collaborative process that informs the drafting and adoption of each Restatement. As Professors Henderson and Twerski explain: “Altogether, at least a dozen formal drafts, ... widely circulated among ALI members, were discussed, debated, criticized, and revised over the five-year life of the project. The Reporters met with one group or another in formal sessions at least six times each year and presented drafts at Annual Meetings in 1994, 1995, 1996, and 1997. Thousands of written suggestions were received and considered by the Reporters, and countless hours were spent ... discussing every conceivable aspect of the project. Reported appellate court decisions and statutes spanning a thirty-year period were examined, classified, and relied on as the basis for the black letter rules and supporting comments. All of this research is included in the finished form of extensive Reporters' Notes.” Henderson & Twerski, *What Europe, Japan, and Other Countries Can Learn from the New American Restatement of Products Liability*, 34 TEX. INT'L L.J. 1, 6 (1999).

In 1997, “[f]or their contributions to this RESTATEMENT, Henderson and Twerski were jointly appointed to the [ALI's] Cutter Reporter's Chair, an honor reserved for Reporters whose work is [considered] . . . especially outstanding.” ALI, PRODUCTS RESTATEMENT, [http://www.ali.org/ali\\_old/promo6081.htm](http://www.ali.org/ali_old/promo6081.htm) (last visited May 8, 2011).

defect in the product. This clearly applies here, where (per the plaintiffs' evidence) the Monitor failed to sound its alarm, which is its sole purpose.

Other highly regarded scholars have echoed the PRODUCTS RESTATEMENT's now twelve-year old finding that circumstantial evidence was, even then, almost universally accepted in American courts to adequately establish that a product is defective. For example, a decade ago, Professor David G. Owen<sup>24</sup> wrote that “[a] substantial and growing majority of American jurisdictions . . . now accept this principle of circumstantial evidence for proving defectiveness in strict products liability.” David G. Owen, *Manufacturing Defects*, 53 S.C. L. REV. 851, 882 (2002) (emphasis added; footnotes omitted).<sup>25</sup> As evidenced by the nearly 200 cases (from 47 States) listed in Appendix B, the “substantial . . . majority” has indeed “grow[n]” since that time.

**C. LEADING TORT COMMENTATORS COMMEND PLAINTIFFS' USE OF CIRCUMSTANTIAL EVIDENCE IN PRODUCTS LIABILITY CASES AS “LOGICAL” AND “FAIR,” AS WELL AS “WELL-ESTABLISHED”**

There are good reasons why courts in 47 States unambiguously allow litigants to use circumstantial evidence in products liability cases and why the ALI has “endorse[d]” and

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<sup>24</sup> Owen is the Carolina Distinguished Professor of Law and Director of the Office of Tort Law Studies at the University of South Carolina. He also is the author of the leading casebook on the subject, PRODUCTS LIABILITY AND SAFETY (6<sup>th</sup> ed. 2010), the preeminent hornbook/treatise on the topic, PRODUCTS LIABILITY LAW (2d ed. 2008), and the most widely used “nutshell” in the field, PRODUCTS LIABILITY IN A NUTSHELL (8<sup>th</sup> ed. 2008), as well as the co-author of the most frequently cited multi-volume treatise on the subject: MADDEN & OWEN ON PRODUCTS LIABILITY (3d ed. 2000). Finally, Professor Owen is the editor of PHILOSOPHICAL FOUNDATIONS OF TORT LAW (1995), a co-author of PROSSER AND KEETON ON TORTS (5th ed. 1984 and 1988 Supp.), an Adviser to the American Law Institute on the RESTATEMENT (THIRD) OF TORTS, and an Editorial Adviser for the ALI's RESTATEMENT OF PRODUCTS LIABILITY.

<sup>25</sup> See David G. Owen, *Design Defect Ghosts*, 74 BROOK. L. REV. 927, 944 (2009); Dominick Vetri, *Order Out of Chaos: Products Liability Design-Defect Law*, 43 U. RICH. L. REV. 1373, 1427-32 (2009); Owen, PRODUCTS LIABILITY LAW, § 7.4 at 473 (“[h]aving spread across the nation . . . , the malfunction doctrine has become a well-established precept of modern products liability law.”). See also Chad E. Wallace, *Skimming the Trout from the Milk: Using Circumstantial Evidence to Prove Product Defects under the Restatement (Third) of Torts*, 68 TENN. L. REV. 647, 665, 677-81, 691 (2001).

“certified” the use of circumstantial evidence in such cases.<sup>26</sup> As Professor Owen, who extols the views of the “growing majority,” explains:

it is difficult to see how any jurisdiction could reject some properly formulated version of such a well-established, fair, and logical principle of proof. In short, the manifest merits of this simple canon of circumstantial evidence suggests that its acceptance should soon be universal.

Owen, *Manufacturing Defects*, 53 S.C. L. REV. at 883 (emphasis added; footnotes omitted).<sup>27</sup>

Other students of the issue agree. Indeed, “[f]ew would question the use of circumstantial evidence to prove products liability in appropriate cases.” J. Gregory Marks, *Determining the Indeterminate Defect*, 36 ST. MARY’S L.J. 237, 239 (2005) (quoting *Ford Motor Co. v. Ridgway*, 135 S.W.2d 598, 603 (Tex.2004) (Hecht, J.)).<sup>28</sup> As evidenced above, no State has “question[ed] the use of circumstantial evidence to prove products liability” in the proper case and under appropriate conditions. *Id.*

In the final analysis, South Carolina courts have every right to stand alone and to “question the use of circumstantial evidence to prove products liability.” After all, the majority is often wrong and “a foolish consistency is the hobgoblin of little minds . . . .” Ralph Waldo Emerson, *Self-Reliance*, in EMERSON, ESSAYS: FIRST SERIES 53 (1895 ed.). Nevertheless, *amici* respectfully submit there are no jurisprudentially sound reasons for South Carolina courts to

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<sup>26</sup> In Professor Owen’s view, the ALI’s decision “to endorse[] the principle in the Products Liability Restatement § 3,” did not advocate substantial changes in existing law but merely restated and “[c]ertif[ied] the propriety of the doctrine’s widespread acceptance.” *Manufacturing Defects*, 53 S.C. L. REV. at 883 (footnotes omitted).

<sup>27</sup> See Owen, *Design Defect Ghosts*, 74 BROOK. L. REV. at 944 (balanced, “fair and simple”). Cf. Owen, PRODUCTS LIABILITY LAW, § 6.5 at 430 (“logic and fairness” support the use of “circumstantial proof of defect[s]”), and *id.*, § 7.4 at 473 (“[h]aving spread across the nation . . . , the malfunction doctrine has become a well-established precept of modern products liability law.” (footnote omitted)).

<sup>28</sup> See James A. Henderson, Jr. and Aaron D. Twerski, *The Products Liability Restatement in the Courts*, 27 WM. MITCHELL L. REV. 7, 21-24 (2000); Vicki L. MacDougall, *The Impact of the Restatement (Third) Torts: Products Liability*, 62 CONSUMER FIN. L.Q. REP. 105, 110-11 (2008); Victor M. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U.L.REV. 796, 828-36 (1983).

disregard their own long-standing precedents, and to ignore the decisions of 47 other States, by denying the plaintiffs the opportunity to use circumstantial evidence to make their case that the CAS Monitor that failed to warn them of their baby's life-threatening condition was defective.

**D. SOUTH CAROLINA COURTS ALSO SHOULD FOLLOW THE ALI RESTATEMENT'S GUIDANCE REGARDING THE USE OF CIRCUMSTANTIAL EVIDENCE IN LIEU OF "PROOF OF A SPECIFIC DEFECT," IN LIEU OF PROOF OF A "REASONABLE ALTERNATIVE DESIGN," IN LIEU OF THE NEED FOR EXPERT TESTIMONY IN EVERY CASE, AND REGARDLESS OF WHETHER THE PRODUCT IN QUESTION FAILED BECAUSE OF A DESIGN DEFECT OR A MANUFACTURING DEFECT.**

*Amici* respectfully suggest that South Carolina courts not only should adopt the ALI's general position allowing circumstantial evidence in products cases, but also the ALI's particular guidance regarding the need for expert testimony, alternative designs, and identification of which component of a product is defective and in what respect.

The text of the first paragraph of the PRODUCTS RESTATEMENT § 3 explicitly states that the existence of a product defect "may be inferred . . . without proof of a specific defect." (This contrasts with the Circuit Court's opinion that the Graves are required to "identify the specific defect" in the CAS Monitor, April 8<sup>th</sup> Order at 9). Official Comment c to PRODUCTS RESTATEMENT § 3 elaborates on this rule:

**c. No requirement that plaintiff prove what aspect of the product was defective**—The inference of defect may be drawn under this Section without proof of the specific defect. Furthermore, quite apart from the question of what type of defect was involved, the plaintiff need not explain specifically what constituent part of the product failed. For example, if an inference of defect can be appropriately drawn in connection with the catastrophic failure of an airplane, the plaintiff need not establish whether the failure is attributable to fuel-tank explosion or engine malfunction.

(Emphasis added). As detailed in both the following footnote and accompanying Appendix C, the views set forth in § 3, Comment (c) are completely consistent with case law from around the country, which hold that a plaintiff is not required to identify the alleged defect with

particularity, or describe which individual “constituent part” or sub-component of a product was flawed, or explain precisely how and why a component was defectively designed, or how and why a sub-component was defectively manufactured, or how and why the entire product malfunctioned.<sup>29</sup>

As a further consequence, products liability plaintiffs relying on circumstantial evidence “need not prove that the product departed from its intended design or that a reasonable alternative design could have been adopted.” Section 3, Reporters’ Note 1 (emphasis added).<sup>30</sup> See Michael D. Green, *The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects*, 74 BROOK. L. REV. 807, 835 (2009).

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<sup>29</sup> See, e.g., *Ramos v. Howard Indus., Inc.*, 885 N.E.2d 176, 178 (N.Y.2008) (“It is well settled that a products liability cause of action may be proven by circumstantial evidence, and thus, a plaintiff need not identify a specific product defect”); *Bennett v. Asco Services, Inc.*, 621 S.E.2d 710, 717 (W.Va.2005) (“A plaintiff is not required to establish a strict products liability cause of action by identifying the specific defect that caused the loss, but instead may permit a jury to infer the existence of a defect by circumstantial evidence.”). For additional representative cases, see Appendix C.

As Professor Owen explains: “Since normal products liability doctrine requires a plaintiff to establish that a product was defective and that the defect caused his harm, requiring a plaintiff to prove that a specific defect caused the accident might appear to make good sense. But the very purpose of the malfunction doctrine is to allow a plaintiff to prove a case by circumstantial evidence when there simply is no direct evidence of precisely how or why the product failed. Sometimes the specific cause of a malfunction disappears in the accident when the product blows up, burns up, is otherwise severely damaged, or is thereafter lost. Not infrequently, however, products simply malfunction, and mysteriously so, leaving no tangible trace of how or why they failed. In all such situations, where direct evidence is unavailable, the courts have properly refused to require the plaintiff to prove what specific defect caused the product to malfunction.” Owen, *Manufacturing Defects*, 53 S.C.L. REV. at 874 (footnotes omitted). See Owen, PRODUCTS LIABILITY LAW, § 7.4 at 472; 2 Dobbs, TORTS, §§ 360, 362.

<sup>30</sup> A “tentative draft” of the PRODUCTS RESTATEMENT, which lacked this disclaimer, was heavily criticized for nullifying plaintiffs’ ability to use circumstantial evidence to prove their case without expert testimony or proof of feasible alternative designs. See Wright, *Principles of Products Liability*, 26 REV. LITIG. at 1087 (the “feasible alternative design requirement imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration. Such a rule would require plaintiffs to retain an expert witness even in cases in which lay jurors can infer a design defect from circumstantial evidence.”) (quoting *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1332 (Conn.1997) (internal citations omitted)).

Moreover, PRODUCTS RESTATEMENT § 3, together with the cases cited in the accompanying official Comments and Reporters' Notes, establishes that a plaintiff is not required to adduce expert testimony to prove a product defect in every case, regardless of whether the alleged defect is one of design or manufacture; rather, the need for such testimony depends on the facts and circumstances of each case.<sup>31</sup> (Indeed, as a general rule, “[i]t is well settled that expert testimony is unnecessary in cases where jurors ‘are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training.’” *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 46 (2d Cir.2004) (citations omitted)).<sup>32</sup>

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<sup>31</sup> See, e.g., *Newell Rubbermaid, Inc. v. Raymond Corp.*, 2010 WL 2643417, \*11 (N.D. Ohio 2010) (applying Ohio law) (“expert testimony is not always required to prove the material elements of a design defect claim.” (citations omitted)); *Hughes v. Stryker Sales Corp.*, 2010 WL 1961051, \*2 (S.D. Ala. 2010) (“under Alabama law, but . . . [a]s also consistent with precedents from other jurisdictions,” “expert testimony is not always necessary to establish the existence of a manufacturing defect” and the issue of “[w]hether expert testimony is required [in a products liability case] ultimately depends on whether it is a fact issue upon which the jury needs assistance to reach an intelligent or correct decision.” (citations omitted; brackets in the original); *Driskill v. Ford Motor Co.*, 269 S.W.3d 199, 204 (Tex. App. 2008) (expert testimony is “generally encouraged” but definitely is “not required to establish a products liability claim.” . . . Whether expert testimony is required depends on whether the issue involves matters beyond ‘the general experience and common understanding of laypersons.’”) (citations omitted); *Cansler v. Mills*, 765 N.E.2d 698, 706 (Ind. App. 2002) (“Expert testimony is not always required . . . if there is sufficient circumstantial evidence . . . .”); *Arnold v. Krause, Inc.*, 233 F.R.D. 126, 132 (W.D.N.Y. 2005) (applying New York law) (“a claim of strict products liability may be established based upon circumstantial evidence” and “[e]xpert testimony as to the specific design defect is not required.”); *Krause Inc. v. Little*, 34 P.3d 566, 571 (Nev. 2001) (“expert testimony is not always necessary to establish the existence of a manufacturing defect.”). For additional representative cases, see Appendix F.

<sup>32</sup> See Wright, *Principles of Products Liability*, 26 REV. LITIG. at 1087 (discussing *Potter*, 694 A.2d at 1332); Frank J. Vandall, *The Restatement (Third) . . . Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN.L.REV. 1407, 1426 & n.118 (1994) (citing cases); Frank J. Vandall, “*Design Defect*” in *Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST.L.J. 61, 76 (1982).

This fully comports with South Carolina practice in both products liability and complex negligence cases, such as ones for medical malpractice.<sup>33</sup> Thus, as the Supreme Court recently stressed: “[i]n discussing the issue of proof in a defective design case, Professors Hubbard and Felix say, ‘As with other matters in varying degrees beyond the knowledge and experience of ordinary persons, expert testimony will often be useful and may be necessary,’” *Watson*, 699 S.E.2d at 174 (emphasis added; quoting F. Patrick Hubbard & Robert L. Felix, *THE SOUTH CAROLINA LAW OF TORTS* 313 (3d ed. 2004)). By negative implication, expert testimony is neither indispensable nor required in every case.

Finally, as detailed in Appendices D and E, many of the cases that informed the RESTATEMENT, or have been guided by it, pointedly emphasize that circumstantial evidence may be used to prove a product defect in both design defect cases<sup>34</sup> and/or manufacturing defect cases.<sup>35</sup> One reason why, at least for circumstantial evidence purposes, it is immaterial to specify whether the product was defectively designed or manufactured is that the two types of defects

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<sup>33</sup> For example, *Green v. Lilliewood*, 272 S.C.186, 192, 249 S.E.2d 910, 913 (1978), reversed the grant of a directed verdict for a defendant physician where plaintiff relied on circumstantial evidence that showed his medical problems began soon after insertion of a medical device, holding that in “considering the sufficiency of circumstantial evidence, the facts and circumstances should be assessed in light of ordinary experience and common sense. This general proposition of tort law has been applied in . . . malpractice cases as an exception to the general rule requiring expert . . . testimony.” (Internal citations omitted). *See Cox v. Lund*, 286 S.C. 410, 416, 334 S.E.2d 116, 120 (1985).

<sup>34</sup> *See, e.g., Atkins v. Gen'l Motors Corp.*, 132 Ohio App.3d 556, 564, 725 N.E.2d 727, 733 (Ohio App.2009) (circumstantial evidence may “suffice to document the existence of a design defect.”); *Webber v. Hilborn*, 2009 WL 5150082 (Mich.App.2009) (“defective design . . . claim may be based on either direct or circumstantial evidence”) (citations omitted). For additional representative cases on the same point, *see* Appendix D.

<sup>35</sup> *See, e.g., Turpin v. Stanley Schulze & Co., Inc.*, 2009 WL 875218, \* 5-6 (Ky.App.2009) (“manufacturing defect” may be established by “circumstantial evidence”) (citations omitted); *Shaun T. Mian Corp. v. Hewlett-Packard Co.*, 237 S.W.3d 851, 854 (Tex.App.2007) (“circumstantial evidence was sufficient to raise an issue of material fact as to each contested element of their manufacturing defect claim.”). For additional representative cases on the same point, *see* Appendix E.

may “overlap[] and operate simultaneously.” Jerry J. Phillips, *Products Liability: Beyond Warnings*, 26 N. KY. L. REV. 595, 623 (1999)). See Owen, *Manufacturing Defects*, 53 S.C.L. REV. at 874.<sup>36</sup>

In sum, this Court should reverse the decision below and allow circumstantial evidence to be used in products liability cases because such evidence is admissible in each of the other States whose courts have considered the question and because the ALI and leading scholars endorse the approach taken by the vast majority of the States.

#### IV. BARRING THE USE OF CIRCUMSTANTIAL EVIDENCE TO PROVE A PRODUCTS LIABILITY CAUSE OF ACTION WILL CONFUSE JURIES AND BURDEN ALREADY OVERTAXED COURTS

Prohibiting plaintiffs from using circumstantial evidence to prove a strict products liability cause of action will not prevent plaintiffs from introducing circumstantial evidence in a products liability case. This is so because South Carolina allows plaintiffs to plead multiple claims in a single case and because products liability plaintiffs often join negligence and breach of implied warranty claims to strict liability claims, just as the plaintiffs did in this case.<sup>37</sup>

Because, as detailed above, products liability plaintiffs may use circumstantial evidence in support of their negligence and warranty claims, juries will be confused by contradictory

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<sup>36</sup> See *Bryan v. John Bean Div. of FMC Corp.*, 566 F.2d 541, 547-48 (5th Cir.1978) (inadequate specifications, a design defect, led to manufacturing defects); *Colt Indus. Op. Corp. v. Frank W. Murphy Mfr., Inc.*, 822 P.2d 925, 930 (Alaska 1991) (same).

<sup>37</sup> See *Melton v. Medtronic, Inc.*, 389 S.C. 641, 650 n. 3, 698 S.E.2d 886, 890 n.3 (Ct.App.2010) (plaintiff “alleged ten causes of action: [including] (1) products liability, negligence (against Medtronic); (2) products liability, strict liability (against Medtronic); (3) breach of warranty, merchantability (against Medtronic); (4) breach of warranty, fitness for a particular purpose (against all defendants); (5) breach of warranty, express (against all defendants); (6) medical malpractice and negligence (against all defendants).”). See also *Holst v. KCI Konecranes Int’l. Corp.*, 390 S.C. 29, 699 S.E.2d 715, 717 (Ct.App.2010) (manufacturer sued for negligence, breach of warranty, and defective design); *Rife v. Hitachi Const. Mach. Co., Ltd.*, 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005) (same).

instructions.<sup>38</sup> Thus, on the one hand, juries will be instructed (for negligence and warranty purposes) to regard “circumstantial evidence is just as good as direct evidence,” *St. Paul Fire*, 251 S.C. at 59-60, 159 S.E.2d at 923, and that both types “inherently possess the same probative value.” *Cherry*, 361 S.C. at 600, 606 S.E.2d at 481. On the other hand, though, for strict liability purposes, jurors will be told to ignore circumstantial evidence as worthless and unreliable. The possibilities of confused juries, inconsistent verdicts, complex post-trial motions, and multiple appeals seem high.

Such results would be unwelcome in any court system and would seem to be especially undesirable to South Carolina’s courts, which are twice as busy as the average court in the country. As Chief Justice Toal explained in her *2010 State of the Judiciary Address*, the South Carolina Judiciary Department (“SCJD”) has been in the midst of, or threatened with, a financial crisis for more than a decade, a crisis which has compelled the SCJD to put into effect a “hiring freeze,” “[r]educe[] judges’ travel, [e]liminate[] travel for law clerks, [r]estrict[] travel for court reporters, [a]uthorize[] county Clerks of Court to operate with skeleton staffs on local furlough days . . . ,” and “[c]ut the reimbursement of the monthly office allowance to judges.” Chief Justice Jean Hofer Toal, *2010 State of the Judiciary: Presentation to the South Carolina Legislature* 5 (Feb. 24, 2010) (<http://www.sccourts.org/whatsnew/2010StateOfJudiciary.pdf>; last

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<sup>38</sup> “In a products liability action, regardless of the theory of recovery pursued, a plaintiff must establish three elements: (1) he was injured by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) the product, at the time of the accident, was in essentially the same condition as when it left the hands of the defendant.” *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 15, 677 S.E.2d 612, 614 (Ct.App.2009) (citations omitted). “In addition, liability for negligence also requires proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design.” *Id.*, 383 S.C. at 15, 677 S.E.2d at 614-15 (citations omitted). “[A] plaintiff must prove the product defect was the proximate cause of the injury sustained,” which requires proof of causation in fact and legal cause. ‘Causation in fact is proved by establishing the injury would not have occurred “but for” the defendant’s negligence,’ while ‘Legal cause is proved by establishing foreseeability.’” *Id.*, 383 S.C. at 16, 677 S.E.2d at 615 (citations omitted).

visited Feb. 29, 2010). As a result, South Carolina judges remain among the busiest in the nation, and “South Carolina continues to have more than twice the national average of filings per judge.” *Id.* at 8.<sup>39</sup> And additional and more stringent cuts might be in the offing.<sup>40</sup>

Barring circumstantial evidence and mandating that plaintiffs retain experts to prove a specific defect in every strict products liability cause of action (which is the Circuit Court’s preferred alternative to the use of circumstantial evidence) not only would increase the litigation costs for plaintiffs who pursue this option (and increase defense costs as well), discourage other plaintiffs from filing suit because the costs are prohibitive (and thereby effectively deny such plaintiffs access to the courts), and increase jury confusion, but also would increase the burdens on the courts to determine the reliability and admissibility of expert testimony and to assess the sufficiency of that testimony.

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<sup>39</sup> According to a “joint study by the Conference of State Court Administrators, the Bureau of Justice Statistics [of the U.S. Department of Justice], and the National Center for State Courts,” all of the “States averaged 1,761 filings per judge and 3.74 judges per 100,000 population in 2006 (most current year for which statistics are available).” *2010 State of the Judiciary* at 8. By contrast, South Carolina averaged 4,374 filings per judge—more than twice as much as the average in the other States—and only 1.1 judges per 100,000 population—less than a third of the average in the other States—in 2006. *Id.*

<sup>40</sup> Thus, Chief Justice Toal further warned that, as a result of the budget crisis: “Lay-offs for the Circuit Court law clerks may occur this Spring 2010; Court of Appeals staff may be reduced from 3 to 2 staff personnel per judge; New law clerks may not be hired next year; Reduction of court reporters being considered; Judicial Department may be forced to run a deficit in the upcoming fiscal year; Consideration being given to not filling some upcoming judicial vacancies and associated non-judicial positions for further costs savings; Current funding levels jeopardize the Court’s ability to adequately fulfill constitutional functions; Furloughs and reductions in force (RIF) may be required . . . .” *Id.* at 6 (emphasis added). As the Chief Justice advised a State Bar convention in January: “We are in as difficult a time as has ever faced the court since its colonial foundation,” she said. “We are in the biggest crisis for maintaining an open court system in South Carolina that we have ever experienced.” Fred Horlbeck, *Chief Justice Jean H. Toal: Judiciary Faces Most Dire Budget Crisis Ever*, SOUTH CAROLINA LAWYERS WEEKLY (Feb. 1, 2010) (<http://www.allbusiness.com/government/government-bodies-offices-regional-local/13891413-1.html>) (last visited Feb. 16, 2010) (emphasis added).

(N.C.2002). The history of India's Monitor seems to provide "circumstantial evidence of a defect" that is "adequate" enough to submit this case to a jury. See *Snider v. Bob Thibodeau Ford, Inc.*, 202 N.W.2d 727, 732 (Mich.App.1972) ("circumstantial evidence in the truck's service history" shows "an inherent defect in the braking system"); *Hamilton Mut. Ins. Co. v. Ford Motor Co.*, 702 N.E.2d 491, 494 (Ohio App.1997).

Third, the Graves' experts testified that they had eliminated alternative causes, e.g., alteration or misuse, for the Monitor's failure. As noted above, CAS not only did not dispute this point, it conceded the Monitor had not be altered or abused. This is important because "elimination of other possible causes" is widely accepted as "circumstantial evidence of a defect." *DeWitt*, 565 S.E.2d at 151.<sup>47</sup>

Lastly, CAS's "voluntary" recall of five years' worth of the same Model 9700 Monitors for exactly the same problems the Graves have alleged in this case—"because the infant apnea monitor might shut down and the audible alarm might fail to sound," FDA, *Recall of Infant Apnea Monitor*, *supra*—constitutes compelling circumstantial evidence that the particular Model 9700 Monitor that "fail[ed] to sound" in this case may have failed for the same reason.<sup>48</sup> This is

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<sup>47</sup> See *Harrison v. Bill Cairns Pontiac, Inc.*, 549 A.2d 385, 390 (Md.App.1988) ("[a]n inference of a defect may be drawn from the happening of an accident, where circumstantial evidence tends to eliminate other causes, such as product misuse or alteration."); *Yanovich v. Zimmer Austin, Inc.*, 255 Fed.Appx. 957, 966, 2007 WL 4163860, \*9 (6<sup>th</sup> Cir.2007) (applying Ohio law); *Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc.*, 473 F.3d 450, 459 (2d Cir.2007) (applying Vermont law); *Hickerson v. Pride Mobility Prod. Corp.*, 470 F.3d 1252, 1258 (8<sup>th</sup> Cir.2006) (applying Missouri law). Cf. PRODUCTS REST., § 3 ("It may be inferred that the harm . . . was caused by a product defect . . . when the incident that harmed the plaintiff . . . was not, in the particular case, solely the result of causes other than product defect . . .").

<sup>48</sup> CAS contends the FDA recall is irrelevant because that recall was ostensibly prompted by a problem, electrostatic interference, which may not have been present in this case, even though that ostensibly different sort of problem with all Model 9700 Monitors manufactured between 1997 and 2001, albeit a problem that produced the exact same failure—"audible alarm might fail to sound," FDA Recall, *supra*--alleged here in the exact same model monitor, the Model 9700. This kind of dispute is one for the jury.

critical because “a product recall can serve as circumstantial evidence sufficient to establish the defect.” *Denton v. DaimlerChrysler Corp.*, 645 F.Supp.2d 1215, 1226 (N.D.Ga.2009).<sup>49</sup>

In the final analysis and on this record, it is not possible to conclude that there was no genuine dispute about material facts and about the inferences that reasonably could be drawn from the circumstantial evidence presented by the Graves’ witnesses and CAS’s witnesses. In this light, summary judgment was not just a “drastic remedy” but an unwarranted one, one that “improperly deprived” the Graves of their right to “trial on disputed factual issues.” *Hoard*, 387 S.C. at 545, 694 S.E.2d at 4.

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<sup>49</sup> See *Louisiana Citizens Prop. Ins. Corp. v. Gen’l Elec. Co.*, 2010 WL 1561176, \*4 (M.D.La.2010) (a safety “recall stands as more circumstantial evidence that GE manufactured a range with an unreasonably dangerous characteristic and that the range had that dangerous characteristic when it left GE’s control.”). See *Fitting v. Dell, Inc.*, 2008 WL 2152233, \*8 (D.Idaho 2008); *Hendrix v. Evenflo Co., Inc.*, 2008 WL 2025840, \*5 (N.D.Fla.2008); *Bombard v. Gen’l Motors Corp.*, 238 F.Supp.2d 464, 468 (N.D.N.Y.2002); *Snodgrass v. Ford Motor Co.*, 2002 WL 485688, \*5 (D.N.J.2002).

Allowing product recalls that predate a product-related incident to be used as circumstantial evidence to establish the defective nature of a product does not contradict the “considerable authority . . . that product recalls . . . occurring after the injury or harm, are not admissible to prove a product defect.” *Kucik v. Yamaha Motor Corp.*, 2010 WL 2694962, \*6 n.3 (N.D.Ind.2010) (emphasis added; citations omitted), because such “authority” is based on the sound policy against discouraging subsequent remedial measures. See *Rutledge v. Harley-Davidson Motor Co.*, 2010 WL 445498, \*3 (5th Cir.2010); *Hughes v. Stryker Sales Corp.*, 2010 WL 1961051, at \*4 n. 9.

CONCLUSION

For the reasons set forth above, *amici* respectfully urge this Court to reverse the Circuit Court's determination that circumstantial evidence may not be used to prove a product defect in a strict products liability cause of action. The Court should accordingly reverse the Circuit Court's grant of summary judgment and remand this case for trial.

Respectfully submitted,



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May 16, 2011

## APPENDIX A

### IDENTITY OF *AMICI CURIAE*

PROFESSOR JOHN F. VARGO (retired) taught products liability and torts for twenty years at Indiana University Law School and at Bond University Law School and Deakin University Law School in Australia. He is the lead author and Editor-in-Chief of Matthew Bender's seven-volume treatise, *PRODUCTS LIABILITY PRACTICE GUIDE* (2008), and the author of more than 40 articles and book chapters.

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PROFESSOR PAUL J. ZWIER II is Professor of Law at Emory University School of Law, where he has taught products liability and torts since 2003, subjects he has taught since 1980. He

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**PROFESSOR FRANK J. VANDALL** is one of the most senior faculty members at Emory University School of Law, where he has taught products liability and torts for over 40 years. He is the author of several relevant books, including PRODUCTS LIABILITY CASES, MATERIALS, PROBLEMS (2002); TORTS, CASES, PROBLEMS AND QUESTIONS (1997); STRICT LIABILITY: LEGAL AND ECONOMIC ANALYSIS (1989); and A HISTORY OF CIVIL LITIGATION: POLITICAL AND ECONOMIC PERSPECTIVES (2011), as well as more than 35 scholarly articles, including *A Call for an Accurate Restatement (Third) of Torts: Design Defect*, 33 U. MEM. L. REV. 909 (2003); and *Constricting Products Liability: Reforms in Theory and Procedure*, 48 VILL. L. REV. 843 (2003).

**PROFESSOR STEPHEN A. SALTZBURG** holds the Wallace and Beverley Woodbury University Chair at the George Washington University Law School, where he has taught evidence and other subjects since 1990; in January 2004, he was named as one of six University Professors (out of more than 2,000 faculty members campus-wide). From 1972 to 1990, Professor Saltzburg taught at the University of Virginia School of Law, where he was named the first incumbent of the Class of 1962 Endowed Chair. Professor Saltzburg has served as a Member of the U.S. Judicial Conference Advisory Committee on the Federal Rules of Evidence and as an American Bar Association ("ABA") Advisor to the Advisory Committee on the Federal

Rules of Evidence as it restylized the Federal Rules. He is the co-author of a leading multi-volume treatise on federal evidence, the FEDERAL RULES OF EVIDENCE MANUAL (9th ed. 2006), the leading multi-volume treatise on how the Federal Rules are used in state courts, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES (1987; Supp. 1994), and books on the California, Texas, and Washington rules of evidence.

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**PROFESSOR CARL T. BOGUS** is Professor of Law and former Director of the Honors Program at Roger Williams University School of Law, where he has taught products liability, torts, and evidence, among other subjects, since 1996. He previously taught at the Rutgers University School of Law-Camden and currently is a Visiting Professor of Law at the Earle Mack

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## APPENDIX B

### FORTY-SEVEN (47) STATES THAT ALLOW PLAINTIFFS TO PROVE PRODUCT DEFECT BY CIRCUMSTANTIAL EVIDENCE<sup>1</sup>

#### ALABAMA

*Brooks v. Colonial Chevrolet-Buick, Inc.*, 579 So. 2d 1328, 1332 (Ala. 1991) ("If, however, under all the attendant circumstances, absent expert testimony, the jury could reasonably infer from the product's failure of performance that a defective condition caused the injury, a prima facie case has nonetheless been established.") (citing *Sears, Roebuck & Co., Inc. v. Haven Hills Farm, Inc.*, 395 So. 2d 991, 995 (Ala. 1981)). See *Meadows v. Coca-Cola Bottling, Inc.*, 392 So. 2d 825, 827 (Ala. 1981) ("circumstantial evidence of similar defects in other units of the product in litigation is competent to show that a product is defective") (citations omitted). See *Goree v. Winnebago Industries, Inc.*, 958 F. 2d 1537, 1541 (11<sup>th</sup> Cir. 1992) (construing Alabama law); *Rudd v. General Motors Corp.*, 127 F.Supp. 2d 1330, 1333 (M.D. Ala. 2001) (construing Alabama law).

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<sup>1</sup> The two States that have not approved the use of circumstantial evidence to prove defect in products liability cases—Alaska and Maine (and which are denoted in the text of this Appendix by double-asterisks \*\*)—have not rejected such use; rather they have not been presented with (or at least have not ruled on) the question (perhaps because their combined population of 2.3 million is less than one percent of the total for the nation, with the result that proportionally few products liability cases litigated in their courts). Furthermore, as highlighted in the text of this Appendix, case law in Alaska and Maine strongly suggests that each State would join the other 47 States if presented with the chance to do so in the appropriate case. Thus, for example, although Alaska courts have not held that circumstantial evidence may be used in products liability cases, those courts often have quoted with approval California Supreme Court decisions that have so held. See, e.g., *Clary v. Fifth Ave. Chrysler Center, Inc.*, 454 P.2d 244, 246-47 (Alaska 1969) ("The facts before us are similar in many respects to those considered by the Supreme Court of California in *Vandermark v. Ford Motor Co.*," 391 P.2d 168, 170 (Cal. 1964), where the California "supreme court held that products liability plaintiffs "were entitled to establish the existence of a defect and of appellee's responsibility for the defect by circumstantial evidence . . .").

## ALASKA \*\*

*General Motors Corp. v. Farnsworth*, 965 P. 2d 1209, 1221 (Alaska, 1998) ("We agree with the California Supreme Court that . . . '[i]n particular circumstances, a product's design may perform so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers.") (quoting *Soule v. General Motors Corp.*, 882 P. 2d 298, 305 (Cal. 1994), which also similarly said "an injured plaintiff will frequently be able to demonstrate the defectiveness of the product by resort to circumstantial evidence, even when the accident itself precludes identification of the specific defect at fault." (quoting, in turn, *Barker v. Lull Engineering Co.*, 573 P. 2d 443, 454 (Cal. 1978)); *Clary v. Fifth Ave. Chrysler Center, Inc.*, 454 P. 2d 244, 246-47 (Alaska 1969) ("The facts before us are similar in many respects to those considered by the Supreme Court of California in *Vandermark v. Ford Motor Co.*, " 391 P. 2d 168, 170 (Cal. 1964), where the California "supreme court held that products liability plaintiffs "were entitled to establish the existence of a defect and of appellee's responsibility for the defect by circumstantial evidence . . . ."). See *Universal Motors, Inc. v. Waldock*, 719 P. 2d 254, 258 (Alaska 1986) (circumstantial evidence is enough to support the consumer's burden of proof in an action for breach of implied warranty that the damage was caused by a defect in factory materials or workmanship). See also *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506, 508 (9<sup>th</sup> Cir. 1974) (construing Alaska law).

## ARIZONA

*Dietz v. Waller*, 685 P. 2d 744, 747 (Ariz. 1984) ("Plaintiffs . . . must be permitted to rely upon circumstantial evidence alone in strict liability cases, because it is unrealistic

to expect them to otherwise be able to prove that a particular product was sold in a defective condition.”) (citations omitted). See *Cox v. May Dept. Store Co.*, 903 P. 2d 1119, 1122 n. 2 (Ariz.App. 1995) (“A plaintiff may also use a *res ipsa loquitur* type of inference to prove the existence of a defect in a strict liability case.”); *Reader v. General Motors Corp.*, 483 P. 2d 1388, 1394 (Ariz. 1971); *Metropolitan Property and Casualty Insurance Co. v. Del Webb's Coventry Homes, Inc.*, 2007 WL 5448133, \*5-6 ) (Ariz. App. 2007). See also *Allstate Ins. Co. v. Ford Motor Co.*, 2010 WL 1654145, \*15-17 (D.Ariz. 2010) (applying Arizona law).

## ARKANSAS

*Yielding v. Chrysler Motor Co., Inc.*, 783 S.W. 2d 353, 355 (Ark. 1990) (“Under our product liability statute, a plaintiff must prove that the product as supplied was defective so as to render it unreasonably dangerous and that such defect was the proximate cause of the accident. It must be shown that the product was in a defective condition at the time it left the hands of the particular seller. It is not necessary to establish these elements by direct proof; circumstantial evidence will suffice.”). See *Harrell Motors, Inc. v. Flanery*, 612 S.W. 2d 727, 729, (Ark. 1981) (“proof of specific defect is not required when common experience tells us that the accident would not have occurred in the absence of a defect”). See also *Williams v. Smart Chevrolet Co.*, 730 S.W. 2d 479, 482 (Ark. 1987); *Ruminer v. General Motors Corp.*, 483 F.3d 561, 564-65 (8<sup>th</sup> Cir. 2007) (applying Arkansas law).

## CALIFORNIA

*Soule v. General Motors Corp.*, 882 P. 2d 298, 305 (Cal. 1994) ("an injured plaintiff will frequently be able to demonstrate the defectiveness of the product by resort to circumstantial evidence, even when the accident itself precludes identification of the specific defect at fault." (quoting *Barker v. Lull Engineering Co.*, 573 P. 2d 443, 454 (Cal. 1978)); *Campbell v. General Motors Corp.*, 649 P. 2d 224, 230 (Cal. 1982). ("the law recognizes that in a products liability case proof of [defect and proximate cause] by direct evidence is frequently impossible; a plaintiff may, therefore, satisfy his burden of proving defect and causation by circumstantial evidence.") (citations omitted); *Cardinal Health 301, Inc. v. Tyco Electronics Corp.*, 169 Cal.App.4th 116, 147, 87 Cal.Rptr.3d 5, 30 (Cal. App. 2008) (in a products liability case, "[c]ausation need not be proved with absolute certainty, and can be shown by circumstantial evidence"). See *Aetna Casualty & Sur. Co. v. Farmers Bros. Co.*, 65 Cal.App.4th 574, 578-79, 76 Cal.Rptr. 2d 587, 589 (Cal.App. 1998); *Elmore v. American Motors Corp.*, 451 P. 2d 84, 87 (Cal. 1969) ("a plaintiff is entitled to establish the existence of the defect and the defendants' responsibility for it by circumstantial evidence."); *Vandermark v. Ford Motor Co.*, 391 P. 2d 168, 170 (Cal. 1964) ("plaintiffs were entitled to establish the existence of a defect and defendants' responsibility therefore by circumstantial evidence"). See also *Notmeyer v. Stryker Corp.*, 502 F.Supp.2d 1051, 1059-60 (N.D.Cal. 2007) (applying California law).

## COLORADO

*Branco Eastern Co. v. Leffler*, 482 P. 2d 364, 366 (Colo. 1971)("Circumstantial evidence is therefore an acknowledged basis for showing causation" in a products

liability case); *Union Insurance Co. v. RCA Corp.*, 724 P. 2d 80, 83 (Colo.App. 1986) (allowing a products liability plaintiff to proceed against manufacturer of an allegedly defective product using circumstantial evidence). See *Manzi by Manzi v. Montgomery Elevator Co.*, 865 P. 2d 902, 904 (Colo.App. 1993) (permitting products liability plaintiff to proceed against manufacturer of an allegedly defective product under the theory of *res ipsa loquitur*). See also *Truck Ins. Exchange v. MagneTek, Inc.*, 360 F.3d 1206, 1215 (10<sup>th</sup> Cir. 2004) (applying Colorado law) ("circumstantial evidence may be used to prove causation.").

## CONNECTICUT

*Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199, 218, 694 A. 2d 1319, 1332 (1997) ("the feasible alternative design requirement imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration. Such a rule would require plaintiffs to retain an expert witness even in cases in which lay jurors can infer a design defect from circumstantial evidence. Connecticut courts, however, have consistently stated that a jury may, under appropriate circumstances, infer a [design] defect from the evidence without the necessity of expert testimony"). (citations omitted); *Paranto v. Piotrkowski*, 2010 WL 4226765, \*4 (Conn.Super. Sept. 22, 2010) (a design or manufacturing "defect may be inferred by circumstantial evidence that (1) the product malfunctioned, (2) the malfunction occurred during proper use, and (3) the product had not been altered or misused in a manner that probably caused the malfunction.") (citations omitted). See *Standard Structural Steel Co. v. Bethlehem Steel Corp.*, 597 F. Supp. 164, 183-84 (D.Conn. 1984) (recognizing Connecticut law permits fact finder to

draw inference of product defect from circumstantial evidence); *Living & Learning Centre, Inc. v. Griese Custom Signs, Inc.*, 491 A. 2d 433, 435 (Conn. App. 1985) ("It is not necessary that the plaintiff in a strict tort action establish a specific defect as long as there is evidence of some unspecified dangerous condition. In the absence of other identifiable causes, evidence of malfunction is sufficient evidence of a defect under § 402A of the SECOND RESTATEMENT OF TORTS.").

## **DELAWARE**

*Reybold Group, Inc. v. Chemprobe Technologies, Inc.*, 721 A. 2d 1267, 1270 (Del. 1998) (in a products liability case, "a plaintiff may submit circumstantial evidence to a jury" to show that a defendant's product "was either defective or the proximate cause of its injury"); *Brown v. Dollar Tree Stores, Inc.*, 2009 WL 5177162, \*4 (Del.Super. 2009) ("In the present case [for negligence], Plaintiff has presented sufficient circumstantial and direct evidence to permit a jury to find that the product was defective even without the aid of expert testimony."). See *Fatovic v. Chrysler Corp.*, 2003 WL 21481012, \*2-3 (Del.Super. 2003)

## **FLORIDA**

*Parke v. Scotty's, Inc.*, 584 So. 2d 621, 623 (Fla.App. 1991) ("proof of defect can be established by reasonable inferences from the circumstances.") (quoting, *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1150 (Fla. App. 1981), and citing *McCarthy v. Florida Ladder Co.*, 295 So. 2d 707, 709-710 (Fla. App. 1974)). See *Miller v. Allstate Insurance Co.*, 650 So. 2d 671, 672 (Fla.App. 1995) ("a products liability plaintiff may establish a

prima facie case for jury consideration on circumstantial evidence”)(citations omitted). See also *Ainsworth v. KLI, Inc.*, 967 So. 2d 296, 302 (Fla.App. 2007). See *Cassini*, 396 So. 2d at 1153 (it is “immaterial that the plaintiffs failed to identify the specific cause of the malfunction since it is inferred that the malfunction itself, under such circumstances, is evidence of the product's defective condition at both the time of the injury and at the time of sale”). See generally *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253,1259 (11<sup>th</sup> Cir. 2002) (construing Florida law).

## GEORGIA

*Rose v. Figgie Intern., Inc.*, 495 S.E. 2d 77, 81 (Ga.App. 1997) (“circumstantial evidence is particularly appropriate in product liability cases to show the manufacturing defect.”); *Folsom v. Sears, Roebuck & Co., Inc.*, 329 S.E. 2d 217, 218 (Ga.App. 1985) (“Circumstantial evidence may be used to establish the existence of a manufacturing defect at the time a product left the manufacturer.”) (citations omitted); *Firestone Tire & Rubber Co. v. King*, 244 S.E. 2d 905, 908-09 (Ga.App. 1978) (“We do not agree that it was necessary for the [plaintiff]/appellee to specify the nature of the defect in order to meet her burden of proof. It has often been held that the existence of a manufacturing defect in a products liability case may be inferred from circumstantial evidence.”). *Graff v. Baja Marine Corp.*, 310 Fed.Appx. 298, 305, 2009 WL 226308, \*6 (11<sup>th</sup> Cir. 2009) (applying Georgia law).

## HAWAII

*Acoba v. General Tire, Inc.*, 986 P. 2d 288, 303-04 (Hawai‘i,1999) (in a “claim for strict product liability, . . . [p]roof of defect and causation may be provided by expert

testimony or by circumstantial evidence.”) (citations omitted); *Wagatsuma v. Patch*, 879 P. 2d 572, 576 (Hawai‘i App. 1994) (“circumstantial evidence is sufficient to prove causation in an action based on negligence and/or strict liability.”) (citations omitted). See *Stewart v. Budget Rent-A-Car Corp.*, 470 P. 2d 240, 242 (Hawai‘i, 1970) (“user’s testimony on what happened is another method of proving that the product was defective”). See also *Rodriguez v. General Dynamics Armament & Tech. Products, Inc.*, 696 F.Supp.2d 1163, 1279 (D.Hawai‘i 2010) (applying Hawai‘i law) (“Plaintiffs may rely on circumstantial evidence to prove the existence of a defect that caused them injury.”); *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 732 (9<sup>th</sup> Cir. 1986) (applying Hawai‘i law).

## IDAHO

*Stanley v. Lennox Industries, Inc.*, 102 P.3d 1104, 1107 (Idaho,2004) (“A prima facie case may be proved by direct or circumstantial evidence of a malfunction of the product and the absence of evidence of abnormal use and the absence of evidence of reasonable secondary causes which would eliminate liability of the defendant.”) (quoting *Farmer v. International Harvester Co.*, 553 P. 2d 1306, 1311 (Idaho 1976)). See *Glanzman v. Uniroyal, Inc.*, 892 F. 2d 58, 60 (9th Cir. 1989) (“A plaintiff need not prove a specific defect to carry his burden of proof. He may prove a prima facie case by direct or circumstantial evidence of a malfunction of the product and the absence of evidence of abnormal use and the absence of evidence of reasonable secondary causes which would eliminate liability of the defendant.”) (applying Idaho law and citing *Farmer*).

## ILLINOIS

*Boyd v. Travelers Insurance Co.*, 652 N.E. 2d 267, 273 (Ill. 1995) (“plaintiffs may be able to prove their products liability action against [a defendant] through circumstantial evidence.”); *Davis v. Material Handling Associates Inc.*, 929 N.E. 2d 1229, 1234, 1237 (Ill.App. 2010) (“a prima facie case of product liability can be established exclusively from circumstantial evidence”; “Illinois law clearly states a products liability case can be established based on circumstantial evidence”); *Sorce v. Naperville Jeep Eagle, Inc.*, 722 N.E. 2d 227, 237 (Ill.App. 1999)(proof of the elements of a strict products liability claim “may be made inferentially, by either direct or circumstantial evidence.”) (citations omitted); *Bollmeier v. Ford Motor Company*, 265 N.E. 2d 212, 217 (Ill. App. 1970). *See Rizzo v. Corning Inc.*, 105 F.3d 338, 343 (11<sup>th</sup> Cir. 1997) (applying Illinois law).

## INDIANA

*Cansler v. Mills*, 765 N.E. 2d 698, 706 (Ind.App. 2002) (“Expert testimony is not always required to establish an element of a products liability action if there is sufficient circumstantial evidence within a lay person's understanding that would constitute a basis for a legal inference and not mere speculation.”) (citations omitted), disapproved on other grounds by *Schultz v. Ford Motor Co.*, 857 N.E. 2d 977 (Ind. 2006). *See U-Haul Intern., Inc. v. Nulls Machine and Mfg. Shop*, 736 N.E. 2d 271, 285 n.3 (Ind.App. 2000); *Montgomery Ward & Co. v. Gregg*, 554 N.E. 2d 1145, 1157 ( Ind. App. 1990). *See also Whitted v. General Motors Corp.*, 58 F.3d 1200, 1207 (7<sup>th</sup> Cir. 1995) (Posner, J.)

(construing Indiana law); *Gaskin v. Sharp Electronics Corp.*, 2007 WL 2819660, \*5-6 (N.D.Ind. 2007) (applying Indiana law).

## IOWA

*Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W. 2d 819, 827 (Iowa 2000) (“[p]roof that a product was sold in a defective, unreasonably dangerous condition can be made by circumstantial evidence.”) (citations omitted); *Mercer v. Pittway Corp.*, 616 N.W. 2d 602, 620 (Iowa 2000) (“Proof that a product is unreasonably dangerous may be proven by circumstantial evidence.”); *Aller v. Rodgers Machinery Mfg. Co.*, 268 N.W. 2d 830, 834 (Iowa 1978) (“A plaintiff may, and usually does, establish that a product is unreasonably dangerous by circumstantial evidence.”)

## KANSAS

*Dieker v. Case Corp.*, 73 P.3d 133, 145-46 (Kan. 2003) (“the elements of a product liability action: ‘may be proved by circumstantial evidence’ and ‘[p]roximate causation in a proper case may be shown by circumstantial evidence.’”) (citations omitted). See *Farmers Insurance Co., Inc. v. Smith*, 549 P. 2d 1026, 1033 (Kan. 1976); *Mays v. Ciba-Geigy Corp.*, 661 P. 2d 348, 360 (Kan. 1983). See *Dorn v. BMW of North America, LLC*, --- F.Supp. 2d ---, 2010 WL 3913226, \*6 (D.Kan. 2010) (applying Kansas law) (“A product liability claim may be proven by either direct or circumstantial evidence.”) (citing *Mays v. Ciba-Geigy*); *Pritchett v. Cottrell, Inc.*, 512 F.3d 1057, 1065 (8<sup>th</sup> Cir. 2008) (“in Kansas, the elements of a products liability action may be proven by

circumstantial evidence"). See also *Orth v. Emerson Elec. Co., White-Rodgers Div.*, 980 F. 2d 632, 637 (10<sup>th</sup> Cir. 1992) (construing Kansas law).

## KENTUCKY

*Turpin v. Stanley Schulze and Co., Inc.*, 2009 WL 875218, \*5 (Ky.App. April 3, 2009) (a "manufacturing defect" may be established by "circumstantial evidence") (citations omitted); *Perkins v. Trailco Mfg. and Sales Co.*, 613 S.W. 2d 855, 857 (Ky. 1981) ("the existence of a defect in the product itself may be established by a sufficient quantum of circumstantial evidence"), quoting *Holbrook v. Rose, Ky.*, 458 S.W. 2d 155, 157 (1970). See *Holbrook*, 458 S.W. 2d at 157 ("Proof of legal causation is required in cases involving liability for products including drugs; again in this instance, legal causation may be established by a quantum of circumstantial evidence from which a jury may reasonably infer that the product was a legal cause of the harm."). See also *Calhoun v. Honda Motor Co.*, 738 F.2d 126, 130 (6<sup>th</sup> Cir.1984) (Under Kentucky law, once a plaintiff demonstrates that a product was defective, the plaintiff must establish causation, which may be proved by either direct or circumstantial evidence).

## LOUISIANA

*Lawson v. Mitsubishi Motor Sales of America, Inc.*, 938 So. 2d 35, 47 (La. 2006) ("the existence of a defect in the product itself may be established by a sufficient quantum of circumstantial evidence."); *Brown v. Sears, Roebuck and Co.*, 514 So. 2d 439, 444 (La. 1987) ("[a] defect may be inferred from the circumstances of the accident."); *Jurls v. Ford Motor Co.*, 752 So. 2d 260, 265 (La. App. 2000) (although a

court cannot permissibly "infer the existence of a defect solely from the fact that an accident occurred, . . . a manufacturing defect may be established by circumstantial evidence."); *id.* at 266 (observing that expert testimony of a specific defect is not required to make out a prima facie case of manufacturing defect).

**MAINE \*\***

*Simon v. Town of Kennebunkport*, 417 A. 2d 982, 984-85 (Me. 1980) (noting that in many types of actions (primarily sounding in negligence but also including in "products liability" actions), "evidence of other similar accidents or occurrences may be relevant circumstantially to show a defective or dangerous condition, notice thereof or causation on the occasion in question."). *See Suminski v. Maine Appliance Warehouse, Inc.*, 602 A. 2d 1173, 1175 (Me. 1992) ("In some circumstances a breach of the implied warranty of merchantability under the [Uniform Commercial Code] may be established by circumstantial evidence.") (citations omitted); *Ginn v. Penobscot Co.*, 334 A. 2d 874, 879 (Me. 1975) (circumstantial evidence may be used to establish negligent defect in a product). *See also Moores v. Sunbeam Products, Inc.*, 425 F.Supp. 2d 151, 158 & n. 10 (D.Me. 2006) (applying Maine law) ("circumstantial evidence may establish a theory of strict liability" in a products liability case (citing *Ginn v. Penobscot Co.*, 334 A. 2d 874 (Me. 1975), and *Poulin v. Aquaboggan Waterslide*, 567 A. 2d 925 (Me. 1989))); *Canning v. Broan-Nutone, LLC*, 480 F.Supp. 2d 392, 404 (D.Me. 2007) (applying Maine law) (plaintiffs may use circumstantial evidence to prove a product defect, citing, *inter alia*, *Moores v. Sunbeam*, and RESTATEMENT OF PRODUCTS LIABILITY § 3); *Canning v. Broan-Nutone, LLC*, 2007 WL 1112355, \*10-17 (D.Me. 2007) (same); *TNT Road Co. v.*

Sterling Truck Corp., 2004 WL 1626254, \*6-7 (D.Me. 2004); *Ricci v. Alternative Energy Inc.*, 211 F.3d 157, 162-63 (1<sup>st</sup> Cir. 2000) (construing Maine law); *Moulton v. Rival Co.*, 116 F.3d 22, 26-27 (1<sup>st</sup> Cir. 1997) (construing Maine law).

## MARYLAND

*Mohammad v. Toyota Motor Sales, U.S.A., Inc.*, 947 A. 2d 598, 613 (Md. App. 2008) ("circumstantial evidence has been held sufficient to establish a prima facie case in a products liability action"). See *Crickenberger v. Hyundai Motor America*, 944 A. 2d 1136, 1143 (Md. 2008); *Laing v. Volkswagen of America, Inc.*, 949 A. 2d 26, 40 (Md. App. 2008); *Harrison v. Bill Cairns Pontiac*, 549 A. 2d 385, 390 (Md. App. 1988). See also *Assurance Co. of America v. York Intern., Inc.*, 305 Fed.Appx. 916, 921, 2008 WL 5455704, \*4-5 (4<sup>th</sup> Cir. 2008) (applying Maryland law); *Shreve v. Sears, Roebuck & Co.*, 166 F.Supp.2d 378, 407-08 (D.Md. 2001) (applying Maryland law).

## MASSACHUSETTS

*Calvanese v. W. W. Babcock Co., Inc.*, 412 N.E. 2d 895, 898 (Mass.App. 1980) ("It is now common in product liability cases to see circumstantial proof . . . for the purpose of proving or disproving the cause of an accident.") (citations omitted). See *Cotter v. McDonald's Restaurant of Mass., Inc.*, 2006 WL 2382735, \*2-3 (Mass.App. 2006); *Benavides v. Stop & Shop, Inc.*, 190 N.E. 2d 894, 896 (Mass. 1963). See also *McKinnon v. Skil Corp.*, 638 F.2d 270, 277 (1<sup>st</sup> Cir. 1981) (applying Massachusetts law). *Makuc v. American Honda Motor Co., Inc.*, 835 F.2d 389, 392-93 (1<sup>st</sup> Cir. 1987) (applying Massachusetts law to breach of warranty claim for defective product); *White v.*

*W.W. Grainger Co., Inc.*, 1988 WL 290663, \*1 (applying Massachusetts law to breach of warranty claim for defective product).

## MICHIGAN

*Webber v. Hilborn*, 2009 WL 5150082 (Mich.App. Dec. 29, 2009) ("defective design or manufacture . . . claim may be based on either direct or circumstantial evidence") (citations omitted); *Skinner v. Square D Co.*, 516 N.W. 2d 475, 480 (Mich. 1994) ("This Court has repeatedly recognized that plaintiffs may utilize circumstantial proof to show the requisite causal link between a defect and an injury in products liability cases."). See *Lubanski v. NLC, Inc.*, 2010 WL 2836328, \*3 (Mich.App. 2010); *Fox v. Sherwin Williams Co.*, 2010 WL 46905, \*7 (Mich.App. 2010); *Kenkel v. Stanley Works*, 665 N.W. 2d 490, 498 (Mich.App. 2003); *Holloway v. General Motors Corp.*, 403 Mich. 614, 271 N.W. 2d 777, 780 (Mich. 1978). See also *Croskey v. BMW of North America, Inc.*, 532 F.3d 511, 516 (6<sup>th</sup> Cir. 2008) (construing Michigan law).

## MINNESOTA

*Schafer v. JLC Food Systems, Inc.*, 695 N.W. 2d 570, 576 (Minn. 2005) ("where the claimed defect is such that there is circumstantial evidence from which it can be inferred that it is more probable than not that the product was defective when it left defendant's hands, absent plaintiff's own want of care or misuse of the product, there is an evidentiary basis for submitting the issue of liability to the jury") (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS Liability § 3 (1998)). See *International Financial Services, Inc. v. Franz*, 534 N.W. 2d 261, 266 (Minn. 1995) ("circumstantial evidence may be

sufficient to show the causal relationship between the product and the injury which followed its use.") (citations omitted). *See also Western Sur. & Casualty Co. v. General Electric Co.*, 433 N.W. 2d 444, 447 (Minn. App. 1988) (holding that "in a strict products liability action, a plaintiff may use circumstantial evidence to prove the existence of a defect" and noting that the use of circumstantial evidence to prove the existence of a defect in a strict liability action is in essence a strict liability version of *res ipsa loquitur*).

## MISSISSIPPI

*Daniels v. GNB, Inc.*, 629 So. 2d 595, 602 (Miss. 1993) ("circumstantial evidence will suffice on the element of showing that the product was defective when it left the hands of the defendants, and that it was in such defective condition at the time of the explosion.") (citations omitted). *See Coca Cola Bottling Co., Inc. of Vicksburg v. Reeves by Reeves*, 486 So. 2d 374, 382-83, 386 (Miss. 1986). *See also Hammond v. Coleman Co., Inc.*, 61 F.Supp.2d 533, 541-42 (S.D.Miss. 1999) (construing Mississippi law and citing *Daniels v. GNB, Inc.*, 629 So. 2d 595, 602 (Miss. 1993)); *Thornton v. Ford Motor Co.*, 2007 WL 2580337, \*5 (S.D.Miss. 2007) (construing Mississippi law and citing *Daniels v. GNB, Inc.*, 629 So. 2d 595, 602 (Miss. 1993)).

## MISSOURI

*Martin v. Survivair Respirators, Inc.*, 298 S.W.3d 23, 30 (Mo.App. 2009) ("Circumstantial evidence may be sufficiently relied on to support a verdict in a products liability case.") (citations omitted); *Strong v. American Cyanamid Co.*, 261 S.W.3d 493, 511 n.4 (Mo.App. 2007) ("Missouri precedent . . . clearly permits the use of circumstantial

evidence to show that a product is defective"); *Peters v. General Motors Corp.*, 200 S.W.3d 1, 18 (Mo.App. 2006) ("Sufficient circumstantial evidence will support a jury verdict in a products liability case."; "[Plaintiff] met his burden of proof and could submit to the jury the issue of strict liability-defective design, if the facts and circumstances in evidence fairly warrant the conclusion that the [product] was defectively designed and dangerous and caused the accident and the resulting injuries . . . ."); *Klein v. General Elec. Co.*, 714 S.W. 2d 896, 900 (Mo.App. 1986) ("[t]he existence of a defect may be inferred from circumstantial evidence with or without the aid of an expert witness"). See *Sappington v. Skyjack, Inc.*, 512 F.3d 440, 447 (8<sup>th</sup> Cir. 2008) (construing Missouri law).

## MONTANA

*Wood v. Old Trapper Taxi*, 952 P. 2d 1375, 1384 (Mont. 1997) ("a claim of product defect may be proven by circumstantial evidence and inferences therefrom"). See *Eisenmenger by Eisenmenger v. Ethicon, Inc.*, 871 P. 2d 1313, 1318 (Mont.), cert. denied, 513 U.S. 919 (1994); *Hagen v. Dow Chem. Corp.*, 863 P.2d 413, 417 (1993) ("it is well established that in actions dealing with product liability, sufficient evidence to make a prima facie case may consist of establishing the circumstances of the incident, similar occurrences under similar circumstances, and elimination of alternative causes."); *Brandenburger v. Toyota Motor Sales, U.S.A., Inc.*, 513 P. 2d 268, 274 (Mont. 1973). See *Brown v. North American Manufacturing Co.*, 576 P.2d 711, 720 (Mont. 1978) ("defendant, in a given [products liability] case, may effectively discharge his burden [of proof regarding an assumption of risk defense] through proof of the subjective elements by circumstantial evidence.").

## NEBRASKA

*Genetti v. Caterpillar, Inc.*, 621 N.W. 2d 529, 542 (Neb. 2001) ("Although expert testimony pointing to a specific defect would be the best means of proving the existence of a defect in some cases, proof that the warranted product is defective may be circumstantial in nature and may be inferred from the evidence."); *Con Urbach v. Industrial Chemical Laboratories, Inc.*, 1997 WL 576595, \*7 (Neb.App. 1997) ("a plaintiff may rely upon circumstantial evidence alone in a strict products liability case, since it is unrealistic to expect a plaintiff to otherwise be able to prove that a particular product was sold in a defective condition.").

## NEVADA

*Allison v. Merck and Co., Inc.*, 878 P. 2d 948, 952 n.5 (Nev. 1994) ("plaintiffs may rely on circumstantial evidence to establish a product defect.") (citations omitted); *Stackiewicz v. Nissan Motor Corp. in U.S.A.*, 686 P. 2d 925, 929 (Nev. 1984) ("evidence of a steering malfunction which resulted in the driver losing control of the vehicle might properly be accepted by the trier of fact as sufficient circumstantial proof of a defect, or an unreasonably dangerous condition, without direct proof of the mechanical cause of the malfunction."). *See Krause Inc. v. Little*, 34 P.3d 566, 571 (Nev. 2001) ("expert testimony is not always necessary to establish the existence of a manufacturing defect");

## NEW HAMPSHIRE

*Elliott v. Lachance*, 256 A. 2d 153, 156 (N.H. 1969) (because "[t]he cornerstone rule in products liability is that proof of mere injury furnishes no rational basis for inferring that the product was defective for its intended use," a products liability plaintiff must, and therefore may adduce "sufficient circumstantial evidence to establish such unfitness or causal defect."). Notably, in discussing the propriety of using circumstantial evidence, the New Hampshire Supreme Court cited both *Vandermark v. Ford Motor Co.*, 391 P. 2d 168 (Cal. 1964) (Traynor, J.), which held that "plaintiffs were entitled to establish the existence of a defect and defendants' responsibility therefore by circumstantial evidence," *id.*, 391 P. 2d at 170, and *Elmore v. American Motors Corp.*, 451 P. 2d 84 (Cal. 1969), which noted that *Vandermark* "recognized that a plaintiff is entitled to establish the existence of the defect and the defendants' responsibility for it by circumstantial evidence," *id.* at 87, and then held "[n]o reason appears why the same rule should not apply where the plaintiff is seeking to prove that the defect caused his injuries." *Id.* See *McConchie v. Samsung Electronics America, Inc.*, 2000 WL 1513777, \*3 (D.N.H. 2000) (applying Maine law) ("[w]hile 'mere injury' is insufficient to prove liability, when a plaintiff cannot identify the specific defect, product defect may be proven through circumstantial evidence of malfunction and a lack of evidence of other causes.") (citing *Elliott v. Lachance*).

## NEW JERSEY

*Thuczek v. Prestige BMW of Ramsey*, 2009 WL 2601625, \*2 (N.J. App. Aug. 26, 2009) ("a manufacturing defect" can be proven by "(1) direct evidence, (2) circumstantial

evidence that justifies such an inference, or (3) negating all other possible reasons for the occurrence to make it reasonable to assume that the defect existed prior to the sale.") (citations omitted); *Lauder v. Teaneck Volunteer Ambulance Corps*, 845 A. 2d 1271, 1277 (N.J.App. 2004) (in a products liability action, "[t]o prove the existence of a defect, a plaintiff may rely on the testimony of an expert who has examined the product or offers an opinion on the product's design. Alternatively, a plaintiff may produce circumstantial evidence of a defect."). See *Myrlak v. Port Authority of New York and New Jersey*, 723 A. 2d 45, 55, 56-57 (N.J. 1999) (stating "the requirements that . . . the defect occurred before the product left the control of the manufacturer, can be satisfied through direct and circumstantial evidence," expressly adopting the approach taken by the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 (1998), noting "the historical antecedent to Section 3 of the RESTATEMENT is traceable to the negligence doctrine of *res ipsa loquitur*" and that "Section 3 of the RESTATEMENT in a products liability case does precisely what *res ipsa loquitur* does in a negligence context"); *id.* at 56 ("A plaintiff can satisfy the requirements of Section 3 of the RESTATEMENT . . . by direct and circumstantial evidence as well as evidence that negates causes other than product defect."). See *State Farm Fire & Casualty Co. v. Kaz, Inc.*, 2008 WL 2122639, \*3-4 (N.J. App. 2008); *Jerista v. Murray*, 883 A. 2d 350, 364 (N.J. 2005); *Scanlon v. General Motors Corp.*, 326 A. 2d 673, 678-79 (N.J. 1974).

## NEW MEXICO

*Salinas v. John Deere Co., Inc.*, 707 P. 2d 27, 32 (N.M.App. 1984) ("The plaintiff may rely on circumstantial evidence" to prove that a product is defective in an action for

strict products liability); *Richards v. Upjohn Co.*, 625 P. 2d 1192, 1195 (N.M.App. 1980) (in an action for products liability, "[c]ausation may be established by circumstantial evidence."). See *Springer Corp. v. Dallas & Mavis Forwarding Co., Inc.*, 559 P. 2d 846, 848 (N.M.App. 1976).

## NEW YORK

*Bueno v. Chase Manhattan Bank*, 23 Misc.3d 1106(A), 2009 WL 960719, \*7 (N.Y.Sup. April 9, 2009) ("Plaintiff may . . . rely on circumstantial evidence to prove a manufacturing defect.") (citations omitted); *Ramos v. Howard Industries, Inc.*, 885 N.E. 2d 176, 178 (N.Y. 2008) ("It is well settled that a products liability cause of action may be proven by circumstantial evidence, and thus, a plaintiff need not identify a specific product defect") (citing *Speller v. Sears, Roebuck & Co.*, 790 N.E. 2d 252 (N.Y. 2003); *Halloran v. Virginia Chems.*, 361 N.E. 2d 991 (N.Y. 1977); *Codling v. Paglia*, 298 N.E. 2d 622 (N.Y. 1973)); *Speller ex rel. Miller v. Sears, Roebuck and Co.*, 790 N.E. 2d 252, 254-55 (N.Y. 2003) ("New York has long recognized the viability of this circumstantial approach in products liability cases. . . . In this regard, New York law is consistent with the . . . RESTATEMENT [THIRD] OF TORTS: PRODUCTS LIABILITY § 3 [1998] ."); *Landahl v. Chrysler Corp.*, 534 N.Y.S. 2d 245, 246 (N.Y.App. 1988) ("plaintiff in a products liability action need not establish the precise nature of the defect in order to make out a prima facie case").

## NORTH CAROLINA

*DeWitt v. Eveready Battery Co., Inc.*, 565 S.E. 2d 140, 151 (N.C. 2002) ("the burden sufficient to raise a genuine issue of material fact in such a case may be met if the plaintiff produces adequate circumstantial evidence of a defect. This evidence may include such factors as: (1) the malfunction of the product; (2) expert testimony as to a possible cause or causes; (3) how soon the malfunction occurred after the plaintiff first obtained product and other relevant history of the product, such as its age and prior usage by plaintiff and others, including evidence of misuse, abuse, or similar relevant treatment before it reached the defendant; (4) similar incidents, "when[ ] accompanied by proof of substantially similar circumstances and reasonable proximity in time," (5) elimination of other possible causes of the accident; and (6) proof tending to establish that such an accident would not occur absent a manufacturing defect. . . . The plaintiff does not have to satisfy all these factors to create a circumstantial case, and if the trial court determines that the case may be submitted to the jury, "[i]n most cases, the weighing of these factors should be left to the finder of fact[.]"" (citations omitted)); *Red Hill Hosiery Mill, Inc. v. MagneTek, Inc.*, 582 S.E. 2d 632, 635 (N.C.App. 2003) ("a products liability case . . . can be proven by circumstantial evidence") (citing *DeWitt*). See also *Walsh v. Restoration Hardware, Inc.*, 122 Fed.Appx. 28, 30, 2005 WL 327556, 2 (4<sup>th</sup> Cir. 2005) (applying North Carolina law) ("If . . . the plaintiffs do not present any direct evidence of the product's defectiveness at the time of sale, they can still raise an issue of material fact sufficient to survive summary judgment through circumstantial evidence.")

## NORTH DAKOTA

*Endresen v. Scheels Hardware and Sports Shop, Inc.*, 560 N.W. 2d 225, 232 (N.D. 1997) ("Circumstantial evidence will also suffice to prove proximate cause in a products liability case.") (citations omitted); *Herman v. General Irrigation Co.*, 247 N.W. 2d 472, 473 (N.D. 1976) (in an action for strict products liability "[a] defect in the product need not be conclusively proved, but can be shown by circumstantial evidence." (Syl. No. 4, by the Court)).

## OHIO

*Atkins v. General Motors Corp.* 564, 725 N.E. 2d 727, 733 (Ohio. App. 2009) ("expert testimony is not always required to prove the material elements of a design defect claim. In some cases, circumstantial evidence alone, without expert testimony, will suffice to document the existence of a design defect. "); *McAuliffe v. W. States Import Co., Inc.*, 651 N.E. 2d 957, 958 n. 1 (Ohio,1995) (" it shall be sufficient for the claimant to present circumstantial or other competent evidence that establishes, by a preponderance of the evidence, that the product in question was defective"); *Watson v. Ford Motor Co.*, 2007 WL 4216975, \*12 (Ohio App. 2007) ("Ohio courts have held that the existence of a design defect in a strict products-liability action may be shown by either direct or circumstantial evidence."); *Triplex Co. v. R.L. Pomante Contractor*, 2006 WL 3240534, \*5 (Ohio App. 2006). See *Najib v. Meridian Medical Technologies, Inc.*, 179 Fed.Appx. 257, 260, 2006 WL 1133299, \*3 (6th Cir. 2006) (applying Ohio law) ("the existence of a product defect can be demonstrated by circumstantial evidence, without the need for expert testimony, even if direct evidence is potentially available.").

## OKLAHOMA

*Nash v. General Motors Corp.*, 153 P.3d 73, 75 (Okla. App. 2006) (in a products liability action, "[t]he existence of a defect may be proved by direct or circumstantial evidence, or a combination thereof.") (citing *Kirkland v. General Motors Corp.*, 521 P. 2d 1353, 1364 (Okla. 1974). See *Lee v. Volkswagen of America, Inc.*, 688 P. 2d 1283, 1285 (Okla. 1984) ("circumstantial evidence, coupled with the proper inferences drawn from it, is clearly an acceptable minimal basis" to prove a product is defective); *Tigert v. Admiral Corp.*, 612 P. 2d 1381, 1383-84 (Okla.App. 1979) (same). See also *Henderson v. Sunbeam Corp.*, 46 F.3d 1151, 1995 WL 39022, \*1 (10th Cir. 1995) (applying Oklahoma law) (circumstantial evidence . . . has always been considered an acceptable, indeed often necessary, means of proof in product cases.").

## OREGON

*Krause v. American Aerolights, Inc.*, 762 P. 2d 1011, 1014 (Or. 1988) ("circumstantial evidence of a dangerous defect in a similar product" is admissible because it is "is relevant to prove that the product involved in this accident was defective."); *Roe Roofing, Inc. v. Lumber Products, Inc.*, 688 P. 2d 425, 427 (Or.App. 1984) ("a latent defect may be proved circumstantially by evidence that the product was used in a normal manner.") (citations omitted). See also *McCathern v. Toyota Motor Corp.*, 332 Or. 59, 23 P.3d 320, 331 (Or. 2001) ("evidence related to risk-utility balancing, which may include proof that a practicable and feasible design alternative was

available, will not always be necessary to prove that a product's design is defective and unreasonably dangerous").

## **PENNSYLVANIA**

*Barnish v. KWI Bldg. Co.*, 980 A. 2d 535, 540 (Pa. 2009) ("the malfunction theory" of products liability "allows for proof of strict product liability claims through circumstantial evidence."); *Dansak v. Cameron Coca-Cola Bottling Co.*, 703 A. 2d 489, 496 (Pa.Super. 1997) ("From this circumstantial evidence, a jury may be permitted to infer that the product was defective at the time of sale."). See *Rogers v. Johnson & Johnson Prods., Inc.*, 565 A. 2d 751, 754 (Pa. 1989); *Woodin v. J.C. Penney Co., Inc.*, 629 A. 2d 974, 975-76 (Pa. Super. 1993); *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 415 (3d Cir. 1999) (construing Pennsylvania law).

## **RHODE ISLAND**

*Olshansky v. Rehrig Intern.*, 872 A. 2d 282, 287 (R.I. 2005) (in a strict products liability action, "[a] plaintiff is permitted to draw inferences of fact based on circumstantial evidence"); *Thomas v. Amway Corp.*, 488 A. 2d 716, 722 (R.I. 1985) ("Introducing probative circumstantial evidence that may create inferences of fact not otherwise subject to direct proof, and which could prove the defect and the causal connection is entirely consonant with the theory of strict liability."). See *Sheehan v. The North American Marketing Corp.*, 610 F.3d 144, 150 (1<sup>st</sup> Cir. 2010) (applying Rhode Island law).

## SOUTH DAKOTA

*Kreager v. Blomstrom Oil Co.*, 379 N.W. 2d 307, 310 (S.D. 1985) ("To recover under a theory of strict liability, the plaintiff must prove by a preponderance of the evidence that the product was defective when delivered. The existence of a defect may, of course, be established by circumstantial evidence.") (citations omitted); *Drier v. Perfection, Inc.*, 259 N.W. 2d 496, 504 (S.D. 1977) (citations omitted) ("No specific defect need be shown if the evidence, direct or circumstantial, permits the inference that the problem was caused by a defect. A defect may be inferred from proof that the product did not perform as intended by the manufacture." ). *See also Kendall v. Bausch & Lomb, Inc.*, 2009 WL 1740008, \*11 (D.S.D. 2009) ("the general rule is that the existence of a defect may be proven by direct or by circumstantial evidence, and a circumstantial case, by itself, is not a bar to a jury determination.") (construing South Dakota law).

## TENNESSEE

*Browder v. Pettigrew*, 541 S.W. 2d 402, 405 (Tenn. 1976) ("we adhere to the body of law which holds that a defect in a product, as well as any other material fact, may be proven by direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence.") (citations omitted). *See Whaley v. Rheem Mfg. Co.*, 900 S.W. 2d 296, 299 (Tenn.App. 1995) ("defect in a product may be proven by direct evidence, circumstantial evidence, or a combination of both.") (citation omitted). *See also Mohr v. DaimlerChrysler Corp.*, 2008 WL 4613584, \*4 (Tenn. App. 2008).

## TEXAS

*Shaun T. Mian Corp. v. Hewlett-Packard Co.*, 237 S.W.3d 851, 854 (Tex.App. 2007) ("we conclude appellants' circumstantial evidence was sufficient to raise an issue of material fact as to each contested element of their manufacturing defect claim."); *Kindred v. Con/Chem, Inc.*, 650 S.W. 2d 61, 63 (Tex. 1983) ("Although no witness could conclusively state that the product was the cause, the jury could have made that determination from circumstantial evidence.") (citations omitted); *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 807 (Tex. 2006) ("circumstantial evidence of a product defect may be offered") (citations omitted); *Sipes v. General Motors Corp.*, 946 S.W. 2d 143, 155 (Tex.App. 1997) (when "the plaintiff has no evidence of a specific design defect or manufacturing defect, he may offer evidence of the product's malfunction as circumstantial proof of the defect."). *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 603 (Tex. 2004) (Hecht and Owen, JJ., concurring) ("Few would question the use of circumstantial evidence to prove products liability in appropriate cases. The hard issue is not whether it can be done, but when and how."). *See also Ayres v. Sears, Roebuck & Co.*, 789 F. 2d 1173, 1175 (5th Cir. 1986) (observing that a Texas design defect is "provable by direct or circumstantial evidence, based on fact or opinion testimony."), abrogated on other grounds, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988).

## UTAH

*King v. Searle Pharmaceuticals, Inc.*, 832 P. 2d 858, 862 (Utah 1992) (where circumstances make it impossible "to adduce direct evidence of causation . . . the doctrine of *res ipsa loquitur* is sufficient to create a factual inference of product defect . . .

sufficient to preclude summary judgment" for the products liability defendant. Thus, a plaintiff may "establish[ ] a prima facie case of liability based on *res ipsa loquitur* if the circumstances of the case otherwise raise a reasonable inference that [the product manufacturer] was liable under either products liability or negligence law."). See *Alder v. Bayer Corp., AGFA Div.*, 61 P.3d 1068, 1089 (Utah 2002). See also *Taylor v. Cooper Tire & Rubber Co.*, 130 F.3d 1395, 1398 (10<sup>th</sup> Cir. 1997) (construing Utah law).

## VERMONT

*985 Associates, Ltd. v. Daewoo Electronics America, Inc.*, 945 A. 2d 381, 386 (Vt. 2008) (" Defendant's argument that plaintiffs' experts should be excluded because they were unable to identify a specific defect in the microwave is without merit. The central issue here is the admissibility of the proffered expert testimony, not the sufficiency of the evidence in proving plaintiffs' case. Again, the fact that Austin was able to arrive at the microwave as the source of the fire only by way of elimination of other sources does not render his methodology unreliable. Experts in products liability cases are rarely able to establish causation to a certainty; such cases tend to be more of an exercise in excluding other causes and determining the likely cause based on circumstantial evidence."); *Travelers Insurance Cos. v. Demarle, Inc., U.S.A.*, 878 A. 2d 267, 272 (Vt. 2005) ("causation in a products liability or warranty case can be proved through circumstantial evidence"). See also *Allstate Insurance Co. v. Hamilton Beach/Proctor Silex, Inc.*, 473 F.3d 450, 452-56 (2d Cir. 2007) (construing Vermont law).

## VIRGINIA

*Owens-Corning Fiberglas Corp. v. Watson*, 413 S.E. 2d 630, 639 (Va. 1992) (in a product liability action, circumstantial evidence is "sufficient to support the jury's finding that [a plaintiff] was exposed to [a defendant's product] and that such exposure was a proximate cause of his death."); *Southern States Co-op. Inc. v. Doggett*, 292 S.E. 2d 331, 335 (Va. 1982) ("Although the fact-finder is not authorized to indulge in speculation or guesswork, this does not destroy the weight of circumstantial evidence in fixing civil liability," including in a products liability case. "Proof of facts from which it can be reasonably inferred that an act or circumstance sought to be established occurred or existed is sufficient to authorize submission of the issue to the jury. But such circumstantial evidence must be sufficient to establish that the result alleged is a probability rather than a mere possibility.") (citations omitted)). *See also Wilder v. Toyota Motor Sales, U.S.A., Inc.*, 23 Fed.Appx. 155, 158 (4<sup>th</sup> Cir. 2001) ("there is no per se rule requiring expert testimony about the specific defect in products liability cases, and in some cases, circumstantial evidence alone may be used to establish product liability in Virginia.") (construing Virginia law).

## WASHINGTON

*Lockwood v. AC & S, Inc.*, 722 P. 2d 826, 840-41 (Wash.App. 1986), *aff'd*, 744 P. 2d 605 (Wash. 1987) ("Circumstantial evidence may establish the entire basis for recovery under either negligence or strict products liability."). *See Allen v. Asbestos Corp., Ltd.*, 138 Wash.App. 564, 157 P.3d 406, 409 (Wash.App. 2007); *Pagnotta v. Beall*

*Trailers of Oregon, Inc.*, 991 P. 2d 728, 732 (Wash.App. 2000). See also *Transue v. Aesthetech Corp.*, 341 F.3d 911, 920 (9<sup>th</sup> Cir. 2003) (applying Washington law).

## WEST VIRGINIA

*Bennett v. Asco Services, Inc.*, 621 S.E. 2d 710, 717 (W.Va. 2005) ("A plaintiff is not required to establish a strict products liability cause of action by identifying the specific defect that caused the loss, but instead may permit a jury to infer the existence of a defect by circumstantial evidence."); *Anderson v. Chrysler*, 403 S.E. 2d 189, 193 (W.Va. 1991) ("Circumstantial evidence may be sufficient to make a prima facie case in a strict liability action, even though the precise nature of the defect cannot be identified, so long as the evidence shows that a malfunction in the product occurred that would not ordinarily happen in the absence of a defect." "In most instances the plaintiff will produce direct evidence of the product's defective condition. In some instances, however, the plaintiff may not be able to prove the precise nature of the defect in which case reliance may be had on the "malfunction" theory of product liability. This theory encompasses nothing more than circumstantial evidence of product malfunction . . . . It permits a plaintiff to prove a defect in a product with evidence of the occurrence of a malfunction and with evidence eliminating abnormal use or reasonable, secondary causes for the malfunction . . . . It thereby relieves the plaintiff from demonstrating precisely the defect yet it permits the trier-of-fact to infer one existed from evidence of the malfunction, of the absence of abnormal use and of the absence of reasonable, secondary causes." (citations omitted)); See *Beatty v. Ford Motor Co.*, 574 S.E. 2d 803, 807 (W.Va. 2002)

## WISCONSIN

*Sumnicht v. Toyota Motor Sales, U.S.A., Inc.*, 360 N.W. 2d 2, 18 (Wis. 1984). ("In addition to expert testimony, the presence of a product's defective design that is unreasonably dangerous can be established by the presentation of circumstantial evidence."); *Rennick v. Fruehauf Corp.*, 264 N.W. 2d 264, 267 (Wis. 1978) ("For the plaintiff to prevail on a products liability claim he must show, among other things, that the product was in a defective condition when it left the possession or control of the seller. The existence of the defect may be shown by a *res ipsa* type of inference."). *See also Godoy ex rel. Gramling v. E.I. du Pont de Nemours and Co.*, 768 N.W. 2d 674, 698-99 (Wis. 2009) (Prosser, Ziegler, & Gableman, JJ., concurring) ("under RESTATEMENT (THIRD) [OF PRODUCTS LIABILITY] § 3, circumstantial evidence may be sufficient in some cases to support a conclusion that a product was defectively designed without requiring proof of a reasonable alternative design, if the product fails to perform its intended function.").

## WYOMING

*Valentine v. Ormsbee Exploration Corp.*, 665 P. 2d 452, 462 (Wyo. 1983) ("It is not necessary to prove a specific defect, and while proof of the failure or malfunction of an article standing alone is insufficient to prove that a product was defective, it is a strong circumstance to consider along with the remaining facts."); *Shipton Supply Co., Inc. v. Bumbaca*, 505 P. 2d 591, 594 (Wyo. 1973) ("the defectiveness of a product may be proved by circumstantial evidence").

## APPENDIX C

### PLAINTIFFS NEED NOT IDENTIFY SPECIFIC PRODUCT DEFECT

*See, e.g., Ramos v. Howard Industries, Inc.*, 885 N.E.2d 176, 178 (N.Y. 2008) ("It is well settled that a products liability cause of action may be proven by circumstantial evidence, and thus, a plaintiff need not identify a specific product defect").

*Bennett v. Asco Services, Inc.*, 621 S.E.2d 710, 717 (W.Va. 2005) ("A plaintiff is not required to establish a strict products liability cause of action by identifying the specific defect that caused the loss, but instead may permit a jury to infer the existence of a defect by circumstantial evidence.").

*Stanley v. Lennox Industries, Inc.*, 102 P.3d 1104, 1107 (Idaho 2004) (circumstantial evidence may be used to determine whether a product is defective. "While direct evidence of identifiable defect is the strongest evidence of a product's defective condition, such evidence of a defect in a product which was present when it left the manufacturer's control will be rare and unusual," with the result that "a plaintiff need not prove a specific defect to carry his burden of proof.").

*Sanders v. Quikstak, Inc.*, 889 F.Supp. 128, 131 (S.D.N.Y.1995) (applying New York law) ("Under certain circumstances, however, a plaintiff need not prove a specific defect in the product at issue. Despite an absence of proof of any specific defect in a product, a jury may infer that an accident occurred because of a defect when the plaintiff has proven that the product did not perform as intended and has excluded all causes of the accident not attributable to the defendant.").

*Henderson v. Sunbeam Corp.*, 46 F.3d 1151 (10th Cir.1995) (applying Oklahoma law) (plaintiff may prove case with circumstantial evidence without identifying a particular defective component).

*Soule v. General Motors Corp.*, 882 P.2d 298, 305 (Cal. 1994) ("an injured plaintiff will frequently be able to demonstrate the defectiveness of the product by resort to circumstantial evidence, even when the accident itself precludes identification of the specific defect at fault.") (citations omitted).

*Anderson v. Chrysler Corp.*, 403 S.E.2d 189 (W.Va.1991) (plaintiff need not identify the specific defect that caused the harm).

*Landahl v. Chrysler Corp.*, 534 N.Y.S.2d 245, 246 (N.Y.App. 1988) ("plaintiff in a products liability action need not establish the precise nature of the defect in order to make out a prima facie case").

*Living & Learning Centre, Inc. v. Griese Custom Signs, Inc.*, 491 A.2d 433, 435 (Conn. App. 1985) ("It is not necessary that the plaintiff in a strict tort action establish a specific defect as long as there is evidence of some unspecified dangerous condition.").

*Dietz v. Waller*, 685 P.2d 744, 745 (Ariz. 1984) ("[N]o specific defect need be shown if the evidence, direct or circumstantial, permits the inference that the accident was caused by a defect").

*Valentine v. Ormsbee Exploration Corp.*, 665 P.2d 452, 462 (Wyo. 1983) ("It is not necessary to prove a specific defect, and while proof of the failure or malfunction of an article standing alone is insufficient to prove that a product was defective, it is a strong circumstance to consider along with the remaining facts.").

*Cassisi v. Maytag Co.*, 396 So.2d 1140, 1153 (Fla. App. 1981) (it is “immaterial that the plaintiffs failed to identify the specific cause of the malfunction since it is inferred that the malfunction itself, under such circumstances, is evidence of the product's defective condition at both the time of the injury and at the time of sale”).

*Harrell Motors, Inc. v. Flanery*, 612 S.W.2d 727, 729, (Ark. 1981) (“proof of specific defect is not required when common experience tells us that the accident would not have occurred in the absence of a defect”).

*Garrett v. Nobles*, 630 P.2d 656, 658 (Idaho 1981) (“plaintiff need not prove a specific defect in order to carry burden of proof”).

*Knight v. Otis Elevator Co.*, 596 F.2d 84 (3d Cir.1979) (applying Pennsylvania law) (plaintiffs need not prove the existence of a specific defect if they can show that the product malfunctioned in the absence of abnormal use and reasonable secondary causes).

*Holloway v. General Motors Corp.*, 271 N.W.2d 777 (Mich.1978) (plaintiffs were not required to prove the specific defect in the product).

*Drier v. Perfection, Inc.*, 259 N.W.2d 496, 504 (S.D. 1977) (“No specific defect need be shown if the evidence, direct or circumstantial, permits the inference that the problem was caused by a defect. A defect may be inferred from proof that the product did not perform as intended by the manufacture.”).

*General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 349-50 (Tex. 1977) (if a “plaintiff has no evidence of a specific defect in the design or manufacture of the product, he may offer evidence of its malfunction as circumstantial proof of [its] defect”).

## APPENDIX D

### CIRCUMSTANTIAL EVIDENCE IN DESIGN DEFECT CASES

*See, e.g., Davis v. Material Handling Associates Inc.*, 929 N.E.2d 1229, 1234 (Ill.App. 2010) ("a prima facie case of [defective design] product liability can be established exclusively from circumstantial evidence").

*Paranto v. Piotrkowski*, 2010 WL 4226765, \*4 (Conn.Super. Sept. 22, 2010) (a design "defect may be inferred by circumstantial evidence") (citations omitted).

*Alza Corp. v. Thompson*, 2010 WL 1254610, \*19 (Tex.App. April 1, 2010) ("when 'the plaintiff has no evidence of a specific design defect . . . , he may offer evidence of the product's malfunction as circumstantial proof of the defect.'" (citations omitted).

*Atkins v. GMC*, 564, 725 N.E.2d 727, 733 (Ohio. App. 2009) ("In some cases, circumstantial evidence alone . . . will suffice to document the existence of a design defect.").

*Webber v. Hilborn*, 2009 WL 5150082 (Mich.App. Dec. 29, 2009) ("defective design . . . claim may be based on either direct or circumstantial evidence") (citations omitted).

*Peters v. GMC*, 200 S.W.3d 1, 18 (Mo.App. 2006) ("Sufficient circumstantial evidence will support a jury verdict in a products liability case."); "[Plaintiff] met his burden of proof . . . if the facts and circumstances in evidence fairly warrant the conclusion that the [product] was defectively designed and dangerous and caused the accident and the resulting injuries . . .").

*Lauder v. Teaneck Volunteer Ambulance Corps*, 845 A.2d 1271, 1277 (N.J., App. 2004) (in a products liability action, "[t]o prove the existence of a defect, a plaintiff may rely on . . . circumstantial evidence of a defect.").

*Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199, 218, 694 A.2d 1319, 1332 (1997) ("a jury may . . . infer a [design] defect from the evidence without the necessity of expert testimony") (citations omitted).

*Sumnicht v. Toyota Motor Sales, U.S.A., Inc.*, 360 N.W.2d 2, 18 (Wis. 1984) ("defective design . . . can be established by the presentation of circumstantial evidence.").

*General Motors Corp. Hopkins*, 548 S.W.2d 344, 349-50 (Tex. 1977) ("[i]f the plaintiff has no evidence of a specific defect in the design . . . of the product, he may offer evidence of its malfunction as circumstantial proof").

