IN THE MISSOURI SUPREME COURT

NO. SC 89610

SHONNIE NEWTON, ET AL.,

Appellant,

v.

FORD MOTOR COMPANY, ET AL.,

Respondent.

MICHAEL J. NOLTE AND BARBIE NOLTE,

Appellants,

v.

FORD MOTOR COMPANY, ET AL.,

Respondents.

RESPONDENT'S SUBSTITUTE BRIEF

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INTRODUCTION

This case involves a terrible accident in which Plaintiffs' claim of a defect in the 2003 Ford Crown Victoria Police Interceptor ("Police Interceptor" or "CVPI") rested alternatively on the location of the fuel tank or on the design of the filler pipe check valve. Ford's theory of defense was that there is no fuel tank design or location that can eliminate all risk of leakage, that Trooper Newton's 2003 Police Interceptor was tested to the most severe rear crash test standards ever adopted by any automobile manufacturer in the world, and that the cause of the fuel leak in this case was the massive crush pictured below that severed the filler pipe in Trooper Newton's Police Interceptor and that resulted from the negligence of the driver of a 13,000 pound truck/trailer combination who—because of the size of the rig he was driving—smashed into the Police Interceptor with a force equal to *twice* that generated by one Police Interceptor hitting another at 75 m.p.h. Automotive engineers have not conceived a way to design filler pipes, needed for every tank regardless of tank location, to withstand such massive force.

The issues on this appeal involve the trial court's routine exercise of its discretion during and after a four-week product liability trial. The few rulings Plaintiffs challenge here were reviewed by the trial court in a comprehensive order denying their motion for a new trial. The same rulings were then scrutinized and affirmed as proper exercises of the trial court's discretion by the Court of Appeals. The Court of Appeals unanimously agreed that five of the six challenged rulings were not in error and further agreed that the rulings were sufficiently routine that an opinion affirming them lacked jurisprudential value. In the only challenge that warranted a published disposition, the Court of Appeals affirmed the trial court's discretionary conclusion that precluding Plaintiffs during closing argument from referring to other incident evidence that post-dated the accident at issue in the case and that Plaintiffs offered solely for purposes of notice to Ford was neither material nor prejudicial.

The dissenting opinion at the Court of Appeals with respect to closing argument appears to be based on at least three misunderstandings: (1) the purpose for which Plaintiffs offered the other incident evidence; (2) Plaintiffs' theories of defect; and (3) Ford's defense. The majority applied settled Missouri law in concluding that the trial court was best suited to decide whether its minimal limitation on Plaintiffs' closing argument was material or prejudicial. The record in this case establishes that the trial court correctly exercised its discretion.

STATEMENT OF FACTS

This appeal involves product liability claims against Ford Motor Company arising from an accident in which a parked 2003 Crown Victoria Police Interceptor was struck in the rear at more than 60 m.p.h. by a 13,000-pound truck-and-trailer. The Police Interceptor, by comparison, weighed less than 4,000 pounds. As noted, the force generated in this collision was twice the force that would have been generated in a 75 m.p.h. impact from another Police Interceptor. (LF 1464). The accident led to a fire and caused the death of Trooper Michael Newton and burns and other injuries to a passenger in his car, Michael Nolte. Plaintiff Shonnie Newton and plaintiffs Michael Nolte and his wife, Barbie, filed lawsuits against Ford and Tradewinds Distributing, Inc. Tradewinds employed Paul Daniel, the driver of the truck that struck Trooper Newton's Police Interceptor. These cases were consolidated for discovery and trial. The Newton and Nolte plaintiffs are referred to collectively as "Plaintiffs."

Trial lasted four weeks, during which the trial court imposed few limitations on Plaintiffs' proofs. Indeed, in denying Plaintiffs' motion for new trial, the trial judge noted:

> The trial record in this case reveals wide latitude given to the plaintiffs in the presentation of their evidence in chief. That presentation included 17 live witnesses and 15 depositions, as well as almost 400 exhibits.

***

> During the course of the trial, a host of Ford documents were admitted and displayed to the jury. This documentary presentation involved documents that Ford had generated over the course of more than 20 years.
>
> ***
>
> Without question, the vast and substantial portion of plaintiffs' evidence in its case in chief was admitted and very little of plaintiffs' desired proof in chief was excluded.

(LF 1442-43). In the end, Plaintiffs obtained substantial verdicts against Tradewinds: $4 million for the Newtons and $4.5 million for the Noltes. However, the same jury—after a few hours of deliberation—rejected Plaintiffs' product liability claims against Ford and returned a verdict in Ford's favor. (Tr. 4355-57).

I. THE ACCIDENT

On May 22, 2003, Trooper Michael Newton pulled Michael Nolte over for a traffic violation and parked his 2003 Police Interceptor behind Mr. Nolte's car. Both cars were off the road, on the right shoulder of Interstate 70. Tradewinds employee, Paul Daniel, was driving a Ford F-350 with a 30-foot gooseneck trailer on the same stretch of I-70. Plaintiffs' Substitute Brief describes the Tradewinds vehicle as "a pick-up truck pulling an empty trailer." (Br. 11). The words are technically correct but may create a misimpression of its size. A photograph of the vehicle that struck Trooper Newton's Police Interceptor is reproduced below:

(LF 1191). The "pick-up" truck weighed 9,300 pounds, had dual rear wheels, and a USDOT stamp on its side. (Tr. 2103). Mr. Daniel's trailer weighed 3,400 pounds, and the truck-and-trailer combination weighed 13,000 pounds—more than three times the weight of Trooper Newton's Police Interceptor. (Tr. 1098, 2103-05).

Mr. Daniel was traveling 65-70 m.p.h. as he approached Trooper Newton's parked vehicle. (Tr. 785, 1012, 1098, 2098-99). There was no evidence of braking before the truck slammed into the left or driver's side rear of the Police Interceptor. (Tr. 1009). Over Plaintiffs' objection, the trial court directed a verdict in their favor against Tradewinds, noting: "The evidence clearly showed that the crash in this case involved monumental force." (LF 1463). The impact destroyed the rear of the Police Interceptor and sheared off heavy steel components on the left side of the vehicle where the impact force was concentrated.

As depicted in the Introduction, the impact ripped through the left or driver's side of Trooper Newton's Police Interceptor, which houses the fuel door and the opening for the filler pipe. The filler pipe or filler neck is a tube that exists on all vehicles and allows the tank to be filled with fuel. As a result of the accident, the gas cap and its housing

separated from the filler pipe, as it was designed to do, in order to minimize the risk that the gas cap housing would pull the filler pipe from the tank and leave an opening in the tank. (Tr. 3268-69, 3316, 3766-67). The filler neck remained connected to the tank, as it was designed to do. (Tr. 3268-69, 3316, 3766-68). As a result of the crush to the Police Interceptor, a valve at the bottom of the filler pipe, just inside the fuel tank, was broken. (Tr. 1084-85; 3766-68). The design purpose of this valve was to meet a 1998 federal emissions requirement associated with fuel vapor created when re-fueling the vehicle. (Tr. 3591-95, 3768-69). According to Plaintiffs' expert, this combination of actions—opening the "top" and "bottom" of the filler pipe—allowed gas to escape, the gas ignited, and a fire occurred. (Tr. 1173-74).

Plaintiffs alleged that the 2003 Police Interceptor is defective because its fuel tank is located behind the rear axle rather than in front of the rear axle. Plaintiffs also alleged that the design of the filler pipe and the emissions check valve is defective. At trial, Ford contended that the location of the Police Interceptor's fuel tank behind the rear axle is safe and offered as proof of that contention, among other things:

- An investigation conducted in 2001 and 2002 by the National Highway Traffic Safety Administration ("NHTSA") concluded that Police Interceptors had an incidence of post-collision fires comparable to all other sedans, even though those other sedans were not exposed to the risks associated with police work. (Tr. 1868-70; LF 1119).

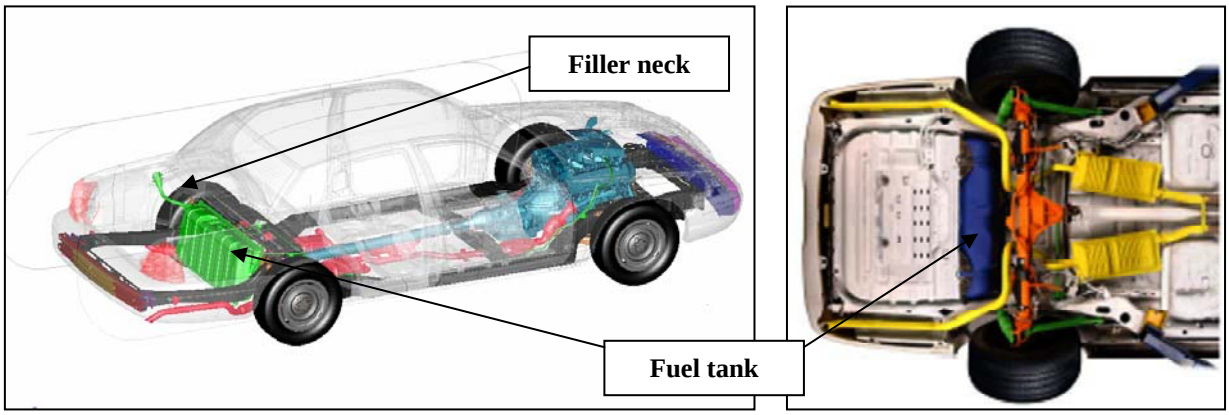
- Relocating the fuel tank would not have changed the location of the filler pipe; it would have been in the crush path of the truck/trailer rig regardless of the fuel tank location. (Tr. 3231-32; LF 1461-66).
- In 137 rear crash tests conducted on Police Interceptors, Ford had never seen a severed filler pipe. (Tr. 1756-57).
- Trooper Newton's accident was the only known Panther platform collision in which the filler pipe was severed. (LF 1501).
- But for the severed filler pipe, there would have been no fire, and Trooper Newton and Mr. Nolte would have walked away from the accident. (Tr. 2214-16, 2221).

II. THE POLICE INTERCEPTOR AND OTHER PANTHER PLATFORM VEHICLES

The 2003 Police Interceptor is part of Ford's Panther platform. The platform includes the Ford Crown Victoria, the Ford Crown Victoria Police Interceptor, the Lincoln Town Car, and the Mercury Grand Marquis. Production of the Panther platform began in 1979. The platform underwent significant changes for the 1992, 1998 and 2003 model years.

The Panther Platform is a full-sized sedan with a large interior, back seat and trunk. (Tr. 3118-24). It has rear-wheel drive, a live rear axle, and full body-on-frame construction. All (or nearly all) other model year 2003 cars have unibody constructions. (Tr. 3110-12, 3117-19). Because of the space utilized and the clearances needed for

these core design characteristics, the fuel tank on the Police Interceptor is necessarily located behind the axle. (Tr. 3123-37).



(LF 1186). An aft-of-axle tank location was used almost exclusively in the automobile industry when cars were rear-wheel drive. Most aft-of-axle tanks, however, were located *horizontally* and were much closer to the rear bumper than is the Police Interceptor's *vertical* tank, which is located more than three feet from the rear bumper. (Tr. 3746).

Police officers like the Police Interceptor because of the durability and performance associated with its full frame, V-8 engine, rear-wheel drive, and live rear axle. (Tr. 3098, 3111-12, 3122-24). These features meet police needs for a pursuit vehicle that can handle severe duty. Police officers also like the Police Interceptor because of its spacious interior, large back seat, and big trunk. (Tr. 3119-21, 3123-24). As a result of these features, which preclude a tank location under the passenger compartment, the Police Interceptor has dominated the police car market, earning a 70%-80% market share for the past decade.

In 1999, Ford received a report from the Florida Highway Patrol. This report claimed that police officers' use of their cars exposed them to an increased risk of high-

speed rear-end accidents. As described in the report and elsewhere, this increased risk results from unique police work because police regularly park their cars in and beside highways in connection with traffic stops, construction details, and accident investigations. (LF 1106-07). In early 2002, as a result of three highly-publicized rear-end accidents, the Arizona Attorney General raised similar concerns. In June 2002, Ford and the Arizona Attorney General announced the formation of the Police Officer Safety Action Plan to study this situation and determine what measures, if any, could be taken to reduce these unique risks. (Tr. 2778-82; LF 1118). The Plan included two main groups: the Technical Task Force, which consisted of Ford engineers, and the Blue Ribbon Panel, which consisted of representatives from Ford, police officers, and an independent vehicle design expert selected by the Attorney General. (Tr. 2778-82, 2808-11; LF 1118).

At the time these groups were formed, the Police Interceptor—like all passenger cars sold in the United States—was subjected to front, side, and rear crash testing to meet Federal Motor Vehicle Safety Standard 301 ("FMVSS 301"), which specifically addresses fuel system integrity in crashes. (Tr. 1766-70). In FMVSS 301's rear crash standard, a rigid rear moving barrier that weighs 4,000 pounds strikes the tested vehicle at 30 m.p.h. (Tr. 1766-70). Since the 1992 model year, Ford also tested the Panther platform to meet its internal rear crash guidelines. These guidelines require 50 m.p.h. car-to-car crash tests in the rear of the struck vehicle at both 50% and 100% overlap and also perpendicular at the filler pipe of the struck vehicle. (Tr. 1697-98). Plaintiffs' expert admitted Ford's testing was "state of the art," (Tr. 1753), and no one identified a

manufacturer with a more extensive rear crash test program than Ford. (Tr. 1697-98, 1770-73).

In 2002, in connection with the work of the Technical Task Force, Ford attempted to further enhance the safety of the Police Interceptor by developing shields for certain components to further protect the fuel system and then subjecting the Police Interceptor to 75 m.p.h. rear crash testing with a 50% overlap between the struck and target vehicles. (Tr. 2789-90, 2850). The goal of the testing was no puncture of the fuel tank or continuing leakage in that test mode. (Tr. 2793-94). No manufacturer in the world had ever attempted such a severe test. (Tr. 2782-84). As the result of this testing and other work of the Blue Ribbon Panel and Technical Task Force, in September 2002, the Arizona Attorney General and Ford announced a number of measures to reduce the risk of high-speed rear-end accidents and fires resulting from such accidents. (LF 1118-19).

The measures announced included the Upgrade Kit, which was designed to reduce the risk of punctures to the fuel tank from other vehicle components. (LF 1119). The Upgrade Kit was developed based on many things, including Ford's history of designing and developing fuel systems, vehicle inspections of Police Interceptors involved in high-speed rear impacts that resulted in fuel leakage, crash test vehicles involved in high-speed rear-end collisions, bench testing of shields and materials, scientific analysis of materials, and extensive supplier interaction and support, among other things. (Tr. 2787-89). Measures designed to reduce the risk were then announced in October 2002. (LF 1118-19). In May 2003, before Trooper Newton's accident, Ford published to its 32,000 law

enforcement fleet customers a letter detailing the continued progress associated with the Police Officer Safety Action Plan.

In taking these steps, however, Ford clearly and repeatedly stated they would not *eliminate* the risk of fuel system compromise if a Police Interceptor was struck with enough force. (Tr. 950, 961, 2818-20, 2877-78, 2921-22, 3254, 3516, 4202). As noted by the trial court and the Court of Appeals, Ford stressed this point throughout trial, with its own witnesses and exhibits. Exhibit 888 is the May 2003 letter Ford sent to all 32,000 law enforcement agencies that had purchased Police Interceptors, and it specifically noted that "there will ALWAYS be risk associated with high speed accidents. Just as a bullet-resistant vest doesn't make an officer immune to gunshots, no fuel system can be immune to leaks in these high-speed accidents." (Tr. 2824-27 (emphasis in original)). Ford's Upgrade Kit addressed known sources of leakage, but no vehicle can be made leak-proof. The Upgrade Kit was not designed to, and did not, address the risk of a filler pipe separation such as occurred in Trooper Newton's accident. (Tr. 2921-22).

III. PLAINTIFFS' ALLEGED ERRORS

Plaintiffs claim the trial court erred in limiting one portion of Plaintiffs' closing argument, by limiting cross-examination of a Ford witness, Jack Ridenour, by admitting NHTSA's 2002 Report, and by denying the motion for new trial based on cumulative error. Plaintiffs' Statement of Facts makes the argumentative, and repeated, claim that Ford "emphasized" the post-Newton accident evidence that is the focus of the first Point Relied On. As Ford explained in response to Point One below, there were three references during trial that included, but were not limited to, the six post-Newton

accidents that the trial court had excluded as irrelevant. Those three references collectively comprise fewer than three pages of a trial transcript that spans more than 4,000 pages. Whether there was any emphasis at all, and by whom, is a matter for this Court to decide.

A. Evidence Regarding "Other Incidents" and the Effectiveness of the Upgrade Kit

At a two-day pre-trial hearing during which Plaintiffs presented evidence and argument in favor of admitting other incident evidence, Plaintiffs sought to admit 53 accidents—the first of which occurred in 1981—involving a Panther platform vehicle (*i.e.*, Lincoln Town Car, Mercury Grand Marquis, Ford Crown Victoria, or Ford Crown Victoria Police Interceptor) in which a compromise to the fuel system occurred as the result of a rear-end collision. (LF 1086). Ford contended that none of the accidents was substantially similar to the Newton accident because none of the accidents involved a severed filler pipe. Ford also contended that any accident involving a Police Interceptor without the Upgrade Kit was not the same vehicle as Trooper Newton's.

Plaintiffs initially sought to offer the Panther platform accidents as evidence of both notice and defect. During the hearing, the trial court questioned Plaintiffs' attempt to offer the Panther Platform accidents as evidence of defect. (PreTr. 381-83). Plaintiffs thereafter determined not to offer the Panther platform accidents as evidence of defect, but only as notice to Ford of a rear-end accident in which there was a fuel leak or fuel-fed fire: "We have made a decision to only offer those [Panther Platform accidents] for

purpose of notice." (PreTr. 389). As a result, the trial court excluded as irrelevant six of the 53 Panther platform accidents that occurred *after* the Newton accident.

Both at the pretrial evidentiary hearing and at trial, Plaintiffs agreed that a limiting instruction would be needed to explain to the jury the limited use that it could make of the other accident evidence they planned to offer. (PreTr. 76-77; Tr. 1015-16). The limiting instruction was given to the jury before Plaintiffs' expert Jerry Wallingford took the stand on direct examination. That instruction (Instruction No. 3) provides in relevant part as follows:

> Mr. Wallingford will and other witnesses may testify about other rear end collisions involving Panther platform vehicles in which there was a fuel leak or a fuel fed fire. This testimony may be considered by you in determining whether or not Ford Motor Company knew of the fact of these other rear end collisions involving Panther platform vehicles in which there was a fuel leak or a fuel-fed fire. You may not consider this testimony in determining whether or not the 2003 Crown Victoria Police Interceptor was defectively designed and unreasonably dangerous.

(Tr. 1016-17; LF 1221). Because Ford planned to respond to Plaintiffs' other incident evidence with its own evidence of rear-end collisions involving Panther platform vehicles where there was *no* fuel leak or *no* fuel-fed fire, the trial court gave a mirror image limiting instruction with respect to Ford's other accident evidence. Ford's evidence of

other accidents was also limited to those that pre-dated Trooper Newton's. Jury Instruction No. 4 provided in pertinent part as follows:

> Mr. Ridenour will testify about other rear end collisions involving Panther platform vehicles in which there was no fuel leak or no fuel-fed fire. This testimony may be considered by you in determining whether or not Ford Motor Company knew of the fact of these other rear end collisions involving Panther platform vehicles in which there was no fuel leak or no fuel-fed fire. You may not consider this testimony in determining whether or not the 2003 Crown Victoria Police Interceptor was defectively designed and unreasonably dangerous.

(Tr. 3065; LF 1224).

Both instructions were included without objection in the packet of instructions available to the jury during deliberations.

B. Cross-Examination of Jack Ridenour

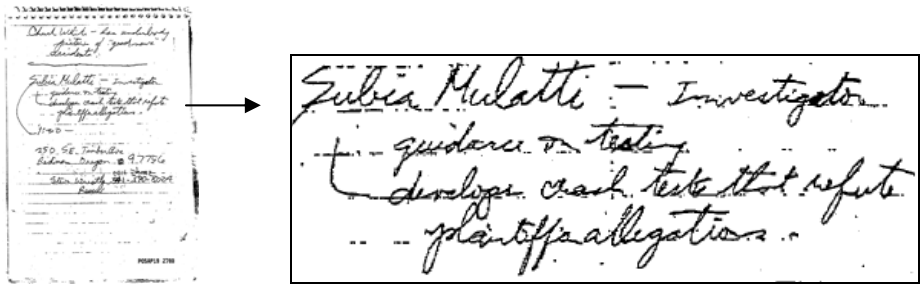
Jack Ridenour began working at Ford in 1971. (Tr. 3071). He had fuel system design and release responsibility for the Granada and the 1979 Mustang. (Tr. 3071-72). Mr. Ridenour then went to work for Ford's Design Analysis Department, which is responsible for assessing the field performance of Ford vehicles, working with design engineers and participating in litigation. (Tr. 3076-80). Mr. Ridenour testified about the design and field performance of the Police Interceptor and offered opinions regarding the

severing of the filler neck in the Newton accident. Plaintiffs claim error because they were limited in cross-examining Mr. Ridenour with respect to (1) the "Durker Notes;" (2) the Grush-Saunby Report, and (3) the Ford Pinto.

1. Cross-examination Based on the "Durker Notes."

During trial, Plaintiffs attacked the validity of crash tests conducted at Exponent by introducing amounts paid by Ford to Exponent. After significant argument, the trial court allowed cross-examination, re-direct and re-cross of Mr. Ridenour regarding Exponent. (Tr. 3404-18, 3430-49, 3532-44).

However, during re-cross, Plaintiffs attempted to introduce a handwritten note purportedly from a Ford employee, Joe Durker. The note is from one page of a seven-inch by five-inch spiral notebook with "Joe Dierker" written on the front. (LF 1149-77).[1] The relevant page and note are shown below:



(LF 1178). Before the notes were used, Mr. Ridenour admitted he was familiar with Subia Mulatte, an employee of Exponent, and Joe Durker, a Ford employee. (Tr. 3557).

[1] The notebook was produced by Ford in prior litigation and re-produced to Plaintiffs in this case. Mr. Durker's name is misspelled in the transcript.

However, Ford objected when Plaintiffs attempted to cross-examine Mr. Ridenour using the notes. (Tr. 3561).

Mr. Durker was not a witness in this case, he was not deposed in this case, and Plaintiffs did not offer a deposition from another case in which he discussed these notes. Mr. Ridenour could not identify Mr. Durker's notes: "The only knowledge I have about that, sir, is what you have told me." (Tr. 3568). After several lengthy arguments regarding the use of the "Durker Notes," the court stated:

> There is nothing here that you couldn't already argue, in my opinion. It's just like—I bet you money, marbles, and chalk that it's perfectly appropriate for Jerry Wallingford to develop tests or theories that refute Ford's position. It's very typically appropriate for all these things. This is produced by Joe Durker. He [Ridenour] doesn't know anything that in this document. Basically, there is not a foundation to impeach this witness with that.

(Tr. 3574). The trial court then offered to allow Plaintiffs to ask questions that went to the alleged substance of the notes, and Plaintiffs' counsel stated: "Okay. That's good." (Tr. 3575). Plaintiffs did not make a further record or offer of proof. (Tr. 3575).

2. Cross-examination Based on the Grush-Saunby Report

The Grush-Saunby Report (the "Report") was attached to and prepared in connection with Ford's Petition to Reconsider a 1973 Amendment to FMVSS 301. In evaluating the costs and benefits of the proposed standard—which was required by

legislation—the Report used "the societal cost values prepared by NHTSA." (LF 1092). The Report specifically notes that using NHTSA's "Societal Costs of Motor Vehicle Accidents ... does not signify that Ford accepts or concurs in the values." (LF 1092).

The trial court granted Ford's motion in limine regarding the Report. (PreTr. 534-35). Plaintiffs attempted to use the Report to cross-examine Mr. Ridenour, claiming it was inconsistent with his testimony regarding a different document—the "Chiara memo." (Tr. 3511-12). The court sustained Ford's objection to the use of the Report. (Tr. 3512). Thereafter, Plaintiffs made an additional proffer and argument regarding the Report. (Tr. 3862-3880). The proffer attempted to connect Mr. Ridenour's testimony regarding the Chiara memo to the Report. (Tr. 3865-66).

Plaintiffs recognized that the Report dealt with a different issue than the Chiara memo. (Tr. 3866-67). And, Plaintiffs offered no evidence or testimony showing Mr. Ridenour had any connection to the Report or that the Report had anything to do with the design of the 2003 Police Interceptor. (Tr. 3866-78). The trial court concluded: "And to be honest with you, in a vacuum the way this is utilized, and the state we are with the record, I think that the probative value of its use is outweighed by its prejudicial effect." (Tr. 3878).

3. Cross-examination Based on the Ford Pinto

Early during trial, the trial court allowed Plaintiffs to use a Pinto crash test for the limited purpose of establishing Ford's "notice" of a "problem" with behind-the-axle fuel tanks. However, the trial court prohibited further argument or discussion regarding the Pinto. In describing its reasoning, the trial court stated:

> I think I have given you great flexibility in this other-act stuff, and these Pinto cars and the Crown Vics, I don't think they're even close. I mean, I think they are off-the-moon different.

(Tr. 3195). There was no evidence that Ford relied on the design and development of the Pinto in connection with the design or development of any Panther platform car.

At trial, Plaintiffs claimed Mr. Ridenour was responsible for the design of the Pinto but, when questioned by the trial court outside the presence of the jury, Mr. Ridenour clearly stated: "I had system responsibility when I worked in fuel systems for different cars and I listed those. Pinto was not one them." (Tr. 3199). The trial court distinguished this type of responsibility from Mr. Ridenour's work on component parts that were used on many cars, including the Pinto. (Tr. 3199-3200, 3307-09). The design and functioning of these parts was not at issue. Given this record, the trial court found there was no foundation for the "Pinto cross," and that it would be unfairly prejudicial to Ford. (Tr. 3312).

C. Admission of NHTSA's ODI Report

On November 27, 2001—almost two years before the subject accident—the Office of Defects Investigation ("ODI") at NHTSA opened an investigation of fuel leaks following rear impact crashes in model years 1992-2001 Ford Crown Victoria, Crown Victoria Police Interceptor, Lincoln Town Car, and Mercury Marquis vehicles. (LF 1105). The ODI's investigation thus involved the same platform at issue in this case, the same alleged defect, and many of the same "other incidents" introduced by Plaintiffs at trial. The results of the ODI's investigation were detailed in an October 3, 2002 closing

resume ("ODI Report"). (LF 1101, *et seq.*). The ODI Report concluded that the crash energy levels associated with rear-impact tank failures in accidents involving Police Interceptors were significantly greater than the energy levels in the federal government's fuel system crash tests, that the risk of fire in high-energy crashes of Police Interceptors is comparable to similar passenger vehicles as well as a competitive police car, and that numerous high-energy rear crashes involving Police Interceptors resulted in little or no fuel loss and no fire. (LF 1102). The ODI closed its investigation because it was "unlikely that further investigation would produce sufficient evidence to demonstrate the existence of a safety-related defect in the subject vehicles." (LF 1120). The ODI Report was admitted into evidence.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN RESTRICTING PLAINTIFFS' CLOSING ARGUMENT TO OTHER INCIDENTS THAT PRE-DATED THE NEWTON ACCIDENT, AND EVEN IF SUCH RESTRICTION WAS ERROR, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THE ERROR WAS NEITHER MATERIAL NOR PREJUDICIAL AND DID NOT WARRANT A NEW TRIAL IN THAT PLAINTIFFS HAD OFFERED THE OTHER INCIDENTS AS EVIDENCE OF NOTICE ONLY, INCIDENTS THAT POST-DATED THE ACCIDENT AT ISSUE COULD NOT HAVE CONSTITUTED NOTICE TO FORD, AND FORD NEVER CONTENDED THAT THE UPGRADE KIT DID OR COULD ELIMINATE ALL LEAKS OR FIRES IN POLICE INTERCEPTORS CAUSED BY HIGH-SPEED REAR END IMPACTS.

A. Standard of Review

Missouri trial courts have broad discretion in ruling upon a motion for new trial. *Whitted v. Healthline Mgmt., Inc.*, 90 S.W.3d 470, 473 (Mo. App. 2002); *Enos v. Ryder Auto. Operations, Inc.*, 73 S.W.3d 784, 788 (Mo. App. 2002). A trial court should not overturn a verdict lightly because trials are costly for the litigants, the jurors, and the taxpayers. *Keltner v. K-Mart Corp.*, 42 S.W.3d 716, 722 (Mo. App. 2001). The trial court's denial of a motion for new trial is reviewed for abuse of discretion. *LaRose v. Washington Univ.*, 154 S.W.3d 365, 373 (Mo. App. 2004); *Kehr v. Knapp*, 136 S.W.3d 118, 122 (Mo. App. 2004). The appellant has the burden of showing that the trial court

abused its discretion. *State v. Albanese*, 9 S.W.3d 39, 45 (Mo. App. 1999). "Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *State v. White*, 81 S.W.3d 561, 567 (Mo. App. 2002) (citation omitted). "A new trial will be available only upon a showing that trial error or misconduct of the prevailing party incited prejudice in the jury." *LaRose*, 54 S.W.3d at 373 (citation omitted). An appellate court should not reverse the trial court's denial of a motion for new trial "unless there is a substantial or glaring injustice." *Kehr*, 136 S.W.3d at 122 (citation omitted).

A trial court is allowed wide discretion in controlling argument of counsel and, absent clear abuse of such discretion, its ruling should control. *Hawk v. Union Elec. Co.*, 798 S.W.2d 173, 175 (Mo. App. 1990); *Norfolk & W. Ry. Co. v. Greening*, 458 S.W.2d 268, 273 (Mo. 1970); *Lewis v. Bucyrus-Erie, Inc.*, 622 S.W.2d 920, 926 (Mo. banc 1981). "Where an able trial judge does not consider the argument of sufficient importance to require a new trial we normally defer to that judgment." *Hawk*, 798 S.W.2d at 175; *accord Giddens v. Kansas City S. Ry. Co.*, 937 S.W.2d 300, 309 (Mo. App. 1996). Even if the trial court abused its discretion, reversal is only appropriate if the error materially affected the merits of the action to justify reversal. *See* R.S. Mo. § 512.160(2) (2000).

B. There Was No Error and No Prejudice in Restricting Plaintiffs' Closing Argument to Other Incidents that Pre-dated the Newton Accident.

The real issue before the Court on this point about closing argument is this: What permissible argument were Plaintiffs prohibited from making that materially affected the merits of the trial? The analysis is two-pronged. First, accepting that the six post-Newton Police Interceptor accidents were "in evidence," albeit barely and vaguely, for what purpose could Plaintiffs have used them in closing argument? Second, if such an argument was available, was the inability to make it material and prejudicial? As will be explained below, Plaintiffs could not have used the post-Newton accidents without injecting error into the case. Even tolerating the error their use would have created, moreover, the sole argument the post-Newton accidents could have supported was that the Upgrade Kit with which Trooper Newton's Police Interceptor was equipped did not eliminate fuel leaks in Police Interceptors involved in violent rear-end collisions. Ford, however, conceded that point throughout, and Plaintiffs made that very argument without objection based on other evidence in the case. The post-Newton accidents, therefore, were neither relevant nor material, and no prejudice resulted from the trial court's discretionary decision to preclude Plaintiffs from arguing them.

1. Evidence of the Six Post-Newton Incidents

During this four-week trial, there were three minor references that included, but were not limited to, the post-Newton incidents: a chart on a PowerPoint slide displayed during Ford's opening; a single reference to "about 11 accidents" when the testimony of

Sue Cischke from a prior trial was read; and, two questions referring to "11 accidents with shields" asked during Richard Cupka's cross-examination.

a. Ford's opening statement

Ford's opening dealt only briefly with Plaintiffs' "other incidents." Ford's counsel first stated:

> Over 22 years, there has been one incident in the 22 years covered by these 46 where a filler neck was severed in two.

(Tr. 906). Later, Ford's counsel mentioned the "45 incidents that Mr. Wallingford wants to talk about" then moved to discussion of the energy involved in some of those accidents. (Tr. 934-36). In his final reference during opening statement, Ford's counsel stated:

> These incidents, most of these cars were never tested at 75. Most of them did not have the upgrade kit. Most of them didn't have trunk packs. Most of them didn't follow the trunk pack[ing considerations]. And none of them involved a filler neck separation. None of them.

(Tr. 962).

A PowerPoint slide which included the six post-Newton incidents among others on a chart was displayed for a few seconds during Ford's opening. Plaintiffs' statement (Br. 67) that Ford "introduced the … chart at trial" is misleading because it implies that the chart was introduced into evidence. Neither the PowerPoint slide nor the chart was offered or admitted into evidence. And the focus of the brief discussion of Plaintiffs'

other incident evidence in Ford's opening statement was on an undisputed point—*only* Trooper Newton's accident involved a severed filler pipe.

b. Ms. Cischke's reference to "about 11 accidents"

The next reference to post-Newton accidents occurred more than three weeks after openings. Plaintiffs and Ford read designated testimony given in a prior case by Sue Cischke, a Ford Vice President. In the context of testimony that explained that incidents would continue to occur even with the Upgrade Kit, Ms. Cischke referred to "about 11 accidents" that had occurred after the Upgrade Kit had been installed on Police Interceptors. Ms. Cischke's testimony was from the Illinois case of *St. Clair County v. Ford Motor Company*, which was tried to a defense verdict in September-October 2004. In that case, which involved allegations of fraud and breach of warranty, the trial court had, over Ford's objection, admitted evidence of rear-end accidents involving Panther Platform vehicles, irrespective of when they had occurred. Ms. Cischke first stated:

> Q. (Mr. Feeney) There have been incidents with shields. It's a fact. Everyone knows it. Are you aware of it?
>
> A. Not only am I aware of it, but we talked about that at the press conference that there would continue to be—accidents would happen, and that we did not think that installation of the shields would eliminate all these types of accidents, and there would be indeed accidents that involved fuel leakage, eventually fire of vehicles that did have shields on them.

(LF 907).

Shortly after this statement, the following testimony was read.

> Q. Have you had a chance to look at some of the information that is available, that's part of the court file here, concerning these incidents?
>
> A. Yes, I have.
>
> Q. And do you have some observations that you think might be helpful to understand from your perspective what your perspective is on some of these incidents?
>
> A. Sure. I could share that with you. Overall, when I look, there's about 11 accidents, I think, that are—are shown up there with the shield there that are vehicles that have been involved in a rear impact that had either some fuel leakage and some had fire … [2]

(LF 907).

The 11 accidents to which Ms. Cischke referred included four accidents prior to Trooper Newton's, the Newton accident, and six that occurred after Trooper Newton's. Ms. Cischke's testimony thus included accidents that the trial court had ruled were

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[2] When Ms. Cischke offered this testimony during the *St. Clair* trial, there was an exhibit that listed the "other accidents" admitted in that case. This exhibit was not used when Ms. Cischke's testimony was read during the *Newton* trial.

admissible as evidence of notice, as well as accidents that were irrelevant to that issue, but her testimony did not distinguish between the two.

c. Mr. Cupka's testimony

Richard Cupka, formerly an engineering manager at Ford, testified the day after Ms. Cischke's testimony had been read. Plaintiffs' counsel asked Mr. Cupka about the 11 accidents that had been mentioned once in Ms. Cischke's testimony.

> Q. Ms. Cischke testified yesterday that she knew of 11 with the shields where there were fuel leaks or fires. Are you aware of those 11 accidents?
>
> A. I don't think there is any for any shielded components.
>
> Q. Not my question.
>
> A. Oh. Well, I'm sure there may be accidents that have had fires, but for the things that we went out to shield and eliminate them as a potential puncture source, we haven't had any that they have not been effective. There will be fires. You can hit one with a—in Michigan our trucks have 80,000—now it's up to 120,000 pound limits on their weights. There is nobody that can keep the fuel in the tanks if one of those hits you. So I'm sure there are going to continue to be some level that we can't shield for; that nobody could.

Q. Have you told law enforcement that there have been 11 other—11 accidents with shields where there has been a fuel leak or fire, at least 11?

A. I have not told law enforcement that, no

Q. You also said that—are you finished? I'm sorry. Didn't mean to cut you off.

A. Sitting here today, I firmly believe that we have not had any leaks or fires from shielded components my system has designed for.

(Tr. 2941-42).

Mr. Cupka did not confirm or testify that there had been 11 accidents involving Police Interceptors with the Upgrade Kit. Furthermore, neither Plaintiffs' counsel's questions nor Mr. Cupka's testimony distinguished between the Panther platform accidents that the trial court had ruled were admissible and those that were irrelevant.

2. The Six Post-Newton Accidents Were Irrelevant on the Issue of Notice and Inadmissible on the Issue of Defect.

The trial court conducted a two-day evidentiary hearing on the admissibility of Plaintiffs' proffered other incident evidence on March 9-10, 2005. At that hearing, Plaintiffs sought the trial court's ruling on the admissibility of 53 "other incidents" involving fuel system compromises to Panther platform vehicles. Plaintiffs initially sought to offer the incidents as evidence of both notice and defect. The trial court questioned Plaintiffs' proposed use of the other incidents as evidence of defect.

Recognizing that offering the incidents for purposes of notice only required a significantly lesser showing of substantial similarity, Plaintiffs told the trial judge that they would be offering their other incident evidence solely to prove notice to Ford. (PreTr. 389 ("we have made a decision to only offer those for purpose of notice."); LF 1455, 1462). Because the other incidents were offered only for notice—*i.e.*, whether or not Ford knew of the fact of these accidents in which there was a fuel leak or a fuel-fed fire—the trial court excluded the six accidents that occurred after Trooper Newton's. (LF 1458, 1462 n.17).

At the pre-trial evidentiary hearing, Plaintiffs agreed that the post-Newton accidents were irrelevant for purposes of notice; they further suggested that the only way that post-Newton accidents could become admissible was if Ford were to defend the case by claiming an absence of accidents. (PreTr. 437). Ford did not tender that defense. About that there is no dispute.

Plaintiffs introduced other incident evidence at trial through their design expert—Jerry Wallingford. (Tr. 1429, *et seq.*). Before Mr. Wallingford took the stand on direct, the trial court gave the jury the following limiting instruction:

> Mr. Wallingford will and other witnesses may testify about other rear end collisions involving Panther platform vehicles in which there was a fuel leak or a fuel fed fire. This testimony may be considered by you in determining whether or not Ford Motor Company knew of the fact of these other rear end collisions involving Panther platform vehicles in

> which there was a fuel leak or a fuel-fed fire. You may not consider this testimony in determining whether or not the 2003 Crown Victoria Police Interceptor was defectively designed and unreasonably dangerous.

(Tr. 1015-16; LF 1221). Plaintiffs did not object to the instruction. To the contrary, they proposed it. (Tr. 697-98). The testimony that there had been "about 11 accidents" involving Police Interceptors with the Upgrade Kit, therefore, was technically in evidence, but its use was limited to the issue of notice.

The six post-Newton accidents within those 11, however, were irrelevant to the issue of notice. The trial court understood that, and so did Plaintiffs. Evidence of a similar incident occurring after Trooper Newton's "has no probative value" on the issue of the defendant's notice. *Nash v. Stanley Magic Door, Inc.*, 863 S.W.2d 677, 680 (Mo. App. 1993); *see also Crump v. Versa Prods., Inc.*, 400 F.3d 1104, 1109 (8th Cir. 2005).

The record is clear, furthermore, that Plaintiffs never offered *any* other incident evidence for any purpose other than notice. That is, they did not offer it for defect. (*See* LF 1462 n.17 ("The Court further believes that the Plaintiffs had an opportunity to establish a record that these events were admissible to show product defect and they failed to do so.")). After Ford's opening statement, Plaintiffs told the trial court that they wanted to use the post-Newton incidents "in the OSI presentation Mr. Wallingford will make." (Tr. 1366). Plaintiffs did not make an offer of proof with respect to Mr. Wallingford's testimony concerning the post-Newton accidents. They did not recall Mr. Wallingford after Ms. Cischke's and Mr. Cupka's testimony. Plaintiffs did not

attempt to lay a foundation for purposes of offering the post-Newton accidents as evidence of defect. Plaintiffs did not object when the trial court included in the instructions available to the jury the limiting instruction it had previously given as Instruction No. 3 in which the jury was instructed that other Panther platform incident evidence could be considered for purposes of notice *but not* as evidence of defect. (Tr. 4021, 4062; *see also* Tr. 1016-18). In fact, Plaintiffs have *never* explained how they could have used the post-Newton incidents in closing argument without creating error by presenting an argument that was in direct conflict with the court's instructions.

Despite there having been no attempt at trial to make the post-Newton accidents admissible on the issue of defect, Plaintiffs' Brief in this Court says that they planned to argue the post-Newton accidents on the issue of defect anyway—to prove that the location of the Police Interceptor's fuel tank was defective in spite of the Upgrade Kit. (*E.g.*, Br. 63, 65, 71, 81, 84).

- "Plaintiffs intended to argue to the jury in support of Plaintiffs' theory that the 11 incidents showed that the design defect of the fuel storage system still existed after the redesign incorporated the plastic shields." (Br. 75).
- "Plaintiffs were thus not allowed to argue admitted evidence to support their theory on the first issue the jury was told to consider—whether there was a defect at all." (Br. 81).

- " ... it was the evidence of the shield's *ineffectiveness* that became the key liability issue for the design defect claim under Appellants' theory" (Br. 84 (emphasis in original)).

Use of the post-Newton accidents to argue defect, however, as already noted, would have been clear error and in *direct* conflict with the trial court's instructions to the jury. *E.g.*, *Gerow v. Mitch Crawford Holiday Motors*, 987 S.W.2d 359, 363 (Mo. App. 1999) (trial court's discretion concerning final argument "is not so broad as to permit argument beyond the issues or to urge a theory of claim or defense which conflicts with the trial court's instructions"); *Edwards v. Union Pac. R.R. Co.*, 854 S.W.2d 518, 520 (Mo. App. 1993); *Rob-Lee Corp. v. Cushman*, 727 S.W.2d 455, 458 (Mo. App. 1987). Even further, as noted above, there was *no* evidence in the record regarding the circumstances of the post-Newton accidents, thus no foundation that they were substantially similar to Trooper Newton's. As a consequence, they could not have been used as evidence of defect. *See Peters v. General Motors Corp.*, 200 S.W.3d 1, 10 (Mo. App. 2006); *Thornton v. Gray Auto. Parts Co.*, 62 S.W.3d 575, 583 (Mo. App. 2001).

Perhaps recognizing that the modest limitation on closing argument that the trial court actually (and appropriately) imposed does not support a new trial, Plaintiffs overstate their case: they claim that "the trial court instructed the jury to disregard ***all*** argument about the evidence of post-upgrade kit failures" and that the trial court "denied Plaintiffs the opportunity to argue the evidence of post-upgrade kit punctures and fires in closing argument—again." (Br. 77 (emphasis in original) & 79; *see also* Br. 88 (the trial

court's error was compounded by its instruction "to disregard argument concerning all 11 post-shield-upgrade CVPI fuel leak and/or fuel fire incidents")).

Contrary to Plaintiffs' claim, the trial court instructed the jury to disregard only the "last argument of counsel" that referred to "11 accidents with the shield that involved rear impacts that had some fuel leakage and some fire." (Tr. 4120-21). The trial court's routine instruction did not extend to "***all*** argument" about post-Upgrade Kit failures. Plaintiffs were allowed to, and did argue, post-Upgrade Kit failures even *after* they now say the trial court precluded them from doing so. During the second portion of his closing argument, for example, Mr. Emison asked the jury to compare Plaintiffs' evidence of other accidents involving fuel leaks to Ford's evidence of other accidents without fuel leaks. He specifically reminded the jury that Plaintiffs had shown them 46 accidents with a leak, while Ford had shown fewer than 10 without a leak. (Tr. 4327-28). Of course, the 46 accidents to which Mr. Emison referred were comprised of the 45 Panther platform incidents that Plaintiffs had offered on the issue of notice, including *all* post-Upgrade Kit pre-Newton accidents, as well as Trooper Newton's accident. It was also during this portion of his closing argument that Mr. Emison referred to "24 deaths and 13 burn injuries," a total that necessarily included accidents involving Police Interceptors equipped with the Upgrade Kit. (Tr. 4324; LF 1086).

To summarize the above, the *only* post-Upgrade Kit evidence the trial court precluded Plaintiffs from referring to was the evidence of the six Panther platform accidents that post-dated Trooper Newton's. Plaintiffs could not make use of the "about 11 accidents" testimony because that testimony did not distinguish between the four pre-

Newton accidents, which were admissible to prove notice, and the post-Newton accidents, that were irrelevant on the issue of notice. The trial court had instructed the jury that other incidents could be considered for purposes of notice *only* and *not* on the issue of defect. Further, there was no foundation to admit the post-Newton accidents as evidence of defect. The trial court simply precluded Plaintiffs from arguing evidence that was irrelevant but that had been introduced in the case inadvertently and never withdrawn. This was a routine exercise of the trial court's discretion to control and limit closing argument to relevant issues. Absent clear abuse of that discretion, the trial court's ruling controls. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 870 (Mo. banc 1993); *Norfolk & W. Ry. Co.*, 458 S.W.2d at 273; *Emerson Elec. Co. v. Crawford & Co.*, 963 S.W.2d 268, 272 (Mo. App. 1997); *Eide v. Midstate Oil Co.*, 895 S.W.2d 35, 41 (Mo. App. 1995).

The dissent in the Court of Appeals is premised upon a mistaken view, Ford respectfully submits, of the parties' theories. The dissent must have accepted Plaintiffs' assertions – such as those on pages 63, 65, 71, 81, and 84 of their Brief in this Court – that the shields "*ineffectiveness*" was the key liability issue for the design defect under Appellants' theory. (Br. 84 (emphasis in original)). This was not, however, Plaintiffs' theory at trial.[3]

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[3] The dissent also apparently accepted a number of Plaintiffs' other erroneous arguments. For example, the dissent asserts that evidence of the six post-Newton accidents "was in the case for any purpose and could be utilized for the jury for

As this Court reads both the entire trial transcript and the instructions on which the case was submitted to the jury, it will be evident that the Plaintiffs' claim of defect rested alternatively on the fuel tank's location behind the rear axle or on the design of the filler pipe check valve. Ford's theory of defense was that there was no fuel system design defect in any Police Interceptor, that Trooper Newton's 2003 Police Interceptor was even safer than those that preceded because it had been tested to the most severe rear crash test standards ever adopted by any automobile manufacturer anywhere in the world, and that

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other purposes." *Newton v. Ford Motor Co.*, --- S.W.3d ----, 2008 WL 2572713, at *15 (Mo. App. June 30, 2008). But that ignores both the limiting instruction and the requirements under Missouri law for use of similar accident evidence in product liability cases. *Peters*, 200 S.W.3d at 9-10. The dissent also writes that "Ford's two liability experts testified that they were aware of no fires after the shield kits were installed." *Newton*, 2008 WL 2572713 at *16. No Ford witness so testified at trial; the accident at issue in the case involved a fire in a Police Interceptor equipped with the shields. The dissent also finds prejudice in the Plaintiffs' inability to use the post-Newton accident evidence to support their theory of defect. *Id.* As noted, the post-Newton accidents could not have been used to support the Plaintiffs' claim of defect because there was no foundation that the accidents were substantially similar to Trooper Newton's and because Instruction No. 3 precluded the jury from considering evidence of other incidents on the issue of defect.

the cause of the fuel leak in this case was the massive crush that severed the filler pipe in Trooper Newton's Police Interceptor and that resulted from Mr. Daniel's negligence, not from the design of the Police Interceptor's fuel system.

The theory of the case is best reflected in the Plaintiffs' verdict directors, Instructions No. 10 and 11 (Newton) and 16 and 17 (Nolte) where Plaintiffs submitted their theories of strict liability and negligence to the jury. (LF 1228-29, 1234-35). The verdict directors sought to impose liability in the case on Ford based on a strict liability theory that "the filler tube check valve or the location of the fuel tank on the 2003 Crown Victoria Police Interceptor was then in a defective condition, unreasonably dangerous when put to a reasonably anticipated use" and a negligence theory that "either the 2003 Crown Victoria Police Interceptor filler tube check valve was defective due to its design, or the 2003 Crown Victoria Police Interceptor fuel tank was defective due to its location." (Tr. 4065-66). These are the core issues in the case, the material issues.

Closing argument must be reviewed in the context of the entire case. It is driven by the verdict director. What is material or collateral in closing argument can be determined in three ways—in the contexts of the entire trial, of the verdict directors, and of the entirety of the closing argument itself. The trial court is in the best position to determine what is collateral or material and is entitled to control closing argument and to limit that argument to issues that are relevant. Viewed in any of these contexts, precluding Plaintiffs from arguing the six post-Newton Police Interceptor accidents was not material, much less prejudicial.

3. Plaintiffs Were Not Prejudiced.

As additional support for their claim of error as to materiality and prejudice, Plaintiffs assert that "Ford made arguments and engaged in a line of questioning that depended upon and emphasized post-Newton/Nolte incidents." (Br. 13). Not so. The pages Plaintiffs cite in support of that contention do not refer to, rely on, or even mention post-Newton accidents.

- **Tr. 924**: This page from Ford's opening includes a discussion of *pre*-Newton accidents in Police Interceptors *without* the Upgrade Kit in which there was no puncture. (LF 45). The page also refers to the NHTSA investigation of Police Interceptors *without* the Upgrade Kit that occurred prior to the Newton accident. Post-Newton accidents were not referred to expressly or by implication.

- **Tr. 950**: This page is also from Ford's opening. There is nothing on the page that refers to other accidents, including post-Newton accidents. It also includes the statements: "no design can eliminate all risk" and "[t]here is no leakproof or fireproof car." Ford's counsel then stated: "It's impossible to design for every accident scenario, but we're continuing to make improvements. This is the upgrade kit. This is what we developed."

- **Tr. 2797, 2819-20, 2823, 2841, 2851-52**: These pages are from Ford's direct examination of Mr. Cupka. The only testimony that even refers to other accidents is at 2819-20 of the transcript and is quoted and highlighted on page 72 of Plaintiffs' Brief. As those quotations make plain, Ford's counsel specifically

limited his questions to accidents or reports of field incidents that occurred *prior to* Trooper Newton's accident.

Similarly, Plaintiffs say that Ford took the defensive position that, even if there had been a design defect in earlier model Police Interceptors, Ford had fixed the defect with the Upgrade Kit. (Br. 65-66). They argue that the post-Newton accidents were needed to counter that defense, as well as Ford's claim that the Upgrade Kit "eliminated 'every one of the leakage modes.'" (Br. 66).

Plaintiffs have constructed a straw man. They did not need the post-Newton accident evidence to counter Ford's defense that the Upgrade Kit fixed the defect in Police Interceptors because that was not Ford's defense. Ford contended that there was no defect in Police Interceptors to begin with; the Upgrade Kit made a safe car even safer. (Tr. 4194). Ford showed that NHTSA had investigated the issue of fires in pre-Upgrade Kit Police Interceptors and found that Police Interceptors had an incidence of fire comparable to other sedans, even though those sedans were not exposed to the risks associated with police work. (Tr. 1868-70; LF 1119). Ford's evidence also showed that NHTSA closed its investigation after concluding that it was unlikely that further investigation would result in finding a safety-related defect in Police Interceptors. (LF 1120). The evidence at trial further established that Trooper Newton's 2003 Police Interceptor was even safer than those NHTSA had evaluated and met rear-end crash test standards no other automobile manufacturer in the world had ever even attempted, much less passed. (Tr. 2817).

Nor did Plaintiffs need the post-Newton accidents to counter Ford's defense that the Upgrade Kit eliminated every one of the leakage modes in Police Interceptors because that was never Ford's defense either. To the contrary, Ford emphasized through direct examination of its own witnesses that the Upgrade Kit only protected those specific components that it shielded, that it was not designed to protect the filler pipe, and that it could not and would not eliminate leaks or fires. (LF 907; Tr. 2820, 2921-22). Such a defense would have been absurd in any event—the Newton accident itself and four other post-Upgrade Kit accidents in evidence that pre-dated Trooper Newton's all involved Police Interceptors equipped with the Upgrade Kit.

In denying Plaintiffs' motion for a new trial, the trial court correctly rejected Plaintiffs' characterization of Ford's defense. (LF 1460). It correctly described Ford's defense as a causation defense—moving the fuel tank would not have changed the location of the filler pipe, and no design could have prevented the filler pipe from being severed by the massive force of a 13,000 pound vehicle smashing into the back of a Police Interceptor at more than 60 miles an hour. (LF 1461). Because it was undisputed that the Upgrade Kit played no role in Trooper Newton's accident, it played only "a small part of Plaintiffs' liability presentation." (LF 1465; *see also* LF 1460-61). And Ford's evidence with respect to the Upgrade Kit was offered to defend Plaintiffs' claim for punitive damages, a claim that the trial court noted Plaintiffs vigorously pursued. (LF 1444, 1461). The Upgrade Kit showed that Ford had attempted to address leakage modes it had seen in Panther Platform accidents before Trooper Newton's Police Interceptor was manufactured.

A more specific review of evidence about the Upgrade Kit will help elucidate Ford's point. Richard Cupka was the chief engineer for the Crown Victoria/Grand Marquis and later became the leader of the Technical Task Force, which developed the Upgrade Kit and other measures for police cars. (Tr. 2772-73, 2780-81, 2949). Mr. Cupka testified almost exclusively about Ford's 75 m.p.h. crash testing that was used in the development of the Upgrade Kit. (Tr. 2773-74). He described each of these crash tests and focused on the source of leakage, if any. He testified that there was no leakage from an item shielded by the Upgrade Kit and no leakage or from a rip or tear of the filler pipe during Ford's crash testing. (Tr. 2796-2881). Mr. Cupka's testimony on these points is not in dispute.

Mr. Cupka described the Upgrade Kit as "a step up in raising the safety level of the vehicle" because it reduced punctures and leaks.

> The Upgrade Kit is an improvement "[b]ecause it prevented the punctures—in this case it reduced—nothing can guarantee that you will never have a puncture or a leak. But this was a step forward in reducing the likelihood of the things that we had seen in the field and investigated in causing a puncture to the tank."

(Tr. 2819). Shortly after, he confirmed he was aware of no accident prior to the Newton accident in which a shielded component punctured the tank. (Tr. 2819-20). Mr. Cupka specifically acknowledged on direct examination, however, that the Upgrade Kit is not a panacea and cannot eliminate fuel leaks:

Q. And does the upgrade kit shield prevent all leakages in all circumstances in all accidents?

A. No. There is nothing that anybody can do to guarantee that there will never be a puncture or a fuel leak or fire.

(Tr. 2820). Also on direct examination, Mr. Cupka described Ford's efforts to develop a fire suppression system even after the Upgrade Kit had been developed and provided to police occurred because Ford "can't guarantee or promise that there will never be a vehicle struck at such a speed or by something so big that there can't be a leak." (Tr. 2827).

Even further, Mr. Cupka admitted on cross-examination the limitations of the Upgrade Kit—the very point Plaintiffs say they needed the post-Newton accident evidence to prove.

Q. The shield upgrade kit was designed strictly for the components they shield; is that true?

A. Correct.

Q. Shield upgrade kit will not prevent punctures from trunk contents; is that true?

A. That's true.

Q. The shield upgrade kit will not prevent fuel leaks because of a filler pipe failure; is that true?

A. True. It has nothing to do with the filler pipe.

Q. The shield upgrade kit will not prevent loss from the FLVV valve, that's one of the little valves on top of the tank; is that true?

A. That's true.

Q. The shield upgrade kit will not prevent fuel leaks from the failure of the sending unit; is that true?

A. True.

(Tr. 2921-22).

Like Ms. Cischke and Mr. Cupka, Mr. Ridenour admitted: "The upgrades and the design changes and the improvements that we have made are not fireproof." (Tr. 3516). Mr. Ridenour's testimony about Plaintiffs' other incidents focused on Exhibit 727, which listed "11 officers" who died in Police Interceptor accidents. (Tr. 3259-66; LF 1121). These are not the same 11 accidents referred to in Ms. Cischke's testimony; they are a subset of the 45 Panther platform incidents that Plaintiffs offered on the issue of notice and *all pre-dated Trooper Newton's accident.* Mr. Ridenour's testimony regarding these accidents was summarized in a Ford exhibit:

Plaintiffs' "Similar Incidents" - Exhibit 727

Accident	Filler Neck Severed	Leakage Addressed
Juan Cruz	No	Yes- Upgrade Kit
Patrick Metzler	No	Yes- Upgrade Kit
Drew Brown	No	1983 CVPI
Skip Fink	No	Yes- Upgrade Kit/TP
Hung Le	No	Yes- Upgrade Kit
Robert Ambrose	No	Yes- Upgrade Kit
Robert Smith	No	Yes- Upgrade Kit/TP
Lynn Ross		Source not identified
Steve Agner	No	Yes- Upgrade Kit
Ed Truelove	No	Yes- Design change

(LF 1215). He first confirmed that only Trooper Newton's accident involved a filler pipe that was torn in two. (Tr. 3261-62). With the exception of one accident, Mr. Ridenour testified the remaining vehicles were substantially different from Trooper Newton's 2003 Police Interceptor and the leakage sources in those accidents had been addressed by the Upgrade Kit. (Tr. 3261-64; LF 1215).

Mr. Ridenour also described the limitations of his opinions regarding these accidents:

> I can't tell you that there wouldn't have been a fire. What I can tell you is the leakage source that caused the fire in those accidents have been addressed with the shield kit, with the changes that we have made to production in the '03 vehicle. So if these officers had been in Officer Newton's car, the leakage sources that resulted in the fire in those cases would not have occurred. Now, I can't tell you that there wouldn't have been other leakage sources, and I can't tell you that there wouldn't have been a fire, but it wouldn't have been those instances. Those have been addressed.

(Tr. 3265). Mr. Ridenour specifically addressed the Newton accident and confirmed Ford had not "figured out a way to prevent a filler neck from being torn in two under the circumstances of the accident that occurred in the Newton case." (Tr. 3265).

Plaintiffs complain that the post-Newton accidents "directly contradicted" this testimony by Mr. Ridenour because they showed that the Upgrade Kit did *not* remedy the

compromises of the fuel tank that Plaintiffs' expert testified would have been remedied by relocating the fuel tank. (Br. 71). The existence of the post-Newton accidents does not "directly contradict" Mr. Ridenour's testimony. Plaintiffs do not contend that the post-Newton accidents involved a leak from a shielded component, so it is unclear how the post-Newton accidents would have contradicted Mr. Ridenour's testimony. Even further, Mr. Ridenour's testimony was limited to accidents that predated Trooper Newton's. Post-Newton evidence could *not* have contradicted that testimony. Like Mr. Cupka and Ms. Cischke, furthermore, Mr. Ridenour specifically testified that leaks and fires would continue, even with the Upgrade Kit. (Tr. 3516). The post-Newton accident evidence is consistent with, not contrary to, this portion of Mr. Ridenour's testimony and thus could not have been used as impeachment. *Aliff v. Cody*, 26 S.W.3d 309, 319-20 (Mo. App. 2000); *St. Louis Sw. Ry. v. Fed. Compress and Warehouse Co.*, 803 S.W.2d 40, 43-44 (Mo. App. 1990). And even if accidents and leaks involving Police Interceptors with the Upgrade Kit did contradict Mr. Ridenour and Mr. Cupka, Plaintiffs had in evidence four such accidents that pre-dated Trooper Newton's, as well as Trooper Newton's, with which to make the point. As a consequence, there was no prejudice.

The post-Newton accidents were not needed to rebut or challenge any argument or defense offered by Ford. Ford did *not* use the Upgrade Kit as evidence that Ford had fixed the defect in earlier model Police Interceptors. Ford did *not* contend that the Upgrade Kit had eliminated every leakage mode in Police Interceptors. And Ford did *not* contend that there were no leaks in Police Interceptors equipped with the Upgrade Kit.

Finally, to reiterate, as noted by the trial court and the majority at the Court of Appeals, the effectiveness of the Upgrade Kit was far from being a key issue in the case, and it played *no* role in Trooper Newton's accident. At most, the post-Newton accident evidence showed that leaks and fires continued even with the Upgrade Kit. But Plaintiffs did not need the post-Newton accidents to make this argument—they had the Newton and pre-Newton post-Upgrade Kit accidents and the testimony of Ford's own witnesses to offer. "If, in a specific instance, a trial court excludes evidence which should have been admitted, the error is harmless if the same evidence is found in the testimony of the same or other witnesses given before or after the objection was sustained." *Coulter v. Michelin Tire Corp.*, 622 S.W.2d 421, 434 (Mo. App. 1981) (citations omitted). If the error in excluding relevant evidence is harmless because there is other evidence on the point in the case, then, by analogy, it must also be harmless to preclude an argument that can be made using other evidence on the point in the case. Therefore, even if the post-Newton accidents were relevant, which Ford denies, there was no material prejudice in precluding Plaintiffs from arguing them.

In sum, the trial court correctly exercised its discretion in imposing a minor and appropriate limitation on Plaintiffs' closing argument. The six post-Newton accidents could not have been used in closing argument without violating the jury's instructions and injecting error into the case. Further, assuming *arguendo* that there was error, the only argument the post-Newton accidents could have supported was an argument that Plaintiffs made based on other evidence in the case and that Ford conceded in any event.

Under the circumstances described above, there is no need to proceed further. Ford will, nevertheless, address Plaintiffs' cited cases. On the facts of this case, Plaintiffs' reliance on *Stokes v. Nat'l Presto Indus., Inc.*, 168 S.W.3d 481 (Mo. App. 2005), and *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10 (Mo. banc 1994), is misplaced.

In *Stokes,* the plaintiff sought to introduce 27 prior accidents involving deep fryers plaintiff alleged to be similar to the accident at issue in *Stokes*. The trial court allowed evidence of only three incidents involving the *exact* deep fryer at issue. The court of appeals held that the trial court applied the wrong standard to the admissibility of other similar accidents and reversed for further evidence on substantial similarity. *Stokes*, 168 S.W.3d at 484. The trial court's erroneous ruling resulted in prejudice because the defendant took advantage by using the exclusion of the other accidents to argue and suggest in closing argument an absence of prior accidents involving the deep fryer at issue. The plaintiff was, therefore, prejudiced because he could not answer defendant's argument on account of the trial court's exclusion. *Id.* at 485.

Nothing of the kind occurred here. Ford did not take advantage of the trial court's ruling precluding the Plaintiffs from arguing post-Newton accidents as did the defendant in *Stokes*. In its closing, Ford used the Upgrade Kit to argue against Plaintiffs' request for punitive damages by showing that even though NHTSA had not found a safety-related defect in Police Interceptors, Ford took steps to make the vehicle safer by shielding components that had caused leaks in earlier accidents and by successfully testing it in 75 m.p.h. rear-end impacts. (Tr. 4212-16).

Ford did not refer to post-Newton evidence in its closing or use the trial court's restriction on that evidence to make an argument that was inconsistent with the post-Newton evidence. For example, Ford did not argue that there were no leaks or fires after the Newton accident. If it had, then *Stokes* would support Plaintiffs' use of the post-Newton accidents in response. Similarly, if one of the post-Newton accidents had involved a severed filler pipe, then *Stokes* would support Plaintiffs' use of that accident to counter Ford's argument that only Trooper Newton's accident did. But none of the post-Newton accidents involved a leak from the filler pipe. There was no advantage to be taken and none taken—the post-Newton accident evidence was entirely consistent with Ford's position throughout the trial that leaks and fires would continue in Police Interceptors even with the Upgrade Kit but that none had involved a severed filler pipe.

In arguing that Ford used post-Newton accident evidence during its closing, Plaintiffs' Brief makes multiple misstatements.

> Although Plaintiffs were forbidden to make any reference to Ms. Cischke's testimony regarding the 11 post-upgrade incidents, Ford proceeded to make use of this very same testimony in its own closing argument, noting the portion of Ms. Cischke's which indicated that in California "they have one rear impact a week resulting in a CVPI being totaled."

(Br. 29-30).

Plaintiffs cite page 4237 of the transcript as support for their statement. The argument made by Ford during that portion of its closing was based on NHTSA's ODI

Report that was in evidence as Plaintiffs' Exhibit 555 and that had been completed in October 2002, more than seven months before Trooper Newton's accident. Ford's argument referred specifically to what NHTSA had found in its Report:

> What do we know about the performance of the Crown Victoria? Well, we know that NHTSA found out in October of 2002 that the California Highway Patrol has 2700 Crown Vics in patrol. They travel 55 to 60 million miles a year. They have one rear impact a week resulting in a CVPI being totaled.
>
> And on this list that Mr. Emison has presented to you, there are two incidents from California. One involved a trooper who was outside the vehicle at the time it was struck.
>
> So this is telling us that, "Hmm, rare events, high-speed rear impacts. There must be something going on here. There must be something good about this design that would produce this kind of record. There must be something pretty good about this design."

(Tr. 4237).

Ford's argument makes no reference to Ms. Cischke or to her testimony. Rather, the statement made by Ford and quoted by Plaintiffs is taken nearly verbatim from the ODI Report. So are the statements that Ford made immediately preceding the quoted language: "The CHP operates a fleet of 4,200 vehicles including 2700 CVPI vehicles ...

The CVPI fleet averages 55-60 million miles of highway use per year or 20.3K miles per vehicle per year. It is common for the CHP to average one rear impact collision per week resulting in a CVPI vehicle being totaled." (LF 1113). Ford's argument was based on pre-Newton evidence. It not only referred to the ODI Report, it specifically responded to Mr. Emison's list which included only the Newton and pre-Newton accidents. (LF 1086). Although Plaintiffs have refused to accept that Ford would defend the case by proving that there never was a defect in Police Interceptors, this argument and the ODI Report are part and parcel of that defense—if NHTSA found in 2002 that the California Highway Patrol had an average of one Police Interceptor per week totaled in a rear-end collision, and yet there were so few incidents in California on Mr. Emison's list spanning more than 20 years, Ford's design must not be defective.

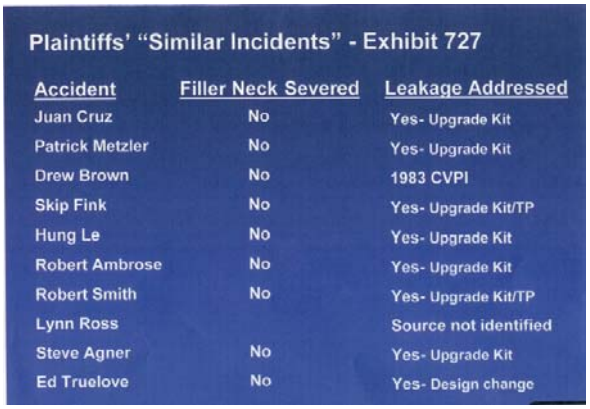
Plaintiffs also omit Ford's argument immediately preceding the language quoted at pages 30-31 of their Brief. In so doing, they attempt to imply that Ford used post-Newton accident evidence to emphasize the efficacy of the Upgrade Kit. The language omitted by Plaintiffs, however, identifies the exhibit displayed to the jury in connection with and around which the entire quoted argument was made—Ford's Exhibit 1680. (LF 1215). The exhibit included *only* incidents that pre-dated Newton. Ford used the exhibit as part of its response to Plaintiffs' argument that the Upgrade Kit was a Band-Aid and that it worked only under limited circumstances. To assist the jury's understanding of the exhibit, Ford described the efforts that had been undertaken in the *development* of the Upgrade Kit. By definition, all of these efforts were undertaken before Trooper

Newton's accident because his Police Interceptor was equipped with the Upgrade Kit. If that fact was not obvious, Ford's argument made it plain.

> Every piece of information about what happened in those incidents was gathered and collected, studied and analyzed, and that is how the upgrade kit was developed. And that was the product that was on this car when this accident occurred in May of 2003.

(Tr. 4215).

Ford then disputed Plaintiffs' argument that the Upgrade Kit was a Band Aid by showing that "every one of the leakage modes" in the accidents that pre-dated Trooper Newton's had been addressed by the Upgrade Kit. (Tr. 4214-15). Exhibit 1680 included only pre-Newton accidents. As the exhibit shows, and as Ford explained, the leakage modes in those incidents had been addressed, except for the Lynn Ross accident for which a source could not be identified.



Plaintiffs' "Similar Incidents" - Exhibit 727

Accident	Filler Neck Severed	Leakage Addressed
Juan Cruz	No	Yes- Upgrade Kit
Patrick Metzler	No	Yes- Upgrade Kit
Drew Brown	No	1983 CVPI
Skip Fink	No	Yes- Upgrade Kit/TP
Hung Le	No	Yes- Upgrade Kit
Robert Ambrose	No	Yes- Upgrade Kit
Robert Smith	No	Yes- Upgrade Kit/TP
Lynn Ross		Source not identified
Steve Agner	No	Yes- Upgrade Kit
Ed Truelove	No	Yes- Design change

Ford's argument specifically referred to the exhibit and made no reference to any post-Newton evidence.

The remaining language quoted by Plaintiffs on page 31 of their brief also refers to pre-Newton evidence exclusively. Plaintiffs apparently believe that unless Ford specifically limited an argument to the time frame that preceded Trooper Newton's accident, Ford was somehow referring to post-Newton accident evidence and thereby opening the door to Plaintiffs' use of that evidence for any purpose. Plaintiffs have it exactly backwards. Ford was entitled to rely on Missouri law and on the rulings that the trial court had made throughout the case and included in the instructions that were given to the jury. The evidence relevant to the jury's decisions on liability and punitive damages was limited to that which pre-dated Trooper Newton's accident. Ford argued only that evidence.

Citing *Tune*, Plaintiffs also erroneously contend that Ford has the burden of showing an absence of prejudice from the trial court's ruling. (Br. 85, 89). *Tune*, however, does not articulate such a rule which, if adopted, would create a new standard of review for all closing arguments throughout the State. Neither *Stokes* nor *Tune* overruled decades of Missouri cases granting trial courts broad discretion in controlling closing argument. Abuse of discretion was the standard in *Stokes*. 168 S.W.3d at 484.

The holding of *Tune*, furthermore, is quite narrow and limited to a specific problem with jury arguments on the amount of damages. *Tune* addresses the prejudice that can occur from "unrebutted" requests for damages made for the first time in the final portion of a plaintiff's closing argument. The rule in *Tune* is that "the party responsible for error relating to an argument on the issue of damages is charged with a rebuttable presumption that the error was prejudicial." *Tune*, 883 S.W.2d at 22.

Tune's presumption does not apply here. As explained, there was no error. In the absence of error, there is no presumption. In addition the error claimed in this case had nothing to do with an argument on the issue of damages. In more than 14 years since *Tune* was decided, no reported decision from any court in this State has applied *Tune's* presumption to a routine restriction on closing argument such as occurred here. Outside the context of an argument involving damages, only one appellate civil opinion cites *Tune* as support for a presumption of prejudice from an improper closing argument. In that case, *Williams v. Cas. Reciprocal Exch.*, 929 S.W.2d 802, 807 (Mo. App. 1996), the trial court prevented counsel from arguing an adverse inference for a witness' failure to testify where that witness was not equally available to both parties. Although the opinion cites *Tune*, the holding of *Williams* did not depend on it, as the failure to allow or exclude proper argument of an adverse inference was presumptively prejudicial long before *Tune*. *Leehy v. Supreme Exp. & Transfer Co.*, 646 S.W.2d 786, 789-91 (Mo. banc 1983); *Duboise v. Ry. Exp. Agency, Inc.*, 409 S.W.2d 108, 114 (Mo. 1966); *Williams v. Rickleman*, 292 S.W.2d 276, 283 (Mo. 1956); *Johnson v. St. Louis Pub. Serv. Co.*, 363 Mo. 380, 385-87 (Mo. 1952). If there was error, actual prejudice must be shown. *Romeo v. Jones*, 144 S.W.3d 324, 332 (Mo. App. 2004); *Whitworth v. Jones*, 41 S.W.3d 625, 627 (Mo. App. 2001).

Closing argument is important. Ford agrees. But it is argument, after all, not evidence. The argument must conform to the evidence and, more importantly, to the instructions given to the jury. This jury was instructed that any evidence of other incidents in the case could be considered *only* on the issue of notice. (Tr. 1015-18). In

their hundreds of pages of argument in the trial court, in the Court of Appeals, and in this Court, Plaintiffs have never explained how the six post-Newton accidents could be used to show notice to Ford. The reason of course is that they cannot. Just as importantly, the trial court determined that there was no prejudice in the minor limitation it imposed on the Plaintiffs during closing argument. (LF 1466). Decades of decisions hold that the trial court's finding of no prejudice is entitled to deference. That deference is warranted here.

The trial court did not err in limiting Plaintiffs' closing argument. Assuming *arguendo,* that it did, Plaintiffs were not prejudiced.

II. THE TRIAL COURT PROPERLY PRECLUDED USE OF THE "DURKER NOTES" TO CROSS-EXAMINE MR. RIDENOUR BECAUSE THIS DECISION WAS NOT AN ABUSE OF DISCRETION AND NO PREJUDICE RESULTED IN THAT THERE WAS NO FOUNDATION FOR THE NOTES AND NO SHOWING OF THEIR RELEVANCE OR MATERIALITY AND BECAUSE THE SUBSTANCE OF THE NOTES WAS NOT ADDRESSED WITH MR. RIDENOUR.

A. Standard of Review

A trial court has broad discretion to control the trial proceedings, *Gerard v. Baxley*, 648 S.W.2d 930, 931 (Mo. App. 1983), and to regulate the manner of witness examination. *Brown v. Yettaw*, 116 S.W.3d 733, 736 (Mo. App. 2003). The trial judge has "great discretion" to control the "extent and scope of cross-examination." *City of Kansas City v. Habelitz*, 857 S.W.2d 299, 301 (Mo. App. 1993). A trial court's decisions regarding cross-examination "will not be disturbed unless an abuse of discretion is clearly shown." *Litton v. Kornbrust*, 85 S.W.3d 110, 113 (Mo. App. 2002) (*citing Nelson v. Waxman*, 9 S.W.3d 601, 604 (Mo. banc 2000)). Likewise, "the admissibility of evidence lies within the sound discretion of the trial court, [i]ncluding the introduction of evidence for the purposes of impeachment." *Id.* (citations omitted).

The "abuse of discretion review standard is quite severe." *Aliff*, 26 S.W.3d at 315. Abuse of judicial discretion occurs "when the trial court's ruling is so unreasonable and arbitrary that it shocks the sense of justice and is clearly against the logic of the surrounding circumstances." *Alberswerth v. Alberswerth*, 184 S.W.3d 81, 100 (Mo. App.

2006). A trial court's evidentiary ruling will be affirmed "unless there is a substantial or glaring injustice." *Romeo*, 144 S.W.3d at 332. Plaintiffs have the burden of establishing an abuse of discretion. *Aliff*, 26 S.W.3d at 315. As with any alleged error, Plaintiffs must also show the court's error was prejudicial.

B. Factual Background

Plaintiffs' description of the evidence and argument regarding Exponent is incomplete. Exponent is a large company employing 700 people, many of whom are Ph.D.s and experts in various fields. (Tr. 3537-38). Exponent frequently works for large companies and government entities by investigating structural, vehicle, and airline accidents. (Tr. 3537-38). For instance, Exponent was involved in the investigation of the 1993 World Trade Center bombing, the 9/11 crash into the World Trade Center, the Oklahoma City bombing, the Hyatt walkway collapse in Kansas City, and the Challenger space shuttle crash. (Tr. 3540-41). Exponent is better known, however, for the research it performs for governments and companies. Subjects vary and include, for example: flood control in Los Angeles; safety of amusement park rides, wireless devices and steroids; structural integrity of dams and power plants; miniature communications for the military; earthquakes; and robotics. (Tr. 3541-42). Exponent has offices in the United States and overseas and is one of the few entities that conducts high-speed crash tests. (Tr. 3538, 3405).

At trial, evidence of high-speed crash tests conducted at Exponent in connection with Ford's defense of two other cases—*Cruz* and *Schechterle*—and during Ford's development of the Upgrade Kit and fire suppression system was admitted and referred to

by both Plaintiffs and Ford. The *Cruz* and *Schechterle* accidents were included in the 45 admitted "other incidents." (LF 1086). Exponent ran the four so-called "*Cruz* tests" in 2002. Ford produced these tests during NHTSA's investigation of the Panther platform vehicles. (LF 1113-15). The *Schechterle* test was a 100 m.p.h. rear crash test on a Police Interceptor with the Upgrade Kit, which resulted in no puncture to the tank.

Plaintiffs claim in their Brief that Exponent creates crash tests for Ford that are specially tailored to help support Ford's position in litigation, and they complain that the trial court limited their efforts to impeach the credibility of Ford and Exponent. (Br. 93, 95). In their opening statements at trial, Plaintiffs sought to attack Exponent's testing because "over … the past five or so years … Ford has paid Exponent $40 million." (Tr. 850). Plaintiffs continued their collateral attack on the *Cruz* testing (conducted at Exponent) during their examination of their design expert, Mr. Wallingford. (Tr. 1593). Plaintiffs focused on the fact that these tests were conducted in litigation and requested by Mr. Feeney's firm (counsel for Ford in the *Cruz* case and in the *Newton/Nolte* case). (Tr. 1961-65).

On cross-examination, Plaintiffs' expert, Mr. Wallingford, admitted he received and reviewed reports and videos for the tests Exponent conducted and had the opportunity to inspect the cars or tanks from the tests.

> Q. Let me ask you this: You got the test reports that are embodied on that exhibit?
>
> A. Yes, I have reviewed those.
>
> Q. You have reviewed the videos?

A. Yes, sir.

Q. You've had an opportunity, if you wanted, to inspect the vehicles?

A. As they were available. Some of the vehicles were available in Clinton, Michigan, Detroit area, and in the Phoenix area.

Q. And you're not questioning the results of those tests?

A. No, sir.

(Tr. 1997-98).

Despite Mr. Wallingford's admission, during their cross of Mr. Ridenour, Plaintiffs attacked the *Cruz* and *Schechterle* crash tests because they were done "for litigation purposes"—a fact that was never disputed. (Tr. 3404). Plaintiffs then asked Mr. Ridenour to confirm that Ford paid Exponent $60 million from 1994 to 2003, but Mr. Ridenour could not do so. (Tr. 3405).

Following this attempted inquiry of Mr. Ridenour, trial counsel argued at length—outside the presence of the jury—regarding the foundation, relevance and admissibility of evidence of Ford's payments to Exponent. Ford argued that only a minor percentage of Exponent's work for Ford involved the Police Interceptor crash tests and included unrelated work that was for both litigation and non-litigation purposes. (Tr. 3406-12, 3434). The trial court agreed that some context regarding the payment was needed. (TR. 3408). Plaintiffs, however, could not lay a foundation for introduction of the payment through Mr. Ridenour. (Tr. 3413-18).

The next day, the trial court revisited Plaintiffs' plan to use Ford's payments to Exponent to cross-examine Mr. Ridenour. (Tr. 3430). Ford maintained its objections regarding the misleading nature of an overall number. (Tr. 3433-41). The trial court then agreed itself to read as an admission that Ford paid $18 million to Exponent in 2002 and 2003 and said, "then you [Ford] on redirect can set up everything that Exponent does and get what you want, okay?" (Tr. 3443). The court specifically contemplated Ford could "bring out the fact that Exponent got hired by the federal government to work on 9/11. You can do all that stuff." (Tr. 3445). Plaintiffs did not object to this procedure. (Tr. 3443-48).

Trial reconvened, and before Plaintiffs' cross-examination of Mr. Ridenour continued, the trial court told the jury:

> Before we commence, I want to advise you of certain information that you can consider in this case. In February of 2004, in a sworn interrogatory, the following was stated: "Ford states that from January 1st 2002, until December 31st 2003, Ford's Office of the General Counsel paid FAA/Exponent $18,404,276.20 for fees, costs, and disbursements."
>
> There is no information that tells us what portion of that was related to litigation expenses versus nonlitigation expenses. The answer does not address the issue of how much is fees and how much are expenses, and it does not in any way

> address the issue of how much of that expenditure had anything to do with Crown Victoria automobiles.

(Tr. 3448-49).

Having allowed evidence of payments to Exponent over Ford's objection, the trial court properly allowed Ford to respond it. (Tr. 3430-47). Ford also was prepared to offer Exponent's annual reports, but Plaintiffs objected on the grounds of hearsay and foundation only. (Tr. 3532-35). After some argument, the following exchange occurred:

> THE COURT: Just so we're clear, Mr. Emison, in fairness to you, I'm sustaining your objection to the extent that I'm not going to let him sit here and run through these documents and read from them.
>
> But I will allow him to utilize the documents to refresh his recollection that doesn't mean it has to be – when you refresh his recollection, that doesn't mean it's necessarily displayed to the jury.
>
> And I will also you to display the one exhibit that lists the corporations that he works with.
>
> And if you think he goes beyond that, then you can raise whatever objection you want.
>
> MR. EMISON: I just want a continuing objection, and I won't raise it again unless I need to. Is that all right?

> THE COURT: That's fine. But what I'm saying, if you think he's gone beyond the dictates of what I said, you got to speak up. I'm not going to do it for you.
>
> MR. EMISON: I will. I understand.

(Tr. 3536-37). Immediately thereafter, in direct response to Plaintiffs' introduction of payments to Exponent, Mr. Ridenour described what Exponent is, what it does, its total revenues, and the cost of crash tests. (Tr. 3537-44). There was no objection to this testimony.

On re-cross by Newton's counsel, Mr. Ridenour admitted he was familiar with Subia Mulatte, an employee of Exponent, and Joe Durker, a Ford employee. (Tr. 3557). Plaintiffs then attempted to cross-examine Mr. Ridenour with a page of handwritten notes which stated in relevant part: "Subia Mulatti – Investigator guidance on testing develops crash tests that refute plaintiffs allegations." (LF 1178). Ford objected because there was no foundation for the admission of the notes. (Tr. 3558-59). They were not Mr. Ridenour's notes and Plaintiffs' counsel claimed they were written by Mr. Durker. (Tr. 3561). Mr. Durker, however, was not a witness in this case, nor was he deposed in this case.

In questioning by the trial court outside the presence of the jury, Mr. Ridenour testified he was only aware of Exponent test engineers (as distinguished from expert consultants) who had a role in these tests. (Tr. 3564). In particular, Mr. Ridenour was "not aware of any crash tests that [Subia Mulatte] developed." (Tr. 3568). He also confirmed that Mr. Durker was not involved in the Crown Victoria litigation and that he

had no knowledge that Mr. Durker had any contact with Exponent or Mr. Mulatte regarding the development of the fire suppression system. (Tr. 3567-68). Mr. Ridenour could not identify Mr. Durker's notes: "The only knowledge I have about that, sir, is what you have told me." (Tr. 3576-78).

After several lengthy arguments regarding the use of the "Durker Notes," the trial court found that there was no foundation for impeachment. (Tr. 3574). The court then offered to allow Plaintiffs to ask questions that went to the alleged substance of the notes, and Plaintiffs' counsel stated: "Okay. That's good." Plaintiffs did not object or make a further record or offer of proof. (Tr. 3575). Plaintiffs conducted additional re-cross of Mr. Ridenour who admitted that some crash tests performed at Exponent were used to refute plaintiffs' allegations. (Tr. 3580-81).

C. There Was No Foundation for the Proposed Cross-Examination.

Plaintiffs attempted to lay a foundation for the admission of the Durker Notes by having Mr. Ridenour confirm he knew Mr. Durker, a Ford employee, and Subia Mulatte, an Exponent employee. (Tr. 3557). As set forth above, after several lengthy arguments, the trial court agreed this was not sufficient foundation for use of the handwritten notes. (Tr. 3574).

In their Brief, Plaintiffs attempt to circumvent the lack of foundation by suggesting that the prior exclusion of Mr. Mulatte's name during the designations of Ms.

Cischke's testimony was "part of a carefully planned tactic by Ford." (Br. 95).[4] At one point in that testimony, Ms. Cischke mentioned, "Subia Mulatte, an Exponent vice president." Ford objected to this testimony and the introduction of Mr. Mulatte's name because he was not a witness in the case and had not been mentioned in any document or testimony. The trial court agreed and removed Mr. Mulatte's name from the testimony. (Tr. 2674-75). Plaintiffs' counsel specifically agreed to this change:

> THE COURT: That's fine. Let's take out the name "Subia Mulatte."
>
> MR. EMISON: All right.
>
> THE COURT: "Are you aware that a vice-president of Exponent is a confidential expert consultant in the Crown Victoria Police Interceptor litigation?"
>
> MR. EMISON: I'm fine with that.

(Tr. 2674-75). A final reference to Mr. Mulatte was also removed by agreement. (Tr. 2677-78). The alleged "tactic" of which Ford is accused is without basis. Furthermore, "[a] claim of error not presented to and decided by the trial court will not support a new trial." *Essman v. Fire Ins. Exch.*, 753 S.W.2d 955, 958 (Mo. App. 1988);

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[4] The handwritten notes were included in thousands of pages of documents produced by Ford in connection with the work of the Police Officer Safety Action Plan.

see also United Missouri Bank, N.A. v. City of Grandview, 179 S.W.3d 362, 366 (Mo. App. 2005).

Plaintiffs' complaint about the trial court's ruling ignores the true foundational problem with the Durker Notes. The notes were not being used to cross-examine Mr. Durker. Mr. Durker had not testified at trial about the notes. No other witness had described the notes. Plaintiffs' Brief suggests the trial court carelessly reached this decision because it had to take a phone call. (Br. 96; Tr. 3559). In fact, after this comment there was extensive argument and discussion regarding the notes during which the trial court and Plaintiffs' counsel questioned Mr. Ridenour, and all counsel made arguments. (Tr. 3560-75).

Without some foundation for the notes, nothing connects them to the testing in this case or to Mr. Ridenour's testimony but Plaintiffs' own erroneous characterizations and conclusions. For example, Plaintiffs repeatedly point to the short note to suggest it raised "substantial" concerns about the credibility of Mr. Ridenour or the independence of Exponent. (Br. 97-103). Nothing in evidence, however, and no offer of proof, support this claim.

Furthermore, no prejudice could possibly have resulted because the trial court allowed Plaintiffs to ask questions that went to the alleged substance of the notes—whether Exponent tests refuted plaintiffs' allegations. When offered this option, Plaintiffs' counsel stated: "Okay. That's good." He did not object (Ford did) or make a further record or offer of proof. (Tr. 3575). "A claim of error not presented to and decided by the trial court will not support a new trial." *Essman*, 753 S.W.2d at 958.

Mr. Wallingford, Plaintiffs' expert, admitted that he was not questioning the results of the tests. (Tr. 1997-98). Finally, Plaintiffs conducted additional cross of Mr. Ridenour during which he admitted that some of the crash tests performed at Exponent were used to refute Plaintiffs' allegations. (Tr. 3577-78).

D. The Cross-examination Had No Probative Value.

Plaintiffs' Brief cites a number of cases regarding the limitation on a trial court's ability to control cross-examinations to material evidence. The quality of the excluded evidence in those cases, however, is far different from that in this case. For instance, *Long v. St. John's Reg'l Health Ctr., Inc.*, 98 S.W.3d 601 (Mo. App. 2003), involved a patient's claim against a hospital for negligent care, which resulted in a defense verdict. The plaintiff claimed the trial court erred by admitting a medical record which contained a statement from plaintiff regarding how the accident happened. The statement in the record was inconsistent with plaintiff's position at trial. The trial court admitted the record and allowed cross-examination as a prior inconsistent statement. On review, the court of appeals noted the statement—how the accident happened—went to a "paramount issue" in the case and affirmed the trial court's decision. *Long*, 98 S.W.3d at 606-07.

Haffey v. Generac Portable Prods., L.L.C., 171 S.W.3d 805 (Mo. App. 2005), a products liability case involving a structure fire allegedly caused by a generator, reached a similar result. Following a defense verdict, plaintiff claimed the trial court erred by allowing defendant to introduce "false issues" in cross regarding alternate causes of the fire. The court of appeals rejected this argument and affirmed the trial court's decision.

Haffey, 171 S.W.3d at 810-11. The disputed issue in *Haffey*—the cause of the fire—was central to the case.

Black v. State, 151 S.W.3d 49 (Mo. banc 2004), which involved defendant's appeal of his conviction for first-degree murder based on ineffective assistance of counsel, is also distinguishable. In *Black*, witnesses offered sharply different accounts of the circumstances leading to defendant's stabbing and killing the victim in question. Some of the witnesses provided prior inconsistent statements regarding whether the defendant acted with deliberation or in a fit of rage or in self defense. *Black*, 151 S.W.3d at 56. Because there was no dispute that defendant stabbed the victim, this was the "key issue" in the case and was "the very root of the matter in controversy." *Id.* However, defendant's counsel failed to make use of these statements and other inconsistencies regarding how much the witnesses and victim had been drinking. *Id.* at 56-57. The court found this "unoffered evidence … went to a central, controverted issue on which the jury focused" and, as a result, found "counsel's ineffectiveness was so prejudicial as to undermine the Court's confidence in the outcome of the trial." *Id.* at 58. The result in *Black* has no application here.

Here, the proposed cross-examination using the Durker Notes was far afield from the central issues in the case. Plaintiffs offered no connection between "Subia Mulatte" and any of the testing performed at Exponent which was admitted at trial. Mr. Ridenour denied Plaintiffs' characterization of the notes—that Exponent is "in the business of testing for money and if someone hires them and pays them, they're going to them favorable results." (Tr. 3544). Instead, as recognized by the trial court, the action

actually described by the notes—performance of some tests to refute the other side's claims—is neither unique nor controversial. The fact that it happens is not in dispute. In this case, furthermore, there was no evidence the crash tests introduced at trial were inaccurate; in fact, Plaintiffs' expert, Mr. Wallingford, admitted he had no criticisms of the results. (Tr. 1997-98).

E. The Durker Notes Were Not Admissible for Impeachment or Contradiction.

Plaintiffs' Brief suggests the Durker Notes were admissible to "impeach" Mr. Ridenour. (Br. 91-103). This claim is based on a number of legal and factual errors. First, the standard of review is clearly abuse of discretion, not some "limited discretion" argued by Plaintiffs. (Br. 99). Abuse of discretion was the standard applied in *Long* and *Haffey* and is also stated in *Jefferson-Gravois Bank v. Cunningham*, 674 S.W. 2d 561, 565 (Mo. App. 1984). Second, the Durker Notes were not "in evidence," and there was no showing they were an admission of Ford. Third, the Durker Notes were not a statement by Mr. Ridenour.

Plaintiffs suggest the Durker Notes were somehow admissible as a prior inconsistent statement of "Ford" but offer no authority in which a similar document was admitted as a prior inconsistent statement. "In laying the proper foundation, it is necessary to ask the witness whether he or she made the statement, quote the statement, and point out the precise circumstance under which it was allegedly made, including to whom the witness spoke and the time and place of the statement." *Aliff*, 26 S.W.3d. at 318 (*citing K.J.B. v. C.A.B.*, 883 S.W.2d 117, 120 (Mo. App. 1994)); *see also State v.*

Boyd, 871 S.W.2d 23, 26 (Mo. App. 1993) (holding that counsel's failure to quote the exact inconsistent statement and his failure to ask witness to admit, deny, or explain the statement did not lay proper foundation and thus, the statement was properly excluded). Plaintiffs never attempted such an offer with Mr. Ridenour and, given his other testimony, any attempt would have failed. All that Plaintiffs established was that Mr. Durker is an employee at Ford. (Tr. 3557). There is no foundation in the record to support any of Plaintiffs' other claims. Accordingly, the trial court properly exercised its discretion, and Plaintiffs' incomplete offer did not preserve this issue for appeal.

Plaintiffs raise their "contradiction" argument for the first time in their Brief. It was raised neither at trial nor in their motion for new trial; therefore, it is not properly before this Court. *Enos*, 73 S.W.3d at 788-89. Even if it had been properly preserved, this argument has no merit because it is based on a false inference for which there is no foundation—that the Durker Notes state that Exponent "create[s] crash tests for Ford that are specially tailored to help support Ford's position in litigation." (Br. 95). The trial court reviewed the Durker Notes and did not accept this conclusion. (Tr. 3574). Plaintiffs made no offer of proof that supports their interpretation of the Durker Notes. The trial court did not abuse its discretion.

III. THE TRIAL COURT PROPERLY PRECLUDED USE OF THE GRUSH-SAUNBY REPORT TO CROSS-EXAMINE MR. RIDENOUR BECAUSE THIS DECISION WAS NOT AN ABUSE OF DISCRETION AND DID NOT PREJUDICE PLAINTIFFS IN THAT THE REPORT HAD NOT BEEN ADMITTED IN EVIDENCE, THERE WAS NO OFFER OF PROOF CONNECTING MR. RIDENOUR TO THE REPORT, AND THERE WAS NO SHOWING OF RELEVANCE OR NECESSITY TO HIS CROSS-EXAMINATION AND NO PREJUDICE RESULTED TO PLAINTIFFS BUT UNFAIR PREJUDICE TO FORD COULD HAVE RESULTED FROM ITS USE.

A. Standard of Review

The trial court has "great discretion" to control the "extent and scope of cross-examination." *City of Kansas City*, 857 S.W.2d at 301. In particular, the trial court exercises its discretion to determine whether a proper foundation has been laid for the admission of a prior inconsistent statement, and appellate review is limited to determining whether the trial court abused its discretion. *Aliff*, 36 S.W.3d at 318. "In laying the proper foundation, it is necessary to ask the witness whether he or she made the statement, quote the statement, and point out the precise circumstance under which it was allegedly made, including to whom the witness spoke and the time and place of the statement." *Id.* (*citing K.J.B. v. C.A.B.*, 883 S.W.2d 117, 120 (Mo. App. 1994)); *see also Boyd*, 871 S.W.2d at 26 (holding that counsel's failure to quote the exact inconsistent

statement and his failure to ask witness to admit, deny, or explain the statement did not lay proper foundation, thus the statement was properly excluded).

B. The Grush-Saunby Report

The Grush-Saunby Report was a cost/benefit analysis of a new rule proposed by NHTSA. The context in which the Grush-Saunby Report was created is worth noting. It is impossible to cite every item in the public record that requires regulatory agencies such as NHTSA to consider the costs and benefits of administrative action, including safety regulations. A brief review of some of the pertinent statutory and regulatory history, however, demonstrates that lawmakers, regulators, and regulated industries all give weighty consideration to costs. Section 103 of the National Traffic and Motor Vehicle Safety Act of 1966 (the "Act") authorized the Secretary of Commerce (now Transportation) to promulgate "appropriate" federal motor vehicle safety standards. 49 U.S.C. § 30111 (2006). "[E]ach standard shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms." *Id.* at § 30111(a) (emphasis added). The Secretary, when prescribing safety standards, must "consider whether a proposed standard is reasonable, practicable, and appropriate ... " *Id.* at § 30111(b)(3) (emphasis added).

The legislative history of the Act clearly states that the term "practicable" includes consideration of costs. The House Report states:

> In establishing standards, the Secretary must conform to the requirement that the standard be practicable. This would require consideration of all relevant factors, including

> technological ability to achieve the goal of a particular standard as well as consideration of economic factors.

H.R. Rep. No. 89-1776 (1966) (emphasis added). The Senate Report similarly stated:

> The Committee intends that safety shall be the overriding consideration in the issuance of standards under this bill. The Committee recognizes, as the Commerce Department letter indicates, that the Secretary will necessarily consider reasonableness of costs, feasibility and adequate lead time.

S. Rep. No. 89-1301 (1966) (emphasis added).

NHTSA complied with congressional instruction to consider the costs of safety measures. In October 1971, NHTSA published its "Program Plan for Motor Vehicle Safety Standards." Page 1 of the Plan stated:

> Rulemaking plans must emphasize a total systems approach in order that the utmost in safety protection may be realized. Approval of rulemaking plans is based on a careful analysis of safety payoff in terms of lives saved and reduction in injuries and on estimates of costs to the consumer.

Motor Vehicle Programs, National Highway Traffic Safety Administration, Program Plan for Motor Vehicle Safety Standards, at p. 1 (Oct. 1971) (emphasis added).

In April 1972, NHTSA published the report upon which Ford based the cost figures in its Petition a year and a half later. The preliminary report was titled "Societal Costs For Motor Vehicle Accidents" and, as noted, assigned dollar values to fatalities and

injuries in motor vehicle accidents. In August 1973, NHTSA amended Standard 301 (to be effective in 1975 and 1976) for passenger cars only. 38 Fed. Reg. 22397 (Aug. 20, 1973). Ford submitted a Petition and the Report in response to this rulemaking.

Ford followed the methodology and figures of NHTSA. It was, therefore, quite appropriate for Ford to provide an analysis of the costs and benefits of the new proposal in its Report. Yet the Petition and the Report read in isolation can lead to improper claims and characterizations. Plaintiffs' claims so demonstrate.

Despite Plaintiffs' assertions to the contrary, there was no evidence that Ford ever used the data in its analysis in the design of any product. Rather, Ford's Report employed NHTSA's figures and methodology for evaluation of a proposed standard. In doing so, the Ford engineers did not place a dollar value on human life. The cost figures were NHTSA's calculations, and Ford did not accept them:

> The casualty to dollars conversion factors used in these studies were the societal cost values prepared by the NHTSA. These values are generally higher than similarly-defined costs from other sources, and their use does not signify that Ford accepts or concurs in the values. Rather, the NHTSA figures are used only to be consistent with the attempt not to understate the relevant benefit.

(LF 1092) (emphasis added).

C. There Was No Foundation for the Use of the Grush-Saunby Report.

The Grush-Saunby Report had not been admitted in evidence at the time Plaintiffs attempted to use it in their cross-examination of Mr. Ridenour. They claim the Report was admissible to impeach Mr. Ridenour's testimony regarding a different document that was admitted into evidence. (Tr. 3512). The admitted document was a 1971 memorandum—which Plaintiffs describe as the "Chiara memo"—that addresses the cost of placing the fuel tank over the axle on older, pre-Panther platform vehicles. Mr. Ridenour discussed the advantages and disadvantages of this location during his direct examination. (Tr. 3222-40). Mr. Ridenour admitted that the Chiara memo included a recognition of the cost and difficultly of creating a barrier between a tank in this location and the passenger compartment. (Tr. 3228-35). Mr. Ridenour further noted that Ford had not figured out how to create this barrier/separation and that cost had nothing to do "with why Ford ultimately was unable to or did not incorporate this idea into a vehicle." (Tr. 3233-3235).

The Noltes' counsel revisited the Chiara memo during his cross-examination of Mr. Ridenour. (Tr. 3507).

> Q. That's because it's my understanding, you said yesterday and you'll say today, that cost has nothing to do—safety is always over cost for Ford?
>
> A. No. That was based on the fact that this $9.95 [the number referenced in the Chiara memo] is a lot cheaper than what we ended up spending to do it the

other way. If we were doing it on cost, we would have gone this way.

(Tr. 3509). A confusing exchange followed shortly after:

Q. Are you saying that Ford tries to factor in cost over safety?

A. No.

Q. Does Ford never factor in cost over safety?

A. Correct.

(Tr. 3510).

Plaintiffs claim the Report was properly offered to impeach Mr. Ridenour's testimony regarding the Chiara memo. Plaintiffs did not, however, lay a foundation for their claim. "In laying the proper foundation, it is necessary to ask the witness whether he or she made the statement, quote the statement, and point out the precise circumstance under which it was allegedly made, including to whom the witness spoke and the time and place of the statement." *Aliff*, 36 S.W.3d at 318 (*citing K.J.B. v. C.A.B.*, 883 S.W.2d 117, 120 (Mo. App. 1994)). During Plaintiffs' offer of proof, the trial court specifically noted that they offered no evidence or testimony showing that Mr. Ridenour had some connection to the 1973 Grush-Saunby Report or that the Report had anything to do with the design of the 2003 Police Interceptor. (Tr. 3866-78).

Plaintiffs recognize this foundational problem and claim the Report was admissible as an admission of "Ford." There was, however, no testimony or offer of proof to support that claim. And this "admission" would not make the Report admissible

to impeach Mr. Ridenour's testimony regarding an entirely different document. As described above, that testimony was clearly related to a particular document which at least had some arguable relevance to Plaintiffs' claims—the cost of relocating a behind-the-axle fuel tank. Plaintiffs recognized that the Grush-Saunby Report dealt with a completely different issue—the addition of a static rollover test for FMVSS 301. (Tr. 3866-67). The Report was not addressed to any particular Ford vehicle and was prepared in light of a Congressional mandate to consider the costs of regulations. More importantly, even if the Report were admissible as an admission of Ford, it still would have to be shown to be relevant and not unfairly prejudicial. The trial court properly found no showing of relevance and significant risk of unfair prejudice.

Plaintiffs raise another contradiction argument for the first time in their Brief. It was raised neither at trial nor in their motion for new trial; therefore, it is not properly before this Court. *Enos*, 73 S.W.3d at 788-89. Even if properly preserved, this argument has no merit because the alleged contradiction concerns a completely different document and a different issue. Further, the basis for the alleged contradiction—that the Grush-Saunby Report placed cost over safety—is a gross distortion of that document. Plaintiffs made no offer of proof to support this interpretation of the Grush-Saunby Report. Accordingly, the trial court did not abuse its discretion.

IV. THE TRIAL COURT PROPERLY ADMITTED THE ODI REPORT BECAUSE ITS ADMISSION WAS AUTHORIZED BY R.S. MO. § 490.220, WAS NOT AN ABUSE OF THE TRIAL COURT'S DISCRETION, AND DID NOT UNFAIRLY PREJUDICE PLAINTIFFS IN THAT THE RECORD WAS KEPT IN A PUBLIC OFFICE OF THE UNITED STATES, WAS RELEVANT TO THE BASIS FOR PLAINTIFFS' CLAIMS, AND WAS INDEPENDENTLY RELEVANT TO PROVE FORD'S STATE OF MIND.

A. Standard of Review

Under Missouri law, office records of the United States are clearly admissible:

> All records and exemplifications of office books, kept in any public office of the United States, or of a sister state, not appertaining to a court, shall be evidence in this state, if attested by the keeper of said records or books, and the seal of his office, if there be a seal.

R.S. Mo. § 490.220 (2000).

This Court has held that this statute "is one of a number of statutes that eliminate the foundational requirements of authentication, best evidence, and hearsay for the admission of certain public documents." *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 55 (Mo. banc 1999) (*citing Hadlock v. Director of Revenue*, 860 S.W.2d 335, 337 (Mo. banc 1993)). Once the requirements of this statute are met, if the public records are relevant, they are admissible. *Id.*

B. The ODI Report Was Admissible Under Section 490.220.

Plaintiffs assert that although the ODI Report is a public record, it should not have been admitted because the report contained untrustworthy opinions and conclusions and was highly prejudicial. Their assertions are without merit.

On November 27, 2001—almost two years before the Newton accident—the Office of Defects Investigation ("ODI") at NHTSA opened an investigation of fuel leaks following rear impact crashes in model years 1992-2001 Ford Crown Victoria, Crown Victoria Police Interceptor, Lincoln Town Car and Mercury Marquis vehicles. (LF 1105). The results of the ODI's investigation were detailed in an October 3, 2002, closing resume, which was admitted at trial. (LF 1105).

There is no question that the ODI Report met the requirements of § 490.220. Indeed, this Court applied § 490.220 to similar NHTSA documents in *Rodriguez*. There, this Court held that the trial court erred in excluding NHTSA reports. This Court found that "[t]he NHTSA reports, which are published in the Federal Register, clearly meet the requirements of the § 490.220 exception. They are not only the records of the NHTSA, but also of the Office of the Federal Register, both of which entities are public offices of the United States." *Rodriguez*, 996 S.W.2d at 56.

Missouri law is not unique. United States government reports such as the ODI Report are routinely admitted in courts of other jurisdictions. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 161-70 (1988); *In re Korean Airlines Disaster of September 1, 1983*, 932 F.2d 1475, 1481-83 (D.C. Cir. 1991); *FAA v. Landy*, 705 F.2d 624, 632-33 (2d Cir. 1983); *Robbins v. Whelan*, 653 F.2d 47, 50-52 (1st Cir. 1981). As recognized by the

Supreme Court of the United States, "it goes without saying that the admission of a report containing 'conclusions' is subject to the ultimate safeguard—the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions." *Beech Aircraft Corp.*, 488 U.S. at 168.

Plaintiffs' claim that the ODI Report contained inadmissible hearsay is not, therefore, a basis for its exclusion in these circumstances; § 490.220 is more than just an authentication statute in that it authorizes the admission of hearsay documents. In *Rodriguez*, this Court held that once the requirements of § 490.220 are met, NHTSA reports are admissible "in their entirety," regardless of whether they contain opinions and conclusions. *Rodriguez*, 996 S.W.2d at 56. Following § 490.220 and *Rodriguez*, the trial court here properly ruled that the ODI Report, in its entirety, was admissible. (PreTr. 820). Furthermore, as recognized in *Beech Aircraft*, Plaintiffs here had the right to present evidence to refute the opinions and conclusions contained in the ODI Report. And, that is precisely what they did—throughout the trial.

C. <u>The ODI Report Was Relevant.</u>

The sole remaining inquiry is whether the ODI Report was relevant. It was; it concerned NHTSA's investigation of the performance of the fuel system in Police Interceptors in rear collisions. Trooper Newton drove a Police Interceptor, which sustained a rear collision. The very basis for Plaintiffs' claims was a design defect based on the location of the fuel tank. In reaching its decision, the ODI relied on: (1) documents provided by Ford, General Motors Corporation, and plaintiff attorneys;

(2) NHTSA records; (3) on-site and phone interviews with police personnel; and (4) inspections of post-crash vehicles. (LF 1105). Among other things, the ODI found:

- Police Interceptors meet FMVSS 301.
- Post-crash fuel leaks occurred in accidents with crash energies "significantly greater" than those generated by FMVSS No. 301 tests.
- There is no single factor that contributed to the post-crash fuel leaks in the Police Interceptor vehicles.
- There have been numerous high-energy rear crashes in Police Interceptor vehicles with little or no loss of fuel and no fire.
- Based on an analysis of FARS data, the risk of fire per fatal rear crash in the Police Interceptor vehicles was comparable to that of Chevrolet Caprice police vehicles. A study conducted by the Florida Highway Patrol reached similar conclusions.

(LF 1119-20). The ODI closed its investigation because it was "unlikely that further investigation would produce sufficient evidence to demonstrate the existence of a safety-related defect in the subject vehicles." (LF 1120). The ODI Report was obviously relevant.

Plaintiffs speculate that the jury was misled "whether the accident in this case was considered in the ODI Report." (Br. 126). The jury would not have been confused. The dates of the accident and the closing of the investigation were clearly described in documents and testimony to the jury. Furthermore, Mr. Wallingford was specifically asked about the General Dynamics investigation of the Newton accident and confirmed

that, following this investigation, NHTSA did not reopen its investigation. (Tr. 1878-81). There could have been no confusion, let alone unfair prejudice, by the admission of the ODI Report.

Finally, even assuming *arguendo* that the ODI Report was not admissible under Missouri's public records statute, the Report was independently relevant to establish Ford's state of mind. Such evidence was appropriate, and its admission was clearly within the trial court's discretion so as to allow Ford to respond to Plaintiffs' claims for punitive damages. *See Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 248 (Mo. banc 2001).

There is certainly no reason for this Court to accept Plaintiffs' plea to revisit *Rodriguez.* The trial court did not err.

V. THE TRIAL COURT PROPERLY REFUSED TO ALLOW PLAINTIFFS TO REFER TO THE PINTO DURING THEIR CROSS-EXAMINATION OF MR. RIDENOUR BECAUSE THE TRIAL COURT'S RULING DID NOT CONSTITUTE AN ABUSE OF DISCRETION AND NO PREJUDICE RESULTED IN THAT THE REFERENCE WAS NOT MATERIAL TO THE CASE, ITS USE WOULD HAVE BEEN UNFAIRLY PREJUDICIAL TO FORD, AND PLAINTIFFS WERE ALLOWED TO ADDRESS THEIR PURPORTED CONCERN WITHOUT REFERRING TO THE PINTO.

A. Standard of Review

A trial court has broad discretion to control the trial proceedings, *Gerard*, 648 S.W.2d at 931, and regulate the manner of witness examination. *Brown*, 116 S.W.3d at 736. The trial judge has "great discretion" to control the "extent and scope of cross-examination." *City of Kansas City*, 857 S.W.2d at 301. A trial court's decisions regarding cross-examination "will not be disturbed unless an abuse of discretion is clearly shown." *Litton*, 85 S.W.3d at 113 (*citing Nelson v. Waxman*, 9 S.W.3d 601, 604 (Mo. banc 2000)). Likewise, "the admissibility of evidence lies within the sound discretion of the trial court, [i]ncluding the introduction of evidence for the purposes of impeachment." *Id.* (citations omitted). As with any alleged error, Plaintiffs must also show the court's error was prejudicial.

B. Evidence of the Pinto Was Neither Relevant Nor Material.

Plaintiffs assert that the trial court erred in prohibiting them from cross-examining Mr. Ridenour about his involvement in the design and later investigation of the Ford

Pinto. Plaintiffs say the evidence was admissible for impeachment purposes and as direct evidence of Ford's notice of a dangerous condition.

Earlier in the trial, the trial court allowed evidence of a 1970 Pinto crash test through Mr. Wallingford. In the test, the Pinto's fuel tank leaked when the filler tube pulled out of the tank and leaked from a puncture in the fuel tank. At various stages of the proceedings, however, the trial court and counsel had recognized the differences between the Pinto and the 2003 Police Interceptor. As the trial court stated:

> I mean, you cannot even have 8th grade science and look at a 2003 Crown Victoria and a Pinto, and if there is ever apples and oranges in terms of the structure of those cars that's obvious.

(Tr. 982). The trial court later stated:

> I think I have given you great flexibility in this other-act stuff, and these Pinto cars and the Crown Vics, I don't think they're even close. I mean, I think they are off-the-moon different.

(Tr. 3195). Plaintiffs' counsel made a similar admission. (Tr. 3197). There was no evidence that Ford relied on or used anything related to the design and development of the Pinto in connection with the design or development of any Panther platform car.

Plaintiffs repeatedly and wrongly argued at trial that Mr. Ridenour was responsible for the design of the fuel system on the Pinto. (Tr. 3193-94, 3196). These erroneous arguments continue in their Brief. (Br. 139-40 ("I don't know if he got caught up or not, but he didn't mention that he worked for the fuel systems for the Pinto. He worked on

them as an engineer ... And he listed these things and he didn't list his work on the Pinto.")). When Plaintiffs made similar claims at trial, the trial court questioned Mr. Ridenour, who stated: "I had system responsibility when I worked in fuel systems for different cars and I listed those. Pinto was not one them." (Tr. 3199; *see also* Tr. 3199-3200). The trial court clearly distinguished this fact from Mr. Ridenour's work on component parts that were used on many cars, including the Pinto, the design and function of which parts were not at issue. (Tr. 3199-3200, 3307-09).

Given the remote connection to any work related to the Pinto and the differences between the Pinto and the 2003 Police Interceptor, the trial court did not abuse its discretion. The remoteness and differences go to lack of both materiality and relevance. Furthermore, the introduction of the Pinto would be unfairly prejudicial. As the trial court observed, the term "Pinto" carries a negative connotation and could confuse the jury. (Tr. 3195-96, 3312). Plaintiffs' Brief itself provides the proposed roadmap for attempting to connect these completely different vehicles:

> Indeed, it would appear that excluding the Pinto evidence on this basis would accomplish nothing more than rewarding Ford for having previously designed an extensively defective vehicle. Plaintiffs do not deny that the defects in the Pinto were so serious that they became a matter of fairly common public knowledge. But Ford should not be able to exclude evidence regarding the Pinto merely because the Pinto was more famously defective than most other vehicles.

(Br. 135). There is no better justification for the trial court's decision than this argument. It clearly reflects Plaintiffs' desire to try a case involving an entirely different vehicle. The trial court did not "reward" Ford by precluding Plaintiffs from cross-examining Mr. Ridenour about a different vehicle designed and manufactured decades earlier.

It is important to note, in addition, that the court did permit Plaintiffs to question Mr. Ridenour about his involvement in lawsuits dating back to the 1970s. The court's limited ruling was as to use of the name "Pinto." (Tr. 3312). During trial, furthermore, Plaintiffs introduced evidence of over forty other similar incidents involving law enforcement officers, some of which resulted in death by fire. (LF 1080). They introduced evidence of the unsuccessful crash testing Ford performed on the Pinto in 1970 through Ford's own documents regarding fuel system integrity. (Tr. 1249-50). They showed that Ford was on notice as early as 1970 of the possibility of fuel leakage from rear of axle fuel tanks. (LF 1479). As a consequence, questioning Mr. Ridenour about his involvement specifically with the Pinto would have been merely cumulative. There is no reversible error in excluding cumulative evidence. *See Hansome v. Nw. Cooperage Co.*, 679 S.W.2d 273, 276 (Mo. banc 1984). The trial court did not abuse its discretion in disallowing Plaintiffs from referring to the Pinto during cross-examination of Mr. Ridenour.

VI. THE TRIAL COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR A NEW TRIAL ON THE BASIS OF CUMULATIVE ERROR BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THAT THERE IS NO CUMULATIVE ERROR AND, EVEN IF THERE WERE ERROR, IT DID NOT PREJUDICE PLAINTIFFS.

A. Standard of Review

A large number of alleged but unproven or non-prejudicial errors do not cumulative error make. *Wright v. State*, 125 S.W.3d 861, 871-72 (Mo. App. 2003) (*citing State v. Gardner*, 8 S.W.3d 66, 74 (Mo. banc 1999)). As this Court has held "[n]umerous non-errors cannot add up to error." *State v. Gray*, 887 S.W.2d 369, 390 (Mo. banc 1994), *cert. denied*, 514 U.S. 1042 (1995) (quoting *State v. Hunter*, 840 S.W.2d 850, 869-70 (Mo. banc 1992)). Where a trial court declines to assign error to any of the grounds raised by a party, cumulative error cannot be the basis for a new trial. *Crawford v. Shop 'N Save Warehouse Foods, Inc.*, 91 S.W.3d 646, 652 (Mo. App. 2002); *Steele v. Evenflo Co., Inc.*, 147 S.W.3d 781, 787 n. 2 (Mo. App. 2004). Furthermore, a party is not entitled to a new trial on account of cumulative error "when there is no showing that prejudice resulted from any rulings of the trial court." *Koontz v. Ferber*, 870 S.W.2d 885, 894 (Mo. App. 1993).

B. There Is No Evidence of Error, Cumulative Error or Prejudice.

In this appeal, Plaintiffs have put forth their points for this Court's consideration, and Ford has responded. As set forth above in each of Ford's responses, Plaintiffs have not shown that the trial court abused its discretion. Even assuming, *arguendo,* that there

were error, the error was not of prejudicial proportion. As a consequence, Plaintiffs are not entitled to a new trial on the ground of cumulative error.

CONCLUSION

For the forgoing reasons, trial court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the forgoing brief, as well as a labeled disk containing the same, was hand delivered this ____ day of January, 2009, to:

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RULE 84.06(c) CERTIFICATION

I hereby certify that this brief complies with the requirements of Missouri Rule 84.06(c): (1) this brief includes the information required by Rule 55.03; (2) this brief complies with the limitations contained in Missouri Rule 84.06(b); (3) this brief contains 21,298 words, as calculated by Microsoft Word software used to prepare this brief; and (4) disks containing this brief were prepared using Norton Anti-Virus and scanned and certified as virus free.

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