UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 25-1808

MILLENTINE COATES,
Appellant

v.

FORD MOTOR COMPANY; XYZ CORPORATION

On Appeal from the District Court, D.V.I.
Chief Judge Robert A. Molloy, No. 3:21-cv-00063

Before: HARDIMAN, BIBAS, and PORTER, *Circuit Judges*
Argued: Dec. 10, 2025; Filed: Aug. 31, 2026

OPINION OF THE COURT

PORTER, *Circuit Judge*.

Millentine Coates was injured in a single-vehicle accident while driving her 2002 Ford Explorer on a Virgin Islands highway. Coates sued Ford Motor Company, alleging that the vehicle's airbags spontaneously deployed, causing her to lose control and crash into a hillside. Ordinarily, Coates would need to identify a specific defect to succeed on a products-liability claim. Instead, Coates alleges an unspecified defect under the "malfunction theory" embodied in Section 3 of the Restatement (Third) of Torts: Products Liability

("Section 3"). Under that doctrine, a defect may be inferred on circumstantial evidence of malfunction, most typically where the product in question is lost, destroyed, or otherwise in a condition where direct evidence of a specific defect is unavailable through no fault of the plaintiff. But here, the vehicle's airbag system was neither lost nor destroyed. Indeed, Coates had her experts inspect it. Yet not completely: Despite her expert recommending further inspection and testing, that was never performed. We conclude that Section 3's more lenient evidentiary standard is unavailable under these circumstances. But even if it were, Coates's evidence is too slight to raise her claim out of the realm of speculation. So we will affirm the District Court's grant of summary judgment for Ford and against Coates on her products-liability claim.

I

A

In September 2016, Coates was driving her 2002 Ford Explorer on a highway in St. Thomas, U.S. Virgin Islands. According to Coates, the airbags in the vehicle spontaneously deployed—hitting her and filling her vehicle with smoke. Disoriented, Coates lost control of the vehicle, swerved across the oncoming lane, and crashed into the adjacent hillside. She incurred significant bodily injuries. At the time of the collision, weather was clear, traffic was light, and Coates was not under the influence of any intoxicants or medications.

Believing that a defect in her vehicle's airbag system caused the airbag's spontaneous deployment that led to her crash, Coates sued Ford on a products-liability claim, among others. Ford denied liability, maintaining that the airbag deployment was not a result of any product defect let alone, one attributable to Ford.

During discovery, the parties inspected Coates's vehicle and reviewed its history. The 2002 Ford Explorer was originally sold that year in New York to its first owner. Later, it was sold in North Carolina in 2005 to its second owner. Finally, it was sold in North Carolina in 2009 to Alvin Ross, Coates's son-in-law, for Coates's use. The vehicle's odometer clocked in at 93,477 miles as late as 2009 before Ross purchased it, but the record lacks evidence of any later odometer reading.

In 2003, the vehicle was involved in "an accident or other incident" with "[d]amage to left front." Joint Appendix ("J.A.") at 519. Later that year its engine was removed and replaced during repairs. In 2004, its body electrical wiring was repaired. In 2015, it was involved in a collision, causing damage to the right side and front bumper, which was repaired. At some point before the 2016 collision at issue here, the front driver's seat was replaced but the seatbelt pretensioners (the components that instantaneously activate seatbelt retraction upon collision) were never reconnected.

Central to Coates's case is the vehicle's restraint control module ("RCM"). The RCM is the "brains" of the vehicle's restraints system, responsible for sensing crashes, deploying airbags, and recording crash data. J.A. at 182. The RCM itself contains an accelerometer sensor (which detects changes in velocity) and receives inputs from other 'satellite' accelerometer sensors situated throughout the vehicle, for example, at its front and sides. According to Ford's design specifications, the RCM is programmed to record crash data—including a commanded airbag deployment—any time there is a sudden change in frontal velocity or an airbag is deployed. The RCM's crash sensing and airbag deployment functions are not dependent on the crash recording function, which activates only after detection and deployments are finished.

As part of a joint inspection of the vehicle by the parties' experts, the RCM was removed from the vehicle and its data was downloaded. For the events in question, despite the airbag's deployment and the vehicle's crash, the RCM did not record any deployment or crash event—and the parties have adduced no evidence to explain that failure. The record also contains no indication of prior RCM or airbag problems associated with the vehicle.

The RCM download did contain historical diagnostic codes indicating prior events with the RCM at some point in its service life but that were no longer active by the 2016 crash. While some of the diagnostic codes related to the RCM's deployment functions, Coates's expert could not testify as to what exactly those meant, why they had been activated, or how they might have caused the spontaneous deployment. Coates's expert proposed conducting additional inspection—i.e., "an internal RCM teardown"—of the RCM to determine the significance of the historical diagnostic codes, but that never happened. J.A. at 890–91. Absent additional information, Coates's expert—while believing the historical diagnostic codes were "suspicious"—agreed that he could not "testify within a reasonable degree of engineering certainty that any of those fault codes caused a spontaneous deployment." J.A. at 920.

During the vehicle's inspection, Coates's experts were unable to locate its frontal accelerometer sensor. Because such satellite sensors can, under certain conditions, send false signals to the RCM, Coates's expert suggested locating the frontal sensor and performing "off-line testing" to determine whether there was "any indication at the sensor level" of a defective condition. J.A. at 326. There were no further inspections.

B

Coates filed this action in the territorial Superior Court of the Virgin Islands, and Ford removed to the District Court of the Virgin Islands. That court transferred the action to the United States District Court for the Eastern District of Michigan, which in turn sent the case back to the District Court of the Virgin Islands following the United States Supreme Court's decision in *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, 592 U.S. 351 (2021).

After discovery, Ford moved for summary judgment, which the District Court granted on Coates's sole remaining claim for products liability. The District Court held, while assuming that Section 3 of the Third Restatement applied, that Coates had failed to create a genuine dispute of material fact as to whether the alleged unspecified defect was extant at the original time of sale; whether it was the most likely cause of the airbag deployment; and whether it was the proximate cause of Coates's injuries. Coates timely appealed only the judgment on her products-liability claim.

II

The District Court of the Virgin Islands had diversity jurisdiction under 28 U.S.C. § 1332 and 48 U.S.C. § 1612 over

Coates's products-liability common law claim. *See Edwards v. HOVENSA, LLC*, 497 F.3d 355, 358 (3d Cir. 2007). We have jurisdiction under 28 U.S.C. § 1291.

We review a grant of summary judgment de novo, applying the same standards as the district court. *Wiest v. Tyco Elecs. Corp.*, 812 F.3d 319, 327–28 (3d Cir. 2016) (citation omitted). Summary judgment is appropriate only where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if its existence or nonexistence might affect the outcome of the suit under governing law. *SodexoMAGIC, LLC v. Drexel Univ.*, 24 F.4th 183, 203 (3d Cir. 2022) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). And a dispute is "genuine" if there is a sufficient evidentiary basis on which a reasonable factfinder could find for the nonmoving party. *Id.* at 203–04 (citing *Anderson*, 477 U.S. at 252).

On summary judgment, a court's task is not to resolve disputes but to determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52. In reviewing the record, a court must construe all facts in the light most favorable to the nonmoving party, and must resolve all reasonable inferences in that party's favor. *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 268 (3d Cir. 2014) (citation omitted). But inference based on speculation, conjecture, or suspicion will not create a genuine dispute of material fact sufficient to survive summary judgment. *Id.* at 269 (citation omitted); *Wiest*, 812 F.3d at 328 (citation omitted).

A federal court exercising diversity jurisdiction over state or territorial law claims must apply the substantive law of the appropriate state or territory. *See Edwards*, 497 F.3d at 360 ("The fact that the District Court of the Virgin Islands is an Article IV court rather than an Article III court does not preclude the application of *Erie*."). So we apply Virgin Islands law and, where inconclusive, "predict how the Supreme Court of the Virgin Islands would decide" the matter. *Id.* at 361 n.3.

III

Coates contends that the District Court, proceeding under Section 3 of the Restatement (Third) of Torts, erred in holding that she had failed to adduce evidence sufficient to survive summary judgment on her products-liability claim. As a threshold matter, we agree with Coates and the District Court that the Supreme Court of the Virgin Islands has all but adopted Section 3. *See Davis v. UHP Projects, Inc.*, 74 V.I. 525, 533 n.3 (2021) (adopting Section 2 of the Restatement (Third) of Torts, and stating that "the same analysis . . . would also support adoption of the rule set forth in section 3."). We predict that the Supreme Court of the Virgin Islands would adopt Section 3. And applying it, we conclude that Section 3's relaxed evidentiary burden is unavailable to Coates under the circumstances of her case. Even with the relaxed burden, Coates could not defeat summary judgment because her evidence that the alleged unspecified defect existed at the time the vehicle left Ford's control amounts to no more than speculation, conjecture, or suspicion and thus does not create the required genuine dispute of material fact.

A

Under Virgin Islands law, products-liability claims are governed by Sections 1 and 2 of the Restatement (Third) of Torts: Products Liability. *See Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 984–85 (V.I. 2011) (adopting Section 1); *Davis*, 74 V.I. at 533–34 (adopting Section 2). As a "general rule," "those engaged in the business of selling or otherwise distributing products are subject to strict liability for harm caused by a defective product." *Davis*, 74 V.I. at 532; *see* Restatement (Third) of Torts: Prods. Liab. § 1. And, consistent with Section 2:

> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect [or] is defective in design . . . . A product:
>
> (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

Davis, 74 V.I. at 533 (quoting Restatement (Third) of Torts: Prods. Liab. § 2).

Coates advances her products-liability claim under both design and manufacturing defect theories. Ordinarily, under either theory, a plaintiff must identify a specific defect in the allegedly defective product. But Coates has not identified any specific defect in the design or manufacture of the vehicle's RCM. Instead, Coates pursues a *res ipsa loquitur*-style inference of defect by way of circumstantial evidence under the commonly labeled "malfunction theory" embodied in Section 3. That section, titled "Circumstantial Evidence Supporting Inference of Product Defect," provides:

> 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.

Tutein v. Ford Motor Co., 67 V.I. 34, 46 (V.I. Super. Ct. 2016) (quoting Section 3); *see id.* ("Section 3 is the soundest rule for the Virgin Islands.").[1]

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[1] Virgin Islands courts have had little occasion to apply and develop the malfunction theory. *But see Tutein v. Ford Motor Co.*, 67 V.I. 34, 46 (V.I. Super. Ct. 2016). Yet many other jurisdictions have done so, with the doctrine variously flying

This doctrine restated in Section 3 is narrow in scope. The malfunction theory "does not relieve a plaintiff of the burden to prove all elements of a product liability claim," *Metro. Prop. & Cas. Ins. Co. v. Deere & Co.*, 25 A.3d 571, 580 (Conn. 2011), and, for example, "is not a means to prove proximate cause or damages," *Roskop Dairy, L.L.C. v. GEA Farm Techs., Inc.*, 871 N.W.2d 776, 796–97 (Neb. 2015); *see also Barnish v. KWI Bldg. Co*., 980 A.2d 535, 541–42 (Pa. 2009); *Myrlak v. Port Auth. of N.Y. & N.J.*, 723 A.2d 45, 54–56 (N.J. 1999). Rather, the malfunction theory simply allows a

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under banners such as "indeterminate defect theory," "general defect theory," or simply as an unnamed circumstantial evidence approach to showing a product defect. David G. Owen, *Manufacturing Defects*, 53 S.C. L. Rev. 851, 871–73 & n.123 (2002) (describing development of malfunction theory); Jonathan M. Hoffman, Res Ipsa Loquitur *and Indeterminate Product Defects: If They Speak for Themselves, What Are They Saying?*, 36 S. Tex. L. Rev. 353 (1995) (same); *see also* Restatement (Third) of Torts: Prods. Liab. § 3, cmt. a. By and large, excepting certain jurisdictional nuances, Section 3 recapitulates the extensive common law on this doctrine. *See, e.g.*, *Myrlak v. Port Auth. of N.Y. & N.J.*, 723 A.2d 45, 55 (N.J. 1999) ("The [New Jersey] rule regarding circumstantial proof of a defect in a strict products liability case was adopted recently in [Section 3 of] the Restatement (Third) of Torts: Products Liability."); *Metro. Prop. & Cas. Ins. Co. v. Deere & Co.*, 25 A.3d 571, 580–81 (Conn. 2011) (applying the malfunction theory while citing without formally adopting Section 3 alongside decisions pre- and post-dating Section 3's publication); *Roskop Dairy, L.L.C. v. GEA Farm Techs., Inc.*, 871 N.W.2d 776, 796 (Neb. 2015) (same).

plaintiff—in the face of a product malfunction but in the absence of direct evidence of a specific defect—to put forward circumstantial evidence from which a product defect existing at the time of sale or distribution can be inferred. *Metro. Prop.*, 25 A.3d at 580; *Roskop Dairy*, 871 N.W.2d at 796–97; *Barnish*, 980 A.2d at 541; *Myrlak*, 723 A.2d at 54–56. In this way, the malfunction theory in the products-liability context resembles the *res ipsa loquitur* doctrine in the negligence context. These doctrines are not separate causes of action, but rather evidentiary rules supplying an alternative means, i.e., circumstantial evidence, for proving a particular element of a cause of action: defect, in the products-liability context; fault, in the negligence context. *Metro. Prop.*, 25 A.3d at 580–81; *Roskop Dairy*, 871 N.W.2d at 796–97; *Barnish*, 980 A.2d at 543; *Myrlak*, 723 A.2d at 54, 55–56. Such circumstantial evidence may include:

> (1) the malfunction of the product; (2) expert testimony as to a variety of *possible* causes; (3) the timing of the malfunction in relation to when the plaintiff first obtained the product; (4) similar accidents involving the same product; (5) elimination of other possible causes of the accident; and (6) proof tending to establish that the accident does not occur absent a manufacturing defect.

Dansak v. Cameron Coca-Cola Bottling Co., 703 A.2d 489, 496 (Pa. Super. Ct. 1997); *see also DeWitt v. Eveready Battery Co.*, 565 S.E.2d 140, 151 (N.C. 2002) (same); *Roskop Dairy*, 871 N.W.2d at 797 (same).

B

Coates concedes that without the benefit of the malfunction theory's wider evidentiary gate her products-liability claim fails because she has not identified a specific defect. On appeal, Ford reprises its argument that Coates is "not entitled to invoke the malfunction theory when the product at issue . . . is not lost or destroyed but is instead available." Appellee's Br. at 21–22. And here, the vehicle and its RCM are available. Coates asserts that the malfunction theory is not so limited, and that her case falls within the doctrine's underlying rationale. The District Court expressed its own reservations but assumed without deciding that Section 3's malfunction theory applied to Coates's case. We now decide that it does not.

1

The malfunction theory in product-liability law sprouted from the *res ipsa loquitur* doctrine common to negligence law. Section 3, cmt. a. These doctrines are motivated by the shared justification that, where an accident itself bespeaks liability, a plaintiff should not be denied recovery because she lacks access to the relevant sources of direct evidence through no fault of her own. *Id.* at cmt. b; *Metro. Prop.*, 25 A.3d at 582; *Roskop Dairy*, 871 N.W.2d at 796. In the seminal case of *Byrne v. Boadle*, which coined the phrase *res ipsa loquitur* (i.e., the thing speaks for itself), the court permitted the jury to draw a circumstantial inference of defendant Boadle's negligence in part because plaintiff Byrne lacked access to direct evidence of how a flour barrel came to fall from Boadle's second-floor warehouse window and strike Byrne as he passed by. 2 H. & C. 722, 159 Eng. Rep. 299 (Ex. 1863); *see also Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1149 (Fla. Dist. Ct. App. 1981);

Matthew R. Johnson, *Rolling the "Barrel" A Little Further: Allowing* Res Ipsa Loquitur *to Assist in Proving Strict Liability in Tort Manufacturing Defects*, 38 Wm. & Mary L. Rev. 1197, 1199 & n.22 (1997). Similarly, in the products-liability context, the malfunction theory is "most commonly invoked" where the allegedly defective product—i.e., the key source of direct evidence—is "unavailable, either because it has been destroyed in the accident, lost, or discarded." 1 Frumer & Friedman, Products Liability § 8.06 (2026) (citation modified). Today, we address the uncommon situation, which poses the question: May a plaintiff tap into the malfunction theory's more generous evidentiary rule, even where the allegedly defective product is not destroyed, lost, or discarded but rather available?

Authorities are limited and inconclusive, often pointing in different directions on this question. Section 3, for example, gestures at a "lost or destroyed" prerequisite in its comments but does not explicitly mandate it in its principal text. *Compare* Section 3, cmt. b ("Frequently, the plaintiff is able to establish specifically the nature and identity of the defect . . . . But when the product unit involved in the harm-causing incident is lost or destroyed in the accident, direct evidence of specific defect may not be available."), *with id.* ("without proof of a specific defect"). And the Virgin Island courts' lone case applying Section 3's malfunction theory involved an allegedly defective airbag system that, unlike here, *was* prematurely discarded by a mechanic. *Tutein*, 67 V.I. at 38. So the court's discussion had no occasion to disclose a view on whether the theory applied where the allegedly defective product was, like here, still available. *Compare id.* at 45 ("Section 3 was intended to apply to cases in which the product fails to perform its manifestly intended function *and* where the product is lost or destroyed."

(emphasis added)), *with id.* at 45–46 ("[P]laintiffs will not be barred from asserting claims where the specific defect cannot be identified *or* the product has been destroyed." (emphasis added)).

Other courts are split. Frumer, *supra*, § 8.06 ("Courts and commentators do not agree on whether a plaintiff may use the theory when the product is still available for inspection."). Some courts have applied the malfunction theory in cases where an allegedly defective product is still available, though typically with little to no analysis of whether the doctrine was in the first place applicable in those circumstances. *See, e.g.*, *Williams v. Smart Chevrolet Co.*, 730 S.W.2d 479, 482–83 (Ark. 1987); *Adkins v. Nestle Purina PetCare Co.*, 973 F. Supp. 2d 905, 915–916 (N.D. Ill. 2013); *Hamilton v. Emerson Elec. Co.*, 133 F. Supp. 2d 360, 364 (M.D. Pa. 2001). By contrast, in the cases with more extensive discussion, courts have criticized this approach and reasoned that "[t]he malfunction theory . . . is only applicable in cases where the subject product or its components were destroyed, or are otherwise unavailable or inaccessible." *Decato v. Brandfon Motors, Inc.*, 2013 WL 4873069, at *7 (Conn. Super. Ct. Aug. 20, 2013); *see also Roskop Dairy*, 871 N.W.2d at 796 (criticizing application of the malfunction theory where allegedly defective product is still available); *Ellis v. Beemiller, Inc.*, 910 F. Supp. 2d 768, 774 (W.D. Pa. 2012) (same).

2

Two considerations counsel against extending Section 3's malfunction theory to circumstances in which an allegedly defective product is still available. For starters, the malfunction theory is already plenty potent, enabling plaintiffs to bridge a wider speculative gap than even *res ipsa loquitur* allows. Though similar in form and function, these doctrines affect a plaintiff's case to differing degrees based on the distinct legal contexts in which each are deployed, i.e., products liability versus negligence.

Consider, for example, a defendant's control over the instrumentality of harm.[2] In a classic *res ipsa loquitur* negligence case, the instrumentality of the plaintiff's harm (like a falling flour barrel causing physical injury) was within the defendant's control at the time of the accident. By contrast, in an ordinary products-liability case, the instrumentality of the plaintiff's harm has left the manufacturer-defendant's control by the time of the accident. Naturally, once a product leaves the manufacturer's control, "the likelihood of other potential causes of the accident that are not attributable to the manufacturer necessarily increases." *Metro. Prop.*, 25 A.3d at 582. Thus, in the usual case, "an inference that an accident involving a product resulted from something attributable to the manufacturer is much more speculative than an inference of negligence by the defendant in res ipsa cases," where typically the instrumentality was within the defendant's control. *Id.*; *see* Jonathan M. Hoffman, Res Ipsa Loquitur *and Indeterminate Product Defects: If They Speak for Themselves, What Are They*

[2] *See* Hoffman, *supra*, at 357 ("[E]xclusivity of control by the defendant is the linchpin of res ipsa . . . ."); *Coastal Air Transp. v. Royer*, 64 V.I. 645, 655 (V.I. 2016) (noting that under *res ipsa loquitur* "a jury is permitted to infer a defendant's negligence from the happening of an extraordinary event under the defendant's control"); *Myrlak*, 723 A.2d at 51 (noting that *res ipsa loquitur* requires that "the instrumentality [of harm] was within the defendant's exclusive control").

Saying?, 36 S. Tex. L. Rev. 353, 360 (1995) ("[T]he leap from negligence to product liability crosses a wide[] chasm" and "extend[s] a theory premised upon exclusive control to circumstances in which the defendant has relinquished all control."); *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 604 (Tex. 2004) (Hecht, J., concurring) (warning that malfunction theory is "less strict" and "a kind of res ipsa [] lite").

And that's not the only way in which malfunction theory packs a stronger punch than *res ipsa loquitur*. Indeed, while the *res ipsa* doctrine permits *one* inference, i.e., "the single inference of negligence," the malfunction theory (tracking the traditional elements of a products-liability claim) permits *two* separate inferences: "that the harmful incident was caused by a product defect, and that the defect was present when the product left the manufacturer's control." *Myrlak*, 723 A.2d at 55. Because the malfunction theory gives a plaintiff a substantial leg up when proving up a products-liability claim, we must carefully apply Section 3, policing the set of circumstances in which it may be invoked.

But there's a more fundamental reason to circumscribe the doctrine: Unlocking the malfunction theory despite the availability of the allegedly defective product ignores the doctrine's underlying rationale. As noted, the malfunction theory (like its progenitor, *res ipsa loquitur*) is purposed to advantage a plaintiff who is disadvantaged in proving up a defect because the allegedly defective product is unavailable for her inspection. Consider, for example, the Virgin Islands plaintiff in *Tutein*. Following a car accident, the mechanic discarded the allegedly defective airbag system, so the plaintiff was necessarily incapable of adducing direct evidence of any defect. *Tutein*, 67 V.I. at 38, 43–44. In those circumstances, Section 3's malfunction theory steps in with an alternative route to satisfy the burden of production because the ordinary route was closed off through no fault of the plaintiff.

Here, by contrast, Coates asks for the malfunction theory's advantage while she retains the ordinary advantage of the vehicle's availability for inspection. This approach makes little sense: Either the unavailability of the allegedly defective product is material or it is not. Hoffman, *supra*, at 366–68. Coates's possession of the vehicle and its airbag system means that she is "*theoretically* capable" of proving up a defect through direct evidence, so there's no need to "level the playing field" via Section 3's malfunction theory. *Ellis*, 910 F. Supp. 2d at 775.

Coates objects to such a "literal interpretation" of Section 3, arguing that the RCM's failure to record crash and deployment data is the "functional equivalent of destruction" because she was "deprived [] of the most probative evidence through no fault of her own." Appellant's Br. at 25–26. In her view, the doctrine's "underlying rationale" is that "plaintiffs should not be denied recovery" where they face an "evidentiary barrier" to proving a specific defect because "the product itself fail[ed] to preserve or reveal crucial evidence." Appellant's Reply Br. at 2, 5.

Coates states the principle at too high a level of generality. True, the RCM *data*, an important source of evidence, is missing. Naturally, that makes proving a defect more difficult. But Coates was still theoretically capable of doing so because other sources of evidence—the RCM *itself*, the rest of the airbag system, and the vehicle—remained available. Coates failed to exhaust these sources of evidence, declining to pursue both an internal teardown of the RCM and inspection of the frontal accelerometer sensor—even after her expert recommended doing so.[3] That underscores the danger of extending Section 3 too broadly. Yes, it's the plaintiff's prerogative to develop or forego additional lines of evidence. But a plaintiff should not look to the malfunction theory to bridge an evidentiary gap that she may well have been able to fill had she diligently inspected the allegedly defective product. *Cf. Lawson v. Mitsubishi Motor Sales of Am., Inc.*, 938 So. 2d 35, 51 (La. 2006).

For the reasons discussed, we join the other courts to have closely considered this issue and predict that though the Virgin Islands Supreme Court will adopt Section 3's malfunction theory it will decline to apply Section 3's malfunction theory where an allegedly defective product was not lost or destroyed but rather was available to the plaintiff for inspection. Here, though the RCM data was missing, Coates remained theoretically capable of proving up a specific defect because the vehicle, the vehicle's airbag system, and the RCM itself were available. Accordingly, Section 3's malfunction theory does not afford Coates the alternative avenue of proving defect by circumstantial evidence. Lacking evidence of defect, Coates fails to demonstrate a genuine issue of material fact as to an essential element of her products-liability claim.

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[3] Coates fails to respond to Ford's argument on this topic in her appellate briefing and thus forfeits any explanation for why she did not undertake these further inspections. *See In re Wettach*, 811 F.3d 99, 115 (3d Cir. 2016) (explaining that any issue an appellant fails to develop in its briefing is forfeited).

C

Even if Section 3's malfunction theory did apply, Coates's evidence is insufficient to withstand summary judgment on her strict liability claim. Under Section 3, when direct evidence of a specific defect is unavailable because the allegedly defective product has been lost or destroyed, a jury may rely on circumstantial evidence to infer the traditional products-liability elements of a defect attributable to the manufacturer or seller if a plaintiff demonstrates by a "preponderance of evidence" that "the incident that harmed [her]" (1) "was of a kind that ordinarily occurs as a result of product defect," and (2) "was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution." Section 3 & cmt. d; *Metro Prop.*, 25 A.3d at 583–84; *Barnish*, 980 A.2d at 541–42.

Satisfying the first element permits the jury to infer that "the plaintiff's injury resulted from a defect in the product rather than from some other cause of the accident, such as operator error." *Metro. Prop.*, 25 A.3d at 584. And satisfying the second element allows the inference that "the defect in the product existed when the product left the manufacturer's control and was not introduced by any other reasonably possible cause outside of its control." *Id.* at 585. As a practical matter, to satisfy Section 3, a plaintiff will often be obliged to present sufficient evidence to negate or discount other potential causes of the incident. *Barnish*, 980 A.2d at 541–42; *Metro. Prop.*, 25 A.3d at 585–86. A plaintiff need not eliminate with certainty all other potential causes, but she must put on evidence sufficient for a reasonable fact finder to infer that the alleged unspecified product defect attributable to the manufacturer or seller was the *most likely* cause of the incident. Section 3, cmt.

d; *Barnish*, 980 A.2d at 541–42; *Metro. Prop.*, 25 A.3d at 585–86; *Williams*, 730 S.W.2d at 482.

1

To show a defect, Coates begins with evidence of the malfunction itself, i.e., the spontaneous airbag deployment. Coates testified that the vehicle's airbag system deployed unprompted as she was driving down the highway, causing her to veer into a hillside. That account was consistent with what she told Officer Lee-Bob who responded to the scene and escorted her to the hospital. While the "mere fact" of an accident and injury is insufficient to get to a jury, Frumer, *supra*, § 8.06, Coates's corroborated testimony that the airbag system malfunctioned by spontaneously deploying amounts to some evidence of defect, *Dansak*, 703 A.2d at 496 ("[T]he malfunction itself is circumstantial evidence of a defective condition." (citation modified)); *Tutein*, 67 V.I. at 47 ("[T]he average juror using common knowledge could find that airbags deploying without provocation is the result of a product defect."). *But see* *Williams*, 730 S.W.2d at 483 (noting that a plaintiff's testimony will not always suffice to "adequately negate any cause of the accident due to driver error or control").

To buttress her testimonial evidence, Coates submits evidence of another malfunction: the RCM's unexplained failure to record crash or deployment data. As Coates argues, if she had crashed the vehicle of her own accord, a regularly functioning RCM would have recorded crash detection and deployment command logs. So the absence of such logs, as she and her experts contend, is evidence that the RCM malfunctioned and caused the airbags to spontaneously deploy. But Ford counters (and Coates's expert concedes) that the RCM has two *independent* functions, such that its ability to detect a crash and deploy the airbags are not dependent on whether it records data on those events.

While the RCM download report lacked crash and deployment logs, it did contain a cache of *historical* diagnostic codes activated at some point during the RCM's service life but prior to Coates's 2016 crash. Some of those historical diagnostic codes were significant, Coates's expert opined, because they "related to the circuits in the RCM that actually command deployment of the airbags" and demonstrated that "sometime in the history of this vehicle there were faults in the airbag deployment drivers." J.A. at 312. Yet Coates's expert could not testify definitively about the meaning of these codes, how they worked, when they occurred, or what had caused them. Thus, while Coates's expert believed that the historical fault codes were "very suspicious," he agreed that he could not testify within a reasonable degree of engineering certainty that any of the historical diagnostic codes caused a spontaneous deployment. J.A. at 889.

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Whether or not Coates's evidence is sufficient to prove up an unspecified defect at the time of the incident, there's yet another evidentiary burden at play: "That there is sufficient evidence to infer a defect does not necessarily mean that there is sufficient evidence to infer that the defect existed at the time of sale." *Living & Learning Ctr., Inc. v. Griese Custom Signs, Inc.*, 491 A.2d 433, 435 (Conn. App. Ct. 1985); *see* Section 3, cmt. d ("Evidence may permit the inference that a defect in the product at the time of the harm-causing incident caused the product to malfunction, but not the inference that the defect existed at the time of sale or distribution.”). In this vein, Ford argues that Coates has failed to put on evidence sufficient to show that an unspecified defect originating with Ford was more likely than an unspecified defect caused by the vehicle’s “age, wear and tear, and extensive repairs.” Appellee’s Br. at 40. We agree.

In assessing the origin of an unspecified defect, Section 3 instructs courts to consider “[s]uch factors as the age of the product, possible alteration by repairers or others, and misuse by the plaintiff or third parties,” which may have introduced the defect sometime after the product’s sale. Section 3, cmt. d; *see Hardin v. Montgomery Elevator Co.*, 435 So. 2d 331, 337 (Fla. Dist. Ct. App. 1983) (“[O]ther factors, including the product’s age, its length of use, severity of use, state of repair, expected useful life, subjection of the product to abnormal use, and its history of maintenance and repair, are all to be considered as parts of the entire fabric in determining whether the plaintiff has made a prima facie showing that the product was defective while still within the manufacturer’s control.”). Of the wide range of factors courts consider, “prolonged use”—i.e., the length and severity of use—is an “important one.” *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 319 A.2d 914, 923 (Pa. 1974) (quoting *Pryor v. Lee C. Moore Corp.*, 262 F.2d 673, 675 (10th Cir. 1958)). Authorities confirm that a shortness of time in use between sale and incident tends to strengthen an inference that the defect existed at sale, whereas a lengthiness of time in use tends to weaken it. *See id.*; *Scanlon v. Gen. Motors Corp., Chevrolet Motor Div.*, 326 A.2d 673, 678 (N.J. 1974) (“Generally speaking, the older a product is, the more difficult it is to prove that a defect existed while in the control of the manufacturer.”). Indeed, as one commentator has observed, every one of the illustrations in Section

3's commentary in which liability is deemed warranted involves a new or nearly new product. Hoffman, *supra*, at 368; *see* Section 3.

As Ford highlights, Coates's case on its face presents substantial evidence of prolonged use, among other factors, that severely undermines any inference that an unspecified defect causing Coates's accident in 2016 existed at the time of the vehicle's original sale by Ford in 2002. To start, the 2002 Ford Explorer saw continuous use over 14 years across more than 93,000 miles—with no indication in the record of prior RCM or airbag defects. Further, the vehicle had multiple owners: it was originally sold in New York in 2002; then sold in North Carolina in 2005 to its second owner; and finally sold in North Carolina in 2009 to Coates's son-in-law for Coates's use. What's more, the vehicle was subject to multiple accidents, repairs, and modifications over the course of its life. In 2003, it was involved in "an accident or other incident" with "[d]amage to left front." J.A. at 519. Later that year its engine was removed and replaced during repairs. In 2004, its body electrical-wiring was repaired. In 2015, it was involved in a collision, causing damage to the right side and front bumper, which was repaired. Plus, at some point before the 2016 collision, the front driver's seat was replaced but the seatbelt pretensioners were never reconnected.

By contrast, Coates offers little beyond the absent data and extant diagnostic codes to negate the possibility that the defect developed in the RCM after the vehicle's sale by Ford. First, Coates notes that Ford admits that the RCM was the original and was present in the Explorer when it left Ford's control. But that says nothing about whether the RCM's *defect* was present at the time of sale. Next, Coates highlights evidence that the vehicle "appeared to be in good condition" when Coates's son-in-law bought it in 2009, and that Coates "never had any problems with [it], routinely maintained it, and did not observe any issues or damage to the vehicle on the day of the accident." Appellant's Br. at 23. This is puzzling, because the fact that there were no problems with the vehicle over a long period of time cuts *against* any inference that the defect existed at the time of sale. *Kuisis*, 319 A.2d at 923; *Barnish*, 980 A.2d at 547; *Scanlon*, 326 A.2d at 678.

Generally, on review of summary judgment, "[t]he questions when and where a defect originated should be left to the finder of fact so long as reasonable and well-balanced minds could be satisfied from the evidence adduced that the defective condition existed when the product was delivered." *Sochanski v. Sears, Roebuck and Co.*, 621 F.2d 67, 70 (3d Cir. 1980) (citation modified). "But in certain situations the prolonged use factor may loom so large as to obscure all others in a case." *Kuisis*, 319 A.2d at 923. Authorities support the conclusion that this is such a case: We find no cases where allegations of an unspecified defect under a malfunction theory survived summary judgment where the product in question had comparably prolonged use (14 years of use over more than 93,000 miles), an attenuated chain of custody (three owners), and wear-and-tear (multiple prior accidents, repairs, and modifications).[4] We have no trouble concluding that Coates

[4] *Compare, e.g.*, *MacDougall v. Ford Motor Co.*, 257 A.2d 676, 677, 680 (Pa. Super. Ct. 1969) (jury question on unspecified steering defect where vehicle was a month old and driven 143 miles prior to accident), *and Agostino v. Rockwell Mfg. Co.*, 345 A.2d 735, 740 (Pa. Super. Ct. 1975) (jury question on unspecified blade-guard defect where power saw

has failed to show that her accident was not "solely the result of causes other than product defect existing at the time of sale or distribution." Section 3.

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was less than a month old and used only ten times), *and Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc.*, 473 F.3d 450, 462 (2d Cir. 2007) (jury question on unspecified power cord defect where coffee maker was new and used just one time), *and McIlvaine v. Ford Motor Co.*, No. 2:12-CV-111-DBH, 2013 WL 588934, at *3 (D. Me. Feb. 13, 2013) (Maine law) (jury question on unspecified brake/throttle defect where vehicle was 14 years old and driven 27,975 miles but had undergone no prior accidents or repairs), *with Quirk v. Ross*, 476 P.2d 559, 563 (Or. 1970) (en banc) (no jury question on unspecified brake defect where vehicle had two owners, normal servicing, and 39,500 miles of use free from brake difficulties), *and Hamilton v. Emerson Elec. Co.*, 133 F. Supp. 2d 360, 377 (M.D. Pa. 2001) (Pennsylvania law) (no jury question on unspecified blade-stop defect where power saw was more than a year old and made 1,000–3,000 cuts without incident), *and Woodin v. J.C. Penney Co.*, 629 A.2d 974, 976 (Pa. Super. Ct. 1993) (no jury question on unspecified power cord defect where freezer had successfully operated for eight years), *and Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 602 (Tex. 2004) (no jury question on unspecified internal defect where vehicle was two years old, driven around 54,000 miles, had multiple owners, and underwent various repairs), *and State Farm Fire & Cas. Co. v. Chrysler Corp.*, 523 N.E.2d 489, 496–97 (Ohio 1988) (no jury question on unspecified electrical defect where vehicle was four months old and underwent significant electrical repair; it was "equally likely that the defect arose as the result of negligent repair").

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Because the allegedly defective product was available for inspection, Coates cannot avail herself of Section 3's more generous evidentiary standard. Even if she could, her evidence is insufficient to "lift [her] contention out of the realm of speculation." *Kuisis*, 319 A.2d at 923. Accordingly, Coates has failed to create a genuine dispute of material fact as to her products-liability claim and Ford is entitled to judgment as a matter of law. We will affirm.

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