IN THE MISSOURI SUPREME COURT

NO. SC 89610

SHONNIE NEWTON, et al.,
Appellant,

v.

FORD MOTOR COMPANY, et al.,
Respondent.

And

MICHAEL NOLTE and
BARBIE NOLTE,
Appellant,

v.
FORD MOTOR COMPANY, et al.,
Respondent.

SUBSTITUTE BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment in a products liability action in the Circuit Court of Jackson County in favor of Defendant Ford Motor Company and against Plaintiffs. Plaintiffs filed timely motions for new trial that were denied by the Circuit Court; Plaintiffs then filed timely notices of appeal. This Court has general appellate jurisdiction over this appeal pursuant to Article V, Section 3 of the Missouri Constitution in that this appeal does not address any issue that falls within the exclusive jurisdiction of the Missouri Supreme Court.

STATEMENT OF FACTS[1]

This action involves claims of negligence and strict liability brought by the family of Trooper Michael Newton ("Trooper Newton") and by Michael Nolte ("Mr. Nolte") against Ford Motor Company ("Ford") and a distributing company, Trade Winds Distributing. (TR4). The claims of Trooper Newton's family and of Mr. Nolte were consolidated for trial. (TR227). The basic facts underlying this action are as follows:

On May 22, 2003, shortly before 7:00 a.m., Trooper Newton pulled Mr. Nolte over in the eastbound lanes of Interstate 70 for a minor traffic violation. (TR2512). Trooper Newton asked Mr. Nolte to get out of his vehicle and join Trooper Newton in

[1] The transcript in these actions was prepared in three separate sections – Pretrial Hearings, Trial and Post-Trial Hearings – with each section beginning pagination at page 1. To distinguish between citations, Plaintiffs use the following designations: "Pre.T. __" for Pretrial Hearings, "TR__" for Trial and "Post.T. __" for Post-Trial Hearings. The Plaintiffs filed separate legal files for the two separate cases that were consolidated for trial below: the Newton action and the Nolte Action. In most instances these legal files are identical and, for purposes of this Brief, Plaintiffs use the designation LF to refer to the Nolte legal file when there is no difference between the two legal files. In those rare instances in which Plaintiffs are referring specifically to the Newton legal file, Plaintiffs use the designation "NewtonLF__." References to Plaintiffs' Exhibits that were admitted at trial are designated as follows: "P.Exh. __."

the patrol car. (TR2512-13). Trooper Newton's had parked his Ford Crown Victoria Police Interceptor ("CVPI")vehicle on the shoulder of I-70, directly behind Mr. Nolte's vehicle with warning lights on the patrol car flashing. (TR992). Both vehicles were well onto the shoulder. (TR992, 2513). Mr. Nolte sat in the passenger seat of Trooper Newton's patrol car while Trooper Newton wrote Mr. Nolte a warning. (TR2513-14).

As the two men were sitting in the patrol car, a pick-up truck pulling an empty trailer was traveling eastbound on Interstate 70 towards the patrol car. (TR995-96). The driver of the vehicle, Paul Daniel, reached for his sunglasses, taking his eyes off of the road. His truck drifted onto the shoulder of I-70. (LF686). By the time Mr. Daniel saw the patrol car it was too late to correct. He struck the patrol car from the rear. (LF686).

Immediately upon impact there was an explosion that engulfed the patrol car in a ball of fire. (TR997; LF669). Trooper Newton burned to death. Passersby pulled Mr. Nolte from the burning CVPI. He suffered very serious burns. (TR2214-16, 2557-58). Trooper Newton's death and Mr. Nolte's injuries resulted from the fire. Both men would have walked away from the collision but for the fire. (TR2214-16, 2221). Neither man suffered so much as a single broken bone as a result of the collision. (TR2191).

While there was no dispute that the collision was caused by Mr. Daniel's negligence, Plaintiffs contended at trial that the explosion and ensuing fire were caused by a defective fuel containment system that Ford used in the CVPI. (TR734, 1016).

Specifically, Plaintiffs contended that Ford had notice of the danger presented by its fuel system as a result of numerous previous accidents and fires involving CVPI's, that the location of the fuel tank in the crush zone behind the rear axle rather in a more protected forward location was a dangerous and defective design, and that the anti-spill valve at the end of the filler pipe was not designed to withstand a crash. (TR735-38). Plaintiffs offered expert testimony to establish that the Newton CVPI was defective and unreasonably dangerous as a result of both of these conditions. (TR1208-09, 1288, 1294-97, 1323, 1414-15, 1565-66, 1702-03).

Ford made the CVPI used by Trooper Newton. (1046-47). The CVPI is one of a series of vehicles all based on the Panther platform. (TR1061-62, 1240). Panther platform vehicles have essentially identical fuel systems. (TR1062-63). Ford had crash tested and had received reports of actual real-world crashes involving Panther platform vehicles, including CVPI's. (TR1016, 1150-51, 1166-67). In a majority of the crash tests the fuel system leaked. (TR1016, 1150-51, 1166-67).

The trial in this action lasted for approximately one month, from May 18, 2005 to June 14, 2005. (TR4365-71). During the course of the trial, the trial court made a number of evidentiary and legal rulings that Plaintiffs contend were in error. The facts that pertain specifically to those rulings are covered in the remaining sections of this statement of facts.

A. EVIDENCE REGARDING OTHER SIMILAR INCIDENTS.

One of the primary types of evidence relied upon at trial was evidence of other similar incidents ("OSI Evidence"). The trial court conducted an extensive pre-trial conference regarding the admission of OSI Evidence and, at that hearing, the court indicated that Plaintiffs would be allowed to admit a number of similar incidents for the purpose of establishing Ford's notice of other incidents that would tend to indicate fuel system defects in the CVPI. (Pre.T. 1-466; TR699, 1362). Because the other similar incidents were admitted for the purpose of establishing notice, the trial court ruled that incidents that occurred after the Newton/Nolte incident were generally inadmissible. (TR1358-59).

At several different points during the trial, Ford placed similar incidents into evidence that had occurred after the Newton/Nolte incident ("post-Newton/Nolte"). (TR928, 2691; LF907, 1179). In addition, Ford made arguments and engaged in lines of questioning that depended upon and emphasized post-Newton/Nolte incidents. (TR924, 950, 1890, 2797, 2819-20, 2823, 2841, 2851-52, 3264-65, 4214-15, 4237, 4245-46, 4265). However, when Plaintiffs attempted to use these same post-Newton/Nolte incidents in their own arguments, the trial court ordered Plaintiffs not to reference the post-Newton/Nolte incidents already introduced into evidence by Ford. (TR4120-21).

1. Post-Newton/Nolte Incidents Presented During Ford's Opening Argument.

In its opening argument, Ford displayed a chart to the jury that included a number of CVPI accidents involving fuel tank punctures. (TR928; LF1179). Six of the accidents included in this chart occurred after the Newton/Nolte collision. (LF1179). Following the close of Ford's opening argument, Plaintiffs asked for a copy of the slide that had been presented to the jury during Ford's opening argument and Ford agreed to provide a copy. (TR966). The next day, Plaintiffs informed the court that Ford had failed to provide a copy of the slide and the court directed Ford to provide Plaintiffs with a copy of the slide. (TR984-85).

During their case in chief, Plaintiffs indicated their desire to discuss the six post-Newton/Nolte accidents that Ford had displayed to the jury.

> MR. BETHUNE [for Plaintiffs]: So during the course of opening, there was this chart that was displayed in the form of a PowerPoint slide that included six additional incidents after the date of our incident. And so by displaying it and publishing it to the jury, we believe it's been constructively admitted into evidence under these cases that we have given you. Like Mr. Emison [co-counsel for Plaintiffs] said, there is no case exactly on point. There are cases that talk about things that are marked as an exhibit and published or displayed to the jury that are considered to be in evidence.
>
> COURT: Okay. How did he use it in opening statement?

MR. BETHUNE: It was in the form of a PowerPoint. Admittedly, it was not marked as an exhibit. It was part of his presentation. It was a slide of a PowerPoint presentation; that was part of his opening statement.

MR. FEENEY: And I did not reference any of these. Actually, I didn't reference any specific incident. I just showed the chart. Frankly, it was my intention to be showing the chart that I thought the jury was going to see from the Plaintiffs, and I had some textual points, none of which had anything to do with these post-Newton incidents.

COURT: So I understand, the way you used the chart, okay? The way that you used the chart was to suggest that these -- none of these were Police Interceptors and you were saying they were different in this case; is that the gist of it?

MR. FEENEY: What I said was no filler necks, et cetera.

COURT: Got it.

MR. BETHUNE: So that's the issue, Your Honor, is whether or not this chart, what I have in my hand, which I'm not sure if we need to mark this offer of proof.

COURT: You certainly can if you wish.

MR. BETHUNE: But this is the chart. We say it was displayed and published to the jury.

COURT: Okay. I think what these cases are intended to mean -- first of all, they're almost all cases of that occurred during trial when witnesses have talked about it. I also think that these cases are basically kind of rooted out of a curative admissibility kind of analysis. They're saying, if somebody uses something, that's arguably inadmissible, okay? To their benefit, okay? It's not fair to not allow the other side to respond to it. Okay?

So what these cases talk about, the classic example occurs like in a criminal case in a mental health report. The prosecutor selectively runs through the mental health report and two thirds is for the jury and the defense wants to put the other in and they complain about it. That's not fair and appropriate.

In this situation, it's an issue of whether or not that his actions somehow created an unfair -- was unfair to you all which changes my relevancy analysis and actually even changes a relevancy ruling that you all agreed to. And I don't think it's the same thing. So I would -- and then so I don't think it's the same thing.

What you might want to define for the record what exactly you would like to do.

MR. BETHUNE: We would like to use these six additional other incidents since they've been displayed to the jury included in the OSI presentation Mr. Wallingford will make.

COURT: I understand that. For the reasons I just stated and also for the reasons of the posture of the hearing that we talked about, in other words, we had a hearing, it was ruled that way, it was ruled that way by agreement, basically.

I don't think Mr. Feeney has done anything that creates any unfair advantage that would change my analysis, and I just don't think they're the same thing. So for that reason I would assume that the offer of proof that Mr. Wallingford – rather than him doing a Q and A, I'm assuming that he would testify about these things, he would say --

See, the other problem is I assume he would say that he's looked at something about them, like he did those others, and I assume he would say all that stuff. And I'll also allow you to make a further written offer of proof as to what Mr. Wallingford would say if you desire to.

MR. BETHUNE: We can do that. Can we attach this portion of the slide?

COURT: I'll allow you to make it as a written offer and it's considered by the Court and it's overruled.

(TR1362-67).

2. The 11 Post-Upgrade Incidents.

Ford came out with a shield "upgrade" kit in 2002-2003 that was intended to protect the fuel tank during rear-impact collisions. (Pre.T. 89, 123-24). These upgrade kits were only put on patrol cars, not on regular civilian vehicles. (Pre.T. 89). The CVPI that was driven by Trooper Newton was a 2003 model and had an upgrade kit installed. (Pre.T. 89).

Ford indicated at pre-trial that the shield upgrade kits were 100% effective and that there were no known incidents (crash testing or otherwise) in which a tank had been punctured by a shielded component. (Pre.T. 124). Ford also represented that the Newton accident was the only incident since 2002 in which a trooper has been killed in a vehicle equipped with the upgrade kit. (Pre.T. 125).

a. Susan Cischke's deposition testimony.

Susan Cischke is a vice-president of safety at Ford. (TR825). Ms. Cischke had testified in a prior action involving the CVPI: City of Centreville v. Ford Motor Co. (TR2690). During the course of trial, portions of Ms. Cischke's testimony from that prior trial were read into evidence by both Plaintiffs and Ford. (TR2690).

A portion of Ms. Cischke's testimony which was designated by Ford, and submitted into evidence by Ford, read as follows:

Q: (By Mr. Feeney) There have been incidents with shields. It's a fact. Everyone knows it. Are you aware of it?

A: Yes. 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.

Q: Have you had a chance to look at some of the information that is available, that's part of the court files 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.

> I know from our experience working with law enforcement that there's probably many more out there that have had impacts with shields that had no leakage, and we know that from experience even during the whole processes. I mean, we had many letters from law enforcement agencies indicating, you know, for instance, in California, they total a vehicle a week and they haven't had any instances of these.
>
> So while this represents vehicles that did have some leakage and some had fire, we know that there are many more others that – that did not have.

(LF907).

After reading this passage, Ford's counsel expressed his concern regarding Ms. Cischke's reference to 11 post-upgrade incidents and the following exchange was had:

> MR. FEENEY: There is a reference here, she just -- there was a reference to 11 incidents. I am concerned that we are in the same problem that I was in the opening. Now, I'm not sure, but I believe she is looking at -- she is probably looking at the Saint Clair admitted OSI list, which would include some incidents after the Newton accident, so I don't want to go any farther with this. I want to stop right here. Could we take a short break? Let me see if I can look at the transcript and figure out -- I may just skip the whole testimony, frankly.
>
> COURT: I think taking a break is probably a good idea.

> MR. FEENEY: We're almost done with it, but when she said "11," I just know that's not right prior to Newton. There are fewer incidents than that prior to Newton.

(TR2691). Ford's counsel did not request that this evidence of the 11 post-upgrade incidents be withdrawn from evidence and no order was issued by the court withdrawing those incidents from evidence.

b. Ford's emphasis of the efficacy of the upgrade kit.

Ford began emphasizing the efficacy of the shield upgrade kit in opening argument. Ford emphasized that other incidents in which CVPI's had experienced fuel leaks in rear-end collisions had occurred prior to implementation of the upgrade kit: "None of those cars had the upgrade kit on it that was developed at 75 miles an hour, but Trooper Newton did." (TR924). Ford emphasized that prior investigations of the CVPI, that had been undertaken by the NHTSA as a result of fuel-system safety problems in that vehicle, had predated implementation of the upgrade kit:

> I'm going to talk about this in a little bit, but you heard that the National Highway Traffic Safety Administration conducted a yearlong investigation into the Panther platform cars, including the Crown Victoria Police Interceptors. Now, this was all before these upgrade kits were developed, 2000 to 2002.

(TR924). Ford emphasized that the upgrade kit was evidence of its continuing efforts to make the CVPI safe: "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." (TR950).

Ford continued to emphasize the efficacy of the upgrade kit during its cross-examination of Plaintiffs' expert, Jerry Wallingford:

> Q. And are you aware of any crash tests at 75 or higher that has been done by Ford where any of the components shielded by the upgrade kit punctured the fuel tank?
>
> A. Not that I am aware of right now on the top of my head, no.

(TR1721-22).

> Q. And am I correct that all of the actions taken by Ford in the summer and fall of 2002, the design actions, were incorporated on the 2003 troop vehicle that Trooper Newton occupied at the time of the accident?
>
> A. All of the design actions? I don't know whether all the actions and investigations that they made were incorporated.
>
> Q. I didn't ask you about investigations. I'm talking about design changes.
>
> A. All right. The changes, yes, sir they were.

Q. And in addition to the fact that the shock towers were moved outboard, but in addition to that, the axle shield upgrade kit?

A. Yes, sir.

(TR1890).

In its case, Ford continued to emphasize the efficacy of the upgrade kit. During its examination of Richard Cupka, one of Ford's engineering managers, Ford elicited the following testimony:

Q. The next column says "punctures from items shielded by upgrade kit." Were any of the items on the car that were shielded by this developmental upgrade kit, did any of those items puncture the fuel tank?

A. No, they did not.

(TR2797).

Q. Did the upgrade kit go at least this far, did it take all the known puncture sources from field incidents, from axle components or axle suspensions and deal with it?

A. Yes, it did.

Q. Are you aware of any incident since the introduction of the upgrade kit up to and including the date of the Newton accident, May 22, 2003, are you aware of any field incident in which a shielded component, shielded

by the upgrade kit, has punctured a fuel tank on a Crown Victoria Police Interceptor struck at any speed under any conditions?

A. Not that I am aware of, no.

Q. Are you aware of any claim that has ever been made by anyone, prior to May of 2003, that the upgrade kit was not as a result of field incidents 100 percent effective in shielding the components that it shields?

A. No. Nobody has made that claim to me or brought it to my attention.

(TR2819-20).

Q. And Trooper Newton's car, which I think was built in December of 2002, that would have had the upgrade kit installed as original equipment at the factory?

A. That's correct.

(TR2823).

Q. I want to talk to you about that. First, let's talk about the results of this test. Was the upgrade kit on the axle in the test?

A. Yes, it was.

Q. Were there any punctures from items shielded by the upgrade kit in this 77 mile an hour test?

A. No, there were not.

Q. Did that fact provide further confirmation to you that the upgrade kit was effective in doing what it was supposed to do?

A. Yes.

(TR2841).

Q. Okay. Let's talk about the results of this test on July 31st. Again, punctures from items shielded by the upgrade kit?

A. No.

Q. In fact, at the risk of getting to the punch line in that column, is the answer "no" with respect to each and every one of those?

A. Yes. We have never punctured the fuel tank with anything shielded by the upgrade kit.

(TR2851-52).

Ford elicited similar testimony from Jack Ridenour, Ford's corporate representative at the trial:

Q. Recognizing that there are certainly no guarantees and absolutes with regard to future events, but can you comment on what you believe to be the likelihood in the future -- strike that.

Can you comment on what you believe to be the likelihood that if any one of these officers was in a 2003 model year Crown Victoria Police Interceptor, what the likelihood would have been that the leakage sources that resulted in fire would have, in fact, occurred in those accidents?

A. I can't tell you that there wouldn't have been a fire. What I can tell you is the leakage sources 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.

(TR3264-65).

c. Reference to the 11 post-upgrade incidents.

During Plaintiffs' cross-examination of Richard Cupka, counsel for Plaintiffs questioned Mr. Cupka about the 11 post-upgrade incidents that had been referenced in Ms. Cischke' 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.

(TR2941-42). This cross-examination regarding the 11 post-upgrade incidents occurred without any objection by Ford, or any indication by the Ford or the court that the 11 post-upgrade incidents had been withdrawn from evidence.

During closing argument, Plaintiffs' counsel attempted to use Ms. Cischke's comments regarding the 11 post-upgrade incidents to refute Ford's emphasis on the

efficacy of the upgrade kit. The trial court did not allow the argument, despite the fact that the evidence had been heard by the jury and not withdrawn.

> [By Mr. Emison] Ms. Cischke, the head of safety, said, 'There have been 11 accidents with the shield that involved rear impacts that had some fuel leakage and some fire.'
>
> After the shields were put on in the fall of 2000, 11 other accidents with fuel leakage and fire with the shields.
>
> MR. FEENEY: Objection, Your Honor.
>
> COURT: Come on up.
>
> (Counsel approached the bench and the following proceedings were had:)
>
> MR. FEENEY: That was withdrawn.
>
> COURT: That was withdrawn.
>
> MR. EMISON: It was not withdrawn from the evidence.
>
> COURT: Yeah, it was withdrawn.
>
> MR. EMISON: All right. All right.
>
> COURT: Hold on just a second. Come on up.
>
> MR. FEENEY: I would like the jury to be instructed they cannot consider that.

COURT: Okay.

MR. EMISON: Your Honor, it –

COURT: My understanding -- I'm just telling you, my understanding is that's why I didn't allow its use in opening. I said, 'We're not going to open the door.' He didn't open the door. My understanding is it was withdrawn.

MR. EMISON: All right.

(The proceedings returned to open court.)

COURT: Ladies and gentlemen of the jury, you are to disregard the last argument of counsel.

(TR4120-21). The trial court specifically recognized that counsel for Plaintiff Nolte was prepared to make the same type of argument and counsel was prevented from doing so for the same reasons set forth in the above-noted exchange. (LF1457). The court provided no explanation for why Plaintiffs were allowed to use Ms. Cischke's comments during their questioning of Mr. Cupka, but were prohibited from referencing the same evidence in closing argument.

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

testimony which indicated that in California "[t]hey have one rear impact a week resulting in a CVPI being totaled." (TR4237).

Ford also continued to emphasize the efficacy of the upgrade kit during its closing argument:

> We created this exhibit to simply deal with the question, the very simple question, the very simple question, is the upgrade kit a Band-Aid. Does the upgrade kit only work under limited circumstances?
>
> Well, here are the limited circumstances that it works under, ladies and gentlemen. That upgrade kit and those countermeasures -- you heard Dick Cupka and Jack Ridenour explain this to you -- they were developed as a result of the joint efforts of law enforcement and Ford Motor Company that gathered information about every wreck that had occurred involving a police officer and, for that matter, a Panther. Every one.
>
> They didn't put their heads in the sand. They didn't keep this from the police. 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.
>
> Now, every one of the leakage modes, with the exception of the Lynn Ross incident, which nobody knows enough about to be able to say this

with any certainty one way or the other, every one of those leakage modes was addressed by the upgrade kit. This is limited circumstances?

(TR4214-15).

These incidents that we're seeing on this last slide, these all occurred with the upgrade kit in place and before the Newton accident. The other ones that we went over did not, but these actually had the upgrade kit on them.

But you can, again, just see the massive amount of damage that's done in these high-speed wrecks, and I think that it's worth noting as we go through this and as you consider this, you know, we're not talking about parking lot, fender-bender-type incidents. These are pretty massive, pretty massive incidents.

And as you can see, the car does extraordinarily well under these circumstances.

(TR4245-46).

Most of these incidents occurred before Ford offered the upgrade kit and announced other measures to reduce the risk. They offered no evidence of how a 2003 Crown Vic with these measures would have performed in any of these incidents. We did.

(TR4265).

d. The trial court's misgivings regarding its ruling during Plaintiffs' closing argument.

In the post-trial hearing in this action, the trial court expressed concern that it may have made a mistake in prohibiting Plaintiffs' counsel from discussing the 11 post-upgrade incidents in closing argument. (Post.T. 2-14, 26-36). The court indicated that, when it granted Ford's objection to Plaintiffs' reference to the 11 post-upgrade incidents during closing argument, it did so under the belief that Plaintiffs had previously agreed that they would not use that material. (Post.T. 9). However, in retrospect, the court indicated it did not believe Plaintiffs' counsel had the same understanding of the matter or that Plaintiffs' counsel believed they had agreed not to use the material. (Post.T. 9).

The trial court acknowledged that, in retrospect, it believed a valid argument could be made that Ford had injected the 11 post-upgrade incidents into the case by reading that portion of the Cischke testimony to the jury. (Post.T. 11). The court also acknowledged that, given Ford's presentation of evidence tending to establish that the upgrade kit had eliminated fuel-system-safety problems, it would have been fair to allow Plaintiffs to refute that evidence by reference to the 11 post-upgrade incidents. (Post.T. 11).

The trial court indicated that these problems with its rulings regarding the 11 post-upgrade incidents did not occur to it until after the trial was complete. (Post.T. 11-12). In this regard, the court stated as follows: "I think an argument can be made that I

was wrong and that I should have at least allowed this argument, if not in the front half, at least in the rebuttal half of Mr. Emison's argument." (Post.T. 12).

In its order denying Plaintiffs' motion for new trial, the trial court acknowledged that the record is sparse with regard to Ford's objection to Plaintiffs' use of the 11-post-upgrade incidents. (LF1460). The court further acknowledged that "[t]o a large degree the failure to crystallize, in the form of a record, these in Chamber concerns falls upon the Court and [Ford's counsel]." (LF1460). The court recognized that much of the testimony of Ford's witnesses, Richard Cupka and Jack Ridenour, focused upon the use of the shield upgrade kits. (LF1460). The court noted that both of these witnesses had essentially testified that the upgrade kit went a long way toward addressing prior concerns about the fuel system in the CVPI. (LF1460). The court further noted that Ford's counsel relied upon the testimony of Mr. Cupka and Mr. Ridenour in closing argument to argue that Ford had addressed prior concerns about the fuel system in the CVPI by implementing the upgrade kit. (LF1461-62).

The court indicated that "upon reflection the Court believes that the proffered argument by Mr. Emison should have been allowed in the nature of fair retaliation to Mr. Feeney's argument and likely such argument was further appropriate to counter or contradict some of the themes present in the testimony of Mr. Cupka and Mr. Ridenour." (LF1462). The court acknowledged that it was error to exclude Plaintiffs from referring to the 11 post-upgrade incidents in closing argument, but found that this error was not prejudicial:

> Nevertheless, upon reflection and based upon a careful review of the closing argument record, I can say with little hesitation that the fairer thing to do would have been to allow the excluded closing argument. Yet this argument and this evidence was far from the core of this case. With equal confidence the Court believes that the denial of this argument did not constitute prejudice that affected the result of the trial.

(LF1466).

B. EVIDENCE REGARDING IMPEACHMENT OF EXPONENT'S CREDIBILITY.

During the course of the trial, a number of crash tests were discussed that had been performed for Ford by a company called Exponent. (TR1512, 1526-27, 1532, 1592-93, 1595, 1597, 1601, 1612, 1644, 1648-50, 1656-57, 1658-59, 1868-69, 3386, 3404-05). Given Ford's substantial reliance upon these Exponent crash tests, Plaintiffs sought to impeach the credibility of Exponent by establishing that Exponent was not a neutral testing facility and that testing was done in a way that would obtain favorable results for Ford. (TR3405, 3413-17).

The trial court even recognized that Ford had made substantial use of crash tests performed by Exponent and, thereby, had placed the credibility of Exponent in issue:

> COURT: Okay. My view of it, and then I'll hear from you all, but let me just give you my thinking on it, is that Ford in this case has utilized, to

> some substantial extent, crash tests that were done by Exponent, and there has been impeachment in depositions and otherwise about the fact that Exponent does a lot of work for Ford and is involved in litigation cases and as a consultant for Ford. That's in the case now.
>
> So I think it's fair to say that Mr. Ridenour, to some degree, testified about utilizing these crash tests as it relates to -- there was some fabric of it in his testimony. I'm not going to get real defined about it.
>
> I think that because of that factor, the amount of money that Exponent has paid -- or the fact that Exponent has paid money to Ford likely has some relevance as it relates to credibility.

(TR3432-33). The court further indicated that Plaintiffs' impeachment of Exponent was proper because "Exponent is doing these tests and these tests are a big part of [Ford's] case." (TR3439). In fact, the court recognized at several points that "Exponent crash tests have been a big part of the Defendant's case." (TR1342).

As noted previously, Jack Ridenour testified at trial as Ford's corporate representative. (TR3186, 3409, 3413). In the course of examining Mr. Ridenour, Ford's counsel elicited substantial testimony regarding Exponent in an effort to bolster Exponent's image as an independent testing facility. Mr. Ridenour testified that Exponent is a large company with 700 employees and with offices across the United States and overseas. (TR3537). Mr. Ridenour testified that Exponent performs a wide

variety of investigations including structural investigations, vehicle investigations, airline crash investigations and bridge collapse incidents. (TR3537-38). Mr. Ridenour testified that Exponent performs investigations and research for many large companies and for the government. (TR3538-40). Mr. Ridenour testified that Exponent has been involved in the investigation of many high profile incidents including the World Trade Center airline crash, the World Trade Center bombing, the Oklahoma City federal building bombing, the Hyatt skywalk collapse in Kansas City and the crash of the Challenger space shuttle. (TR3540). Mr. Ridenour testified that Exponent made $139 million in 2003 as a result of its research and investigations. (TR3543).

After testifying at length to generally bolster Exponent's image and apparent neutrality, Mr. Ridenour then answered the following questions:

> Q. And have you been involved in crash testing vehicles on behalf of Ford Motor Company using the Exponent test facility?
>
> A. Sure. I do that a couple times a year.
>
> Q. And have you ever known Exponent or any of the engineers at Exponent or any of the Ph.D.s that are there -- do you find them to be reliable?
>
> A. Very.
>
> Q. Do you find them to fudge test results for your benefit because you're paying for the test?

A. Never. I wouldn't pay for a test that they did that and they know that. And they have a reputation to protect.

Q. Are you aware of any claim that has ever been asserted against Exponent that they're in the business of testing for money and if someone hires them and pays them, they're going to them favorable results?

A. We wouldn't use them if that was the case.

Q. Do you think the Department of Justice would use them if that was the case? Or the Army?

A. I do not.

(TR3544).

In his cross-examination of Mr. Ridenour, Plaintiffs' counsel attempted to impeach Mr. Ridenour's testimony regarding Exponent's credibility and neutrality by referring to notes of a Ford employee, Joe Dierker, which indicated that Exponent's vice president, Subia Mulatte, performed testing for Ford with the specific objective of refuting theories of plaintiffs in litigation:

Q. Now, you're familiar with a person at Exponent by the name of -- I'll mispronounce his name – Subia Mulatte, who works with CVPI issues?

A. Yes.

Q. He's an Exponent employee; is that right?

A. Yes.

Q. You're familiar with Joe Durker, a Ford employee; is that right?

A. I am. I have known Joe for a long time.

Q. I want to show you Exhibit 4486. This is a notebook of Mr. Durker that's been produced to us by Ford Motor Company. Do you see "produced by Ford Motor Company"?

A. I see that.

Q. Next, I want to refer you to Exhibit 4487 and I'll put it up on the board.

MR. FEENEY: No, you won't. Not without showing it to me.

(TR3557-58). In the ensuing discussion that was held outside the hearing of the jury, Plaintiffs' counsel explained that Ford had gone to substantial lengths to bolster Exponent's credibility through the testimony of Mr. Ridenour and that Plaintiffs were merely trying to impeach that testimony by presenting evidence that contradicted the portrayal of Exponent as a neutral entity. (TR3561-76).

Plaintiffs' counsel explained that he had laid the foundation for this testimony by establishing that Joe Dierker is an employee of Ford and that Subia Mulatte is an employee of Exponent. (TR3561). Plaintiffs' counsel then made a formal offer of proof by questioning Mr. Ridenour outside of the jury's hearing and by offering Plaintiffs'

Exhibits 4486 and 4487. (TR3567-69). Mr. Ridenour acknowledged that he knew Subia Mulatte, that Mr. Mulatte is an employee of Exponent and that Mr. Mulatte has worked as a consultant for Ford on CVPI issues. (TR3567). Mr. Ridenour also acknowledged that he knew Joe Dierker, that Mr. Dierker was an employee of Ford and that Mr. Dierker had worked as a design engineer on the vehicle platform used in the CVPI and worked on the issue of fire suppression in the CVPI. (TR3567). Plaintiffs' counsel then presented Mr. Ridenour with Plaintiffs' Exhibit 4486 which is a notebook of Joe Dierker's that was produced by Ford. (TR3568, 3570-71; LF1149-77). Plaintiffs' counsel specifically asked that Mr. Ridenour review Plaintiffs' Exhibit 4487, which is a page out of Joe Dierker's notebook. (TR3569). On that page of Mr. Dierker's notebook, there is a note indicating that Subia Mulatte is an "investigator" who "develops crash tests that refute plaintiffs' allegation." (TR3569; LF1178). Plaintiffs' counsel offered Plaintiffs' Exhibits 4486 and 4487 into evidence. (TR3569).

In arguing against Plaintiffs' impeachment evidence, Ford's counsel represented to the court that "Subia Mulatte's name hasn't even been presented to the jury. There is no information about who he is or what he's done in connection with the case." (TR3572). However, Ford's counsel neglected to mention that Mr. Mulatte's name had not been presented to the jury because Ford had specifically sought to have Mr. Mulatte's name redacted from the earlier deposition testimony of Susan Cischke. (TR2674). As previously noted, portions of Ford vice president Sue Cischke's

testimony from a prior case were read into evidence at trial. (TR2690). The unredacted form of one passage in that testimony reads as follows:

> Q. (By Mr. Perry) Are you aware that a vice president of Exponent named Subbiah Malladi is a confidential expert consultant to Mr. Feeney in the Crown Victoria Police Interceptor litigation?
>
> A. Yes.

(LF924). In a conference before the court regarding which portions of Ms. Cischke's testimony would be presented to the jury, Ford's counsel objected to the use of Subia Mulatte's name and the court ordered that the name be redacted from the above-noted passage. (TR2674).

Ford's counsel also overlooked the fact that, immediately prior to the conference regarding Plaintiffs' impeachment evidence, Plaintiffs' counsel had asked Mr. Ridenour whether he was "familiar with a person at Exponent by the name of . . . Subia Mulatte, who works with CVPI issues" and Mr. Ridenour had responded "Yes." (TR3557). This testimony was presented to the jury without objection. (TR3557).

The court held that Plaintiffs could not use Plaintiffs' Exhibit 4487 for impeachment purposes or mention the name of Subia Mulatte. (TR3575).

C. THE GRUSH-SAUNBY REPORT.

During cross-examination of Mr. Ridenour, Plaintiffs questioned Mr. Ridenour about a 1971 memorandum in which Ford analyzed the cost of making certain design changes to improve the safety of vehicle fuel systems. (TR3505-10). This 1971 memorandum had previously been admitted into evidence and was used by Ford in its own examination of Mr. Ridenour. (TR3506; P.Exh. 722). The memorandum discussed the installation of a sheet metal barrier that would protect the fuel tank and estimated the cost of installing that barrier at $9.95 per vehicle. (TR3507-09).

In the course of discussing the 1971 memorandum, Plaintiffs questioned Mr. Ridenour about whether Ford factors the cost of design changes over the improved safety obtained by such changes, and the following exchange was had:

> Q. That's okay. I guess I could ask it one way or the other. 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.

(TR3510).

Given Mr. Ridenour's testimony that Ford never factors cost over safety, Plaintiffs sought to impeach Mr. Ridenour's testimony by means of the Grush-Saunby

Report. (TR3511). The Grush-Saunby Report is a 1973 Ford memo prepared by two Ford employees, E. S. Grush and C. S. Saunby, which documents the fact that Ford has factored cost over safety in designing its vehicles. (LF1087). This Report was drafted by Ford and sent to NHTSA in response to a proposed NHTSA federal motor vehicle safety standard regarding fuel system integrity. (LF1087). The Report addressed proposed design changes intended to improve fuel system safety and to reduce the number of fire-related deaths and injuries that resulted from then-current fuel system designs. (LF1087-88). The Report includes a cost/benefit analysis by Ford which values a human life at $200,000 and values a personal injury at $67,000. (LF1090, 1092). The Report estimates the cost of vehicle modifications to meet the proposed minimum federal vehicle safety standards at $11 per vehicle. (LF1092-93). The Report then compares the cost of implementing the proposed safety standard to the benefit gained by saving lives and avoiding fire-related injuries. (LF93). The Report estimates that it would cost $137 million dollars to implement the proposed safety changes, whereas the benefit (based on the figures that Ford used to estimate the value of human life and personal injury) would only be $50 million dollars. (LF1093). Based on these figures, the Report concludes that it would not be "cost effective" to make the changes necessary to save lives and avoid fire-related injuries. (LF1093).

Plaintiffs' counsel attempted to use the Grush-Saunby Report to impeach Mr. Ridenour and Ford, but the trial court refused to allow the use of the Grush-Saunby Report for impeachment purposes:

MR. DAVIS: It's at this point that I would like to offer in Plaintiffs' Exhibit 543. We've had a motion in limine on this. It's the Grush-Saunby Report. Can I show you the exact part I want to talk about?

COURT: Sure. I need to understand it first. Let me get the understanding.

MR. DAVIS: This is talking about fuel tank integrity, and it's about meeting the requirements for the fuel tank requirements before it was mandated.

COURT: Does this purport to be some -- I've got a document in front of me that is a whole bunch of pages and it's dated 1973. Does it appear to have some document that is trying to make some assessment of deaths and burn injuries per vehicle or something like that? It's a 1973 document; is that right?

MR. DAVIS: Yes, sir.

COURT: So what do you want to do?

MR. DAVIS: Well, if you get down to the conclusions, they decide that if it's going to cost $11 per car that -- the very last page is the conclusions. They're saying it costs -- what's that number here? Benefit and cost comparison.

COURT: Regarding what?

MR. DAVIS: Regarding –

MR. FEENEY: The addition of a rollover valve in a 1971 or '72 model vehicle.

COURT: So you want to cross examine him so it's inconsistent with the statement he just made; is that right?

MR. DAVIS: Yes, sir.

COURT: Do you object to it?

MR. FEENEY: I do.

COURT: Sustained.

(TR3511-12).

D. EVIDENCE REGARDING THE FORD PINTO.

Following opening arguments, and prior to Plaintiffs' presentation of any evidence, there was a substantial conference with the trial court concerning the relevance of information regarding the Ford Pinto. (TR972-79). Right at the outset, the court recognized that the Pinto evidence was relevant because the fuel tank on the Pinto was placed in a similar location to the fuel tank on the CVPI. (TR972). The court noted that tests involving the fuel system of the Pinto are "relevant to show that Ford had

awareness of the problems with fuel tank location consistent with [Plaintiffs'] theory." (TR972-73).

Plaintiffs' counsel explained that the crash tests were relevant because the fuel tanks in the tests leaked and thereby put Ford on notice of the danger of placing the fuel tank aft of the axle. (TR974-75). The court agreed with Plaintiffs' argument regarding Ford's notice, noting that "the fact that Ford knew of this and the fact that Ford looked into it and studied these things, that's all -- I think that's relevant evidence for a variety of reasons." (TR977). The court further indicated that this was an appropriate line of inquiry for Plaintiffs: "So, in the generic, you putting on evidence that Ford had a behind-the-axle test and it leaked and it was a problem, I think probably that's relevant evidence the jury has a right to see, okay?" (TR978).

Having recognized the relevance of the Pinto design, given its similarity to the CVPI design, the court allowed Mr. Wallingford to testify about a rear-barrier crash test involving a 1971 Pinto. (TR1249-50). This test was significant because the fuel tank in the 1971 Pinto was located aft of the axle, in essentially the same position as the fuel tank on the CVPI. (TR1250). However, when Plaintiffs attempted to question Mr. Ridenour, Ford's corporate representative, regarding his involvement with the design and investigation of the Pinto, the court had a change of heart and forbid Plaintiffs from even mentioning the Pinto. (TR3193-3201).

Plaintiffs explained that it was appropriate to question Mr. Ridenour regarding the Pinto because Mr. Ridenour was a design engineer with direct experience regarding

the design of the fuel system of the Pinto. (TR3193-94). In this regard, Plaintiffs argued that Mr. Ridenour's qualification as an expert made this issue a fair subject for cross-examination.

In addition to testifying as Ford's corporate representative at trial, Mr. Ridenour also testified as Ford's expert regarding the fuel system in the CVPI. (TR3069-70). In discussing his qualifications as an expert, Mr. Ridenour testified at length about his experience as a fuel system engineer for Ford during the early 1970s. (TR3071). Mr. Ridenour testified that he spent five years during that period "designing fuel systems and fuel system components for Ford cars in North America." (TR3071). In that capacity, he had both component responsibility and systems responsibility. (TR3071). His work involved "the design and release of fuel systems and fuel system components." (TR3072). His responsibilities included "actually participating in a decision-making process on the packaging and location of fuel tanks." (TR3072-73). Mr. Ridenour also testified that he was very familiar with testing that Ford did during this period regarding fuel tank location and that he had personal knowledge regarding "how Ford viewed that testing, why it was done, and what Ford did as a result of it." (TR3075).

In the course of discussing his qualifications as an expert in fuel system design, Mr. Ridenour mentioned a number of specific vehicles for which he participated in the fuel system design, including the Thunderbird, Lincoln Mark, Maverick, Comet, Granada, Monarch, and Versailles. (TR3071-73). Conspicuously absent from this

discussion was any reference to the Ford Pinto which Mr. Ridenour was also associated with. (TR3071-73, 3196-98).

When Plaintiffs sought to question Mr. Ridenour about his experience with the Ford Pinto, one of the reasons that Plaintiffs gave for addressing this issue was the relevance of this issue to Mr. Ridenour's qualifications as an expert on fuel system design. In this regard, Plaintiffs' counsel made the following offer of proof:

> MR. DAVIS: The offer of proof would be this: That right now, so far, he's brought out the history of Mr. Ridenour and he asks what cars he worked for in the '70s. He said, "The Granada platform."
>
> 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.
>
> After he worked on the fuel systems as an engineer where he was a nameplate designer, where he signed off on it, then he became involved for design analysis as the head person for Pinto investigations. He said in his depositions that he investigated more Pinto accidents than anyone else in the company ever. And he said he would go out and get underneath the cars.
>
> And in the Pinto cases, while I would make it abundantly clear they're not even the same kind of car -- it's a small car, not a big car -- they

generically talked about placement of fuel tanks, locations, filler necks and filler neck problems, and that he would talk about those issues.

* * *

This is Plaintiffs' Exhibit 722, which is already in. This is the Chiara memo. The Chiara memo is all about the Pinto cases and it's referred to in the reported decisions.

Without getting into outcomes of Ford Pintos, without getting into a whole lot of other issues, I think there is relevant stuff in there. The relevant stuff, just without talking about it anymore, may just be what he did during these years that's already been brought up and, I think, opened the door.

He asks, "What platforms did you work on during the 1970s as a fuel engineer?" And one of them was the Pinto. In fact, he was the design engineer who would sign off on Pinto fuel system parts.

Now, we could say that without any more. The word "Pinto" has been named in this case. The word "Pinto" shouldn't be necessarily taboo.

(TR3196-98).

Plaintiffs subsequently made a second attempt to convince the court that this was a proper subject of cross-examination:

MR. DAVIS: Your Honor, I have scaled back my wants and desires on this matter, but I have also went and gotten the transcript. In the transcript from yesterday, they were talking about Mr. Ridenour working for Ford during the '70s, working in fuel system design. And they're going through that period and the question was asked, quote, And could you tell the jury some of the models that you have been involved specifically in that part of your experience work at Ford, end quote.

And he listed these things and he didn't list his work on the Pinto. And –

COURT: Okay.

MR. DAVIS: I think as a matter of cross-examining an expert, I can bring this up.

(TR3304-05). Plaintiffs then proceeded to quote to the trial court testimony from other cases in which Mr. Ridenour had admitted that he was involved in the design of the Pinto, was a lead investigator regarding the defects in the Pinto's fuel system, and had investigated more Pinto crashes than anyone else at Ford. (TR3307-11).

The trial court rejected all of Plaintiffs' arguments regarding the propriety of questioning Mr. Ridenour about the Pinto, and forbid Plaintiffs from even mentioning the Pinto because the court believed that the mere name "Pinto" had negative connotations that would result in prejudice. (TR3195-96). As the court explained its rationale:

> Pinto, to me as a layperson, means late '60s, '70s, lots of lawsuits, lots of problems, time bomb vehicle. Okay? Just as a lay person. I don't know if that's fair. Okay? But that's the connotation.
>
> And I have no idea, realistically, what Mr. Ridenour did. I have no idea what those lawsuits were about. I have no idea of whether those were -- what the Pinto deal is, but Pinto is -- to me, Pinto is -- when you talk about Pinto lawsuits, it connotes a controversial kind of thing, and I think the probative value of you impeaching him with that, whatever it's worth, versus its potential prejudicial effect, is greatly outweighed. And that's why I don't think you need to do it.

(TR3306).

The trial court's analysis failed to take into account the extent of Mr. Ridenour's history as an expert for Ford. Mr. Ridenour is a member of the design analysis group at Ford. (TR3369). That group's primary responsibility is to provide engineering and technical support to Ford's legal office. (TR3370). Mr. Ridenour agreed that helping Ford defend against product liability claims was his primary job responsibility. (TR3370). Mr. Ridenour had served in this capacity since 1978, with the exception of a three-year period during the 1980s. (TR3370). Mr. Ridenour has testified in over 200 cases on behalf of Ford over that time period. (TR3371). Among the cases that Mr. Ridenour testified in were Pinto cases and cases involving other vehicles that had the fuel tank located behind the axle. (TR3312, 3372-73). In all of the years that Mr.

Ridenour has testified for Ford, Mr. Ridenour has never once found a Ford vehicle to be defective. (TR3371).

E. THE NHTSA ODI REPORT.

The National Highway Traffic Safety Administration ("NHTSA") Office of Defects Investigation ("ODI") conducted an investigation regarding rear-end collision fires related to the Ford Panther platform beginning on November 27, 2001, and closing on October 3, 2002 ("ODI Report"). (LF1102-1120). The ODI Report is the result of a preliminary investigation that only looked at 26 other incidents involving CVPI vehicles. (LF1102). The ODI Report is based upon studies and reports that have been conducted by other entities including Ford, General Motors, the Florida Highway Patrol and the California Highway Patrol ("CHP"). (LF1102, 1105, 1111-13). During its investigation, ODI failed to perform any independent testing. (LF1105). Instead, ODI reviewed materials from other sources that concerned vehicles other than the CVPI, including some vehicles from other manufacturers. (LF1105). The ODI Report examined other vehicles and incidents that were wholly unrelated to the Newton/Nolte collision. (LF1110-13).

The ODI Report contains unsubstantiated and unfounded anecdotal statistics regarding the CHP's experience with the CVPI. (LF1113). The "data" compiled by ODI represents "approximations" from the memory of a CHP representative. The key passage stated as follows:

> The CHP operates a fleet of 4,200 vehicles including 2700 CVPI vehicles. Vehicles in the CHP fleet are retired after 40-42 months of use. 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. The average impact speed for these crashes is between 45-55 mph, but some are significantly greater. According to the CHP representative's memory, there were only two incidents in the past few years of fuel tank failure following a rear crash.

(LF1113). ODI acknowledged that this information was compiled as the result of an "informal survey," that was based upon a single contact at CHP and was based upon that contact's "memory." (LF1113).

The ODI Report also contains a comparison of the CVPI to "All Other Sedans" ("AOS"). (LF1119). This comparison is not on point with the facts of the instant case because AOS included all four-door sedans on the road, without limitation to fuel system or other similarity to the CVPI. (LF1119). The ODI analysis with regard to AOS also included all crashes and was not limited to rear-end collisions which were supposedly the subject of the report. (LF1119).

The ODI Report contains a list of "Findings" that are essentially expert opinions. (LF1119). The ODI Report indicates that ODI closed its investigation based upon its

findings. (LF1103). The ODI Report also includes a section titled "Reason for Closing" which states as follows:

> Under the present circumstances, it is unlikely that further investigation would produce sufficient evidence to demonstrate the existence of a safety-related defect in the subject vehicles. Therefore, this investigation is closed based on the evidence available at this time.

(LF1120).

During the pre-trial hearing regarding motions in limine in this action, there was a substantial discussion between counsel and the court regarding the admissibility of the ODI Report. (Pre.T. 791-820). At that hearing, Plaintiffs' counsel argued that even if the ODI Report were admitted into evidence pursuant to the Missouri Supreme Court's decision in Rodriguez v. Suzuki Motor Corp., certain portions of the report should not be admitted due to issues of relevance or unfair prejudice. (Pre.T. 798). Specifically, Plaintiffs' counsel argued that the ODI Report incorporates discussion of California Highway Patrol information that would not otherwise be admissible. (Pre.T. 802-03, 807). Plaintiffs argued that, even under the standard for admission of public records recognized in Rodriguez, evidence may still be deemed inadmissible if it is irrelevant or unfairly prejudicial. (Pre.T. 804-05, 812). Plaintiffs' counsel also argued that a limiting instruction should be given to jury, informing the jury that the ODI Report, and the conclusions stated therein, did not constitute a "no-defect" finding with regard to the vehicle platform in question. (Pre.T. 798-800, 807-08). The court ruled that the ODI

Report was admissible in its entirety and refused the request for a limiting instruction. (Pre.T. 820). The ODI report was admitted into evidence over the objection of Plaintiffs. (TR2004-05).

Ford relied upon the ODI Report extensively in its opening argument. (TR924-29, 944-49). Furthermore, during the course of its opening argument, Ford emphasized the portion of the ODI Report that contained the California Highway Patrol information that Plaintiffs had objected to as irrelevant and unfairly prejudicial. (TR927-29). Ford also emphasized the conclusion of the ODI Report – the very portion of the report that had led Plaintiffs to request a limiting instruction to clarify that the report's conclusion was not a finding of "no defect." (TR929, 945).

Ford also used the ODI Report extensively in its cross-examination of Plaintiffs' expert, Jerry Wallingford. (TR1853-81). Once again, Ford emphasized the portion of the ODI Report that contained the California Highway Patrol information to which Plaintiffs had objected. (TR1856-58). Ford also emphasized the conclusion of the ODI Report - the other primary portion of the report to which Plaintiffs had objected. (TR8174-76).

In closing arguments, Ford once again relied extensively upon the ODI Report. (TR4237-41, 4246-47, 4305, 4308). In fact, Ford went so far as to suggest to the jury that the ODI Report was the single most important piece of evidence presented to the jury:

> Then [NHTSA] went one step further. And this to me -- if you remember no other statistic, this is the one you ought to remember, because this one shows that fatal fires per fatal vehicles -- this is right out of FARS – that the Crown Victoria Police Interceptor and the Panthers as a whole with their behind-the-axle fuel tanks have a fatal fire per fatal vehicle risk which is identical to the rest of the fleet. All other sedans.
>
> Talk about job evaluation and job performance again. Is it reasonable to look at someone's performance and compare it to everyone else's?
>
> Now, that kind of happens all the time. Well, you know, you're doing a good job, and you're doing as good a job as these other three people who have the same or similar job. That's done all the time.
>
> If you compare field performance on the Panther platform to all other sedans, it is the same. And NHTSA looked at that and studied it.

(TR4238-39). Ford continued to emphasize the conclusion of the ODI Report during the course of its closing argument:

> [H]ow in the world can you find an automobile manufacturer responsible for what is tantamount to intentional wrongdoing when you've got a federal agency and their safety experts in October of 2002 closing an investigation into these cars that were designed without the upgrade kit shields, without the trunk pack, and finding that "further investigation

> would not produce sufficient evidence to demonstrate the existence of a safety-related defect in the subject vehicles."
>
> I mean, how is it conceivable to say that, therefore, the car company was acting in conscious disregard, deliberately set out to result in conduct that would injure people when you've got a bunch of safety experts in Washington saying that this car does not -- by continuing to investigate, you will not find evidence of a safety-related defect.

(TR4246-47). Near the conclusion of its closing argument, Ford argued that to find for Plaintiffs would mean that "[t]he safety experts at NHTSA, who said, 'No further investigation would result in a finding of a safety-related defect,' don't know what they're talking about." (TR4308).

F. PROCEDURAL HISTORY.

The trial court entered its final judgment in this matter on October 11, 2005. (LF1440). Plaintiffs timely filed their notices of appeal and this appeal followed. (LF1469; NewtonLF1469).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN CONCLUDING THAT ITS ADMITTED ERROR IN SUSTAINING DEFENDANT FORD'S OBJECTION TO PLAINTIFFS' CLOSING ARGUMENT CONCERNING THE EVIDENCE PRESENTED AT TRIAL OF 11 FORD CROWN VICTORIA POLICE INTERCEPTOR POST-UPGRADE KIT FUEL TANK PUNCTURES AND/OR FIRES WAS NOT PREJUDICIAL BECAUSE THE ERROR WAS MATERIALLY PREJUDICIAL IN THAT PLAINTIFFS WERE DENIED THEIR LEGAL RIGHT TO ARGUE THE EVIDENCE SUPPORTING THEIR THEORY OF THE CASE DURING CLOSING ARGUMENT AND WERE DENIED THEIR LEGAL RIGHT TO CHALLENGE BY ARGUMENT FORD'S DEFENSE THEORY THAT FUEL TANK SHIELDS INSTALLED IN THE NEWTON/NOLTE VEHICLE AND ON SUBSEQUENT FORD CROWN VICTORIA POLICE INTERCEPTORS VEHICLES ELIMINATED THE DESIGN DEFECT WHEN EVIDENCE OF POST-UPGRADE KIT AND POST-NEWTON/NOLTE FUEL TANK FIRES AND LEAKS IN FORD CROWN VICTORIA POLICE INTERCEPTORS WAS PROPERLY BEFORE JURY.

Lester v. Sayles, 850 S.W.2d 858 (Mo. banc 1993)

Stokes v. National Presto Industries, Inc., 168 S.W.3d 481 (Mo. App. 2005)

Tune v. Synergy Gas Corp., 883 S.W.2d 10 (Mo. banc 1994)

II. THE TRIAL COURT ERRED IN EXCLUDING PLAINTIFFS' EVIDENCE REGARDING THE STATEMENT OF FORD EMPLOYEE, JOE DIERKER, INDICATING THAT SUBIA MULATTE WAS AN INVESTIGATOR WITH EXPONENT WHO DEVELOPS CRASH TESTS THAT CAN BE USED TO REFUTE PLAINTIFFS' ALLEGATIONS, AND IN DENYING PLAINTIFFS' MOTION FOR NEW TRIAL ON THE SAME BASIS, BECAUSE THIS EVIDENCE SHOULD HAVE BEEN ADMITTED FOR PURPOSES OF IMPEACHMENT AND CONTRADICTION, IN THAT THIS EVIDENCE CONSTITUTED PRIOR INCONSISTENT STATEMENTS OR ADMISSIONS OF FORD AND PRIOR INCONSISTENT STATEMENTS OR ADMISSIONS OF A PARTY ARE ADMISSIBLE FOR THE PURPOSE OF IMPEACHING OR CONTRADICTING TESTIMONY OR EVIDENCE PRESENTED BY THAT PARTY.

Fidelity & Deposit Co. v. Fleischer, 772 S.W.2d 809 (Mo. App. 1989)

Haffey v. Generac Portable Products, L.L.C., 171 S.W.3d 805 (Mo. App. 2005)

Long v. St. John's Regional Health Center, 98 S.W.3d 601 (Mo. App. 2003)

III. THE TRIAL COURT ERRED IN EXCLUDING PLAINTIFFS' EVIDENCE REGARDING THE GRUSH-SAUNBY REPORT, AND IN DENYING PLAINTIFFS' MOTION FOR NEW TRIAL ON THE SAME BASIS, BECAUSE THIS EVIDENCE SHOULD HAVE BEEN ADMITTED FOR PURPOSES OF IMPEACHMENT AND CONTRADICTION, IN THAT THIS EVIDENCE CONSTITUTED PRIOR INCONSISTENT STATEMENTS OR ADMISSIONS OF FORD AND PRIOR INCONSISTENT STATEMENTS OR ADMISSIONS OF A PARTY ARE ADMISSIBLE FOR THE PURPOSE OF IMPEACHING OR CONTRADICTING TESTIMONY OR EVIDENCE PRESENTED BY THAT PARTY.

Fidelity & Deposit Co. v. Fleischer, 772 S.W.2d 809 (Mo. App. 1989)

Haffey v. Generac Portable Products, L.L.C., 171 S.W.3d 805 (Mo. App. 2005)

Long v. St. John's Regional Health Center, 98 S.W.3d 601 (Mo. App. 2003)

IV. THE TRIAL COURT ERRED IN REFUSING TO EXERCISE ITS DISCRETION TO DETERMINE THE ADMISSIBILITY OF EVIDENCE AND TESTIMONY CONCERNING THE ENTIRE NHTSA ODI REPORT BECAUSE THE EVIDENCE WAS INHERENTLY PREJUDICIAL TO PLAINTIFFS IN THAT IT CONTAINED OPINIONS AND CONCLUSIONS THAT WERE TRUSTWORTHY AND WOULD NOT HAVE BEEN ADMISSIBILE IF THEY HAD BEEN OFFERED AS TESTIMONY BY THEIR AUTHORS.

R.S.Mo. § 490.220

V. THE TRIAL COURT ERRED IN PROHIBITING PLAINTIFFS FROM QUESTIONING MR. RIDENOUR REGARDING HIS INVOLVEMENT IN THE DESIGN AND INVESTIGATION OF THE FORD PINTO, AND IN DENYING PLAINTIFFS' MOTION FOR NEW TRIAL ON THE SAME BASIS, BECAUSE THIS EVIDENCE SHOULD HAVE BEEN ADMITTED AS DIRECT EVIDENCE OF NOTICE OF A DANGEROUS CONDITION AND FOR PURPOSES OF IMPEACHMENT, IN THAT THIS EVIDENCE ESTABLISHED THAT

FORD HAD NOTICE OF A DANGEROUS CONDITION IN THE FUEL SYSTEM THAT WAS USED IN THE CVPI AND EVIDENCE REGARDING THE ISSUE OF NOTICE OF A DANGEROUS CONDITION AND EVIDENCE OF A DANGEROUS CONDITIONS SHOULD BE ADMITTED WHEN IT IS BOTH LOGICALLY AND LEGALLY RELEVANT, AND THIS EVIDENCE SERVED TO IMPEACH MR. RIDENOUR'S CREDIBILITY AS A FUEL SYSTEM DESIGN EXPERT AND EVIDENCE SHOULD BE ADMITTED FOR PURPOSES OF IMPEACHMENT WHEN THE EVIDENCE GOES TO A PARAMOUNT ISSUE IN THE CASE.

Jerry Bennett Masonry, Inc. v. Crossland Const. Co., Inc., 171 S.W.3d 81, (Mo. App. 2005)

Nelson v. Waxman, 9 S.W.3d 601 (Mo. banc 2000)

Powell v. Normal Lines, Inc., 674 S.W.2d 191 (Mo. App. 1984)

VI. THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR NEW TRIAL ON THE BASIS OF CUMULATIVE ERROR BECAUSE A NEW TRIAL SHOULD HAVE BEEN GRANTED ON THE BASIS OF CUMULATIVE ERROR IN THAT THERE WERE

MULTIPLE POINTS OF ERROR IN THE TRIAL OF THIS ACTION AND THE CUMULATIVE PREJUDICE FROM THESE MULTIPLE ERRORS RESULTS IN PREJUDICE EVEN IF THE INDIVIDUAL ERRORS DID NOT RESULT IN PREJUDICE.

Crawford v. Shop-N Save Warehouse, Inc., 91 S.W.3d 646 (Mo. App. 2002)

Koontz v. Ferber, 870 S.W.2d 885 (Mo. App. 1993)

ARGUMENT

I.

THE TRIAL COURT ERRED IN CONCLUDING THAT ITS ADMITTED ERROR IN SUSTAINING DEFENDANT FORD'S OBJECTION TO PLAINTIFFS' CLOSING ARGUMENT CONCERNING THE EVIDENCE PRESENTED AT TRIAL OF 11 FORD CROWN VICTORIA POLICE INTERCEPTOR POST-UPGRADE KIT FUEL TANK PUNCTURES AND/OR FIRES WAS NOT PREJUDICIAL BECAUSE THE ERROR WAS MATERIALLY PREJUDICIAL IN THAT PLAINTIFFS WERE DENIED THEIR LEGAL RIGHT TO ARGUE THE EVIDENCE SUPPORTING THEIR THEORY OF THE CASE DURING CLOSING ARGUMENT AND WERE DENIED THEIR LEGAL RIGHT TO CHALLENGE BY ARGUMENT FORD'S DEFENSE THEORY THAT FUEL TANK SHIELDS INSTALLED IN THE NEWTON/NOLTE VEHICLE AND ON SUBSEQUENT FORD CROWN VICTORIA POLICE INTERCEPTOR VEHICLES ELIMINATED THE DESIGN DEFECT WHEN EVIDENCE OF POST-UPGRADE KIT AND POST-NEWTON/NOLTE FUEL TANK FIRES AND LEAKS IN FORD CROWN VICTORIA POLICE INTERCEPTORS WAS PROPERLY BEFORE JURY.

A. Standard of Review.

The trial court admitted its error in refusing to permit Plaintiffs to argue post-Newton/Nolte accident Crown Victoria Police Interceptor ("CVPI") fuel storage system leaks and fires during closing argument. (LF1462, 1466). Despite the fact that evidence of post-Newton/Nolte fires was placed before the jury on two separate occasions by Ford, and despite the trial court's instruction to the jury to *ignore argument* that addressed *all* 11 post-shield leaks and/or fires, the trial court found that its error was not prejudicial. Because Ford based its objection on a factually incorrect premise, and that objection caused the error in this case, Ford must be assigned responsibility for the error at trial.

In the presence of admitted error, reversal is required where the trial court's error is materially prejudicial. Stokes v. National Presto Industries, Inc., 168 S.W.3d 481, 484 (Mo. App. 2005). Given that there was error, Ford bore the burden of showing that the error was not prejudicial. "[T]he party responsible for error relating to argument … is charged with a rebuttable presumption that the error was prejudicial." Tune v. Synergy Gas Corp., 883 S.W.2d 10, 21 (Mo. banc 1994)(discussing damages arguments).

As to closing argument specifically, where the trial court's ruling ties the hands of plaintiffs to rebut the defendant's closing argument, the error is materially prejudicial. "Because of the circuit court's erroneous ruling, Stokes' hands were tied during closing arguments to rebut National Presto's misleading argument. The circuit court's erroneous ruling had a materially prejudicial effect on the trial." Stokes at 485.

B. Argument

This assignment of error is about closing argument, not the trial court's evidentiary rulings. It is about the trial court's decision to deny both Plaintiffs' counsel the opportunity even to discuss with the jury at the close of the trial (1) evidence that directly rebutted the testimony of two Ford witnesses and (2) evidence that directly supported Plaintiffs' theory of the case that Ford's remedial design did not resolve the design defect in the Ford CVPI.

1. Evidentiary Background

This is a products liability case. State Trooper Michael Newton burned to death and his passenger, Mike Nolte, survived but suffered horrible burns, when the CVPI in which they were sitting was struck from behind/side, the fuel storage system failed and the vehicle caught fire.

Plaintiffs' theory of the case centered on the fuel storage system's placement in the CVPI. The CVPI remains one of the very few vehicles that positions the fuel storage system behind the axle – in the same place that the Ford engineers once placed the Pinto fuel tank.

A manufacturer has several options in defending a product liability case. First, the defendant can assert that there is no design defect at all. Though Ford denied any defect, that position was not realistically logically or factually available to Ford because of numerous fires involving CVPI's and because Ford had made a design modification to the CVPI. That design modification involved the installation of a plastic shield in the

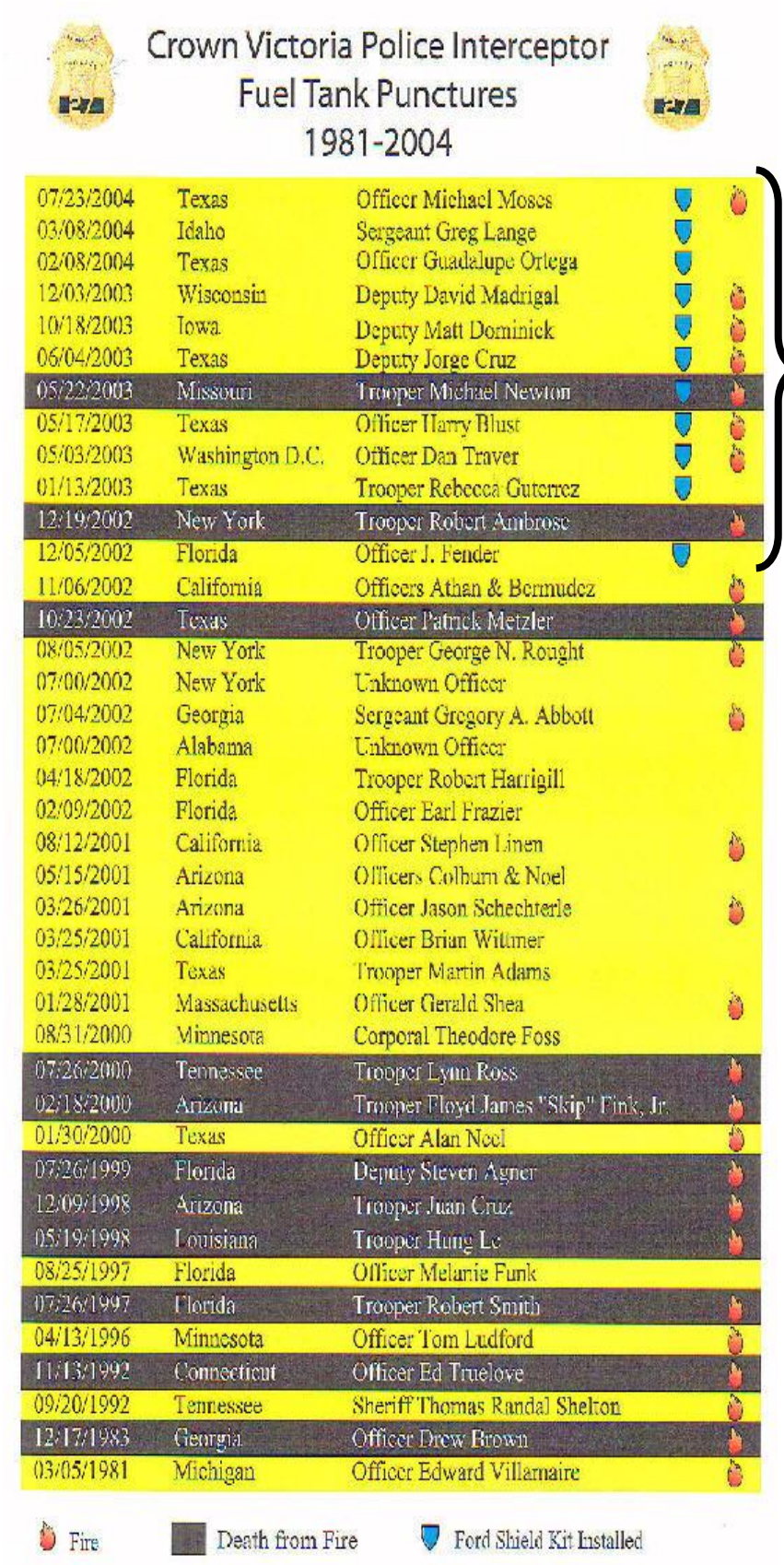
CVPI that Ford claimed eliminated "every one of the leakage modes." Tr.4216. A jury could conclude that Ford designed the upgrade kit to address a defect and find that the redesign proved Ford's knowledge of the initial defect in the CVPI. Thus, the facts dictated that Ford take the second available defensive position, namely that even if there had been a design defect, Ford had fixed the defect with its design change.

According to Plaintiffs' theory, the design change did not correct the major design flaw – the placement of the fuel storage system in the vulnerable area behind the axle. With the tank in that location, structural components of the vehicle – like the rear axle – cannot protect the fuel storage system from rear and rear/side collisions. Internal fuel tank leak prevention safety components which are part of the fuel storage system design – like the anti-spill (check) valve, which stops fuel outflow in the event of a fuel tank compromise – are likewise exposed to compromise from collisions involving the fuel tank as well. In addition, Plaintiffs asserted that the design of the filler tube with the anti-spill valve assembly at the lower end of the filler tube *inside* the tank was defective. When *this* collision occurred, the unprotected tank location allowed the anti-spill valve in the unprotected tank to break at the end of the filler tube. The anti-spill valve was compromised because it was *in* the exposed fuel tank. As a result, gasoline escaped through the filler tube opening and ignited into flames, feeding the deadly fire.

Plaintiffs' evidence showed that to accomplish a true fix for the fuel storage system design defects in the CVPI, Ford should have redesigned the fuel storage system and placed the fuel tank forward of or above the rear axle. Plaintiffs' experts testified

that moving the fuel tank either above or in front of the axle would (1) have moved the location of the filler neck and, (2) as important, protected the anti-leak components *within the fuel tank* from the compromise that fed *this* fire to it tragic proportions.

Plaintiffs' theory accepted the presence of the plastic shield but argued that the shield was little more than a band-aid. It was a band-aid because it did not address the real design flaw – the placement of the fuel storage system behind the axle. The evidence also showed that Ford ***knew*** that the plastic shield upgrade to the fuel storage system design of CVPI's still left police officers at risk death and injury from fuel leaks and fires in otherwise survivable accidents. How did Ford know that the plastic shields did not work? Fires continued after they were installed. ***Ford*** made the point when it introduced the following chart at trial.



Eleven Post Upgrade Kit Tank Punctures/

The 11 accidents to which the chart refers are the sum total of the post-upgrade kit accidents resulting in fuel leakage and/or fire in a Ford CVPI vehicle. Of these 11, 4 accidents involved the upgrade kit with leakage and/or fire that preceded the Newton/Nolte conflagration. Of the 11, 6 accidents came after Newton/Nolte. (The 11th accident is the Newton/Nolte conflagration.)

Ford first placed this chart before the jury in opening statements. Ford put up this chart despite the fact that the trial court had ruled *in limine* that introduction of evidence of the 4 pre-Newton/Nolte accidents could be used by Plaintiffs for purposes of notice, but that none of the 6 post-Newton/Nolte accidents could be discussed.

Later, during the evidentiary portion of the trial, *Ford's* counsel again raised to the 11 post-upgrade leaks and fires. Counsel read portions of the deposition of Ford Vice-President for Safety, Sue Cischke, to the jury. That deposition testimony discussed ***all*** 11 post-shield accidents in which there was a fuel tank puncture and, in some cases, a fire.

This is what the jury heard from Ford:

> Q: (By Mr. Feeney) There have been incidents with shields. It's a fact. Everyone knows it. Are you aware of it?
>
> A: Yes. 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.

Q: Have you had a chance to look at some of the information that is available, that's part of the court files 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.

I know from our experience working with law enforcement that there's probably many more out there that have had impacts with shields that had no leakage, and we know that from experience even during the whole processes. I mean, we had many letters from law enforcement agencies indicating, you know, for instance, in California, they total a vehicle a week and they haven't had any instances of these.

So while this represents vehicles that did have some leakage and some had fire, we know that there are many more others that – that did not have.

(LF907). To repeat: This testimony was read into evidence by Ford, heard by the jury and never withdrawn. Cishke's testimony showed that Ford's design change did ***not*** remedy the compromises of the fuel tank that Plaintiff's expert testified would have been remedied by a change in the placement of the fuel storage system design. Thus, Cishke's testimony aided Plaintiffs' theory of liability.

Moreover, this evidence directly contradicted both Ford's argument and its theory of defense presented through Richard Cupka and Jack Ridenhour. Ford's employee-expert witness, Richard Cupka, testified:

Q [By Ford's Counsel]: The next column says "punctures from items shielded by upgrade kit." Were any of the items on the car that were shielded by this developmental upgrade kit, did any of those items puncture the fuel tank?

A No, they did not.

(TR2797:2-7).

Q Did the upgrade kit go at least this far did it take all the known puncture sources from field incidents from axle components or axle suspensions and deal with it?

A Yes it did.

Q **Are you aware of any incident since the introduction of the upgrade kit up to and including the date of the Newton accident, May 22, 2003, are you aware of any field incident in which a shielded component, shielded by the upgrade kit has punctured a fuel tank on a Crown Victoria Police Interceptor struck at any speed under any conditions?**

A: Not that I'm aware of.

Q: **Are you aware of any claim that has ever been made by anyone prior to May of 2003, that the upgrade kit was not as a result of field incidents 100 percent effective in shielding the components that it shields?**

A: No. Nobody has made that claim to me or brought it to my attention.

(TR2819-2820)(emphasis added).

Ford elicited similar testimony from its corporate representative and expert, Jack Ridenour:

Q. [By Ford's Counsel]: Recognizing that there are certainly no guarantees and absolutes with regard to future events, but can you

comment on what you believe to be the likelihood in the future – strike that.

Can you comment on what you believe to be the likelihood that if any one of these officers [speaking of Officers listed on plaintiffs' OSI's] was in a 2003 model year Crown Victoria Police Interceptor, what the likelihood would have been that the leakage sources that resulted in fire would have, in fact, occurred in those accidents?

A. I can't tell you that there wouldn't have been a fire. **What I can tell you is the leakage sources 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 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.

(TR3263-3265)(emphasis added).

Plaintiffs' cross-examination questioned Mr. Cupka about the 11 post-upgrade incidents that had been referenced in Ms. Cischke' testimony. Cupka's testimony showed he was not fully informed:

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.

(TR2941-42).

Although this is the evidence relevant to this Point, the trial court's evidentiary rulings are not at issue in this Point. This Point is about the right of counsel to argue material evidence presented to the jury during trial.

2. The Closing Argument Issue

A jury could conclude that Cischke's testimony completely discredited every other Ford witness who testified about the effectiveness of the upgrade kit -- including Ford's designated corporate representative, Jack Ridenour, and employee-expert, Richard Cupka. Thus, Plaintiffs intended to argue to the jury in support of Plaintiffs' theory that the 11 incidents showed that the design defect of the CVPI fuel storage system still existed after the redesign incorporated the plastic shields.

Plaintiffs' counsel began to make this argument about the effectiveness of the shields:

> [BY MR. EMISON for Plaintiffs:] Ms. Cischke, the head of safety, said, "There have been 11 accidents with the shield that involved rear impacts that had some fuel leakage and some fire."
>
> After the shields were put on in the fall of 2000, 11 other accidents with fuel leakage and fire with the shields.

Ford interrupted the argument with an objection founded on the erroneous grounds that the Cischke evidence had been withdrawn.

> MR. FEENEY [for Ford]: Objection, Your Honor.
>
> COURT: Come on up.
>
> (Counsel approached the bench and the following proceedings were had:)

MR. FEENEY: That was withdrawn.

COURT: That was withdrawn.

MR. EMISON: It was not withdrawn from the evidence.

COURT: Yeah, it was withdrawn.

MR. EMISON: All right. All right.

COURT: Hold on just a second. Come on up.

MR. FEENEY: I would like the jury to be instructed that they cannot consider that.

COURT: Okay.

MR. EMISON: Your Honor, it –

COURT: My understanding – I'm just telling you, my understanding is that's why I didn't allow its use in opening. I said, "We're not going to open the door." He didn't open the door. My understanding is it was withdrawn.

MR. EMISON: All right.

(The proceedings returned to open court.)

TR4120.

More, the trial court instructed the jury to disregard ***all*** argument about the evidence of post-upgrade kit failures. "***Ladies and gentlemen of the jury, you are to disregard the last argument of counsel."*** (TR4120) This instruction essentially directed the jury not to consider any of the post-shield fires – that is, all of the evidence that showed that the shields were not effective to stop leaks and fires or remedy the design flaw.

Assured of the trial court's protection and the directive to the jury to ignore the evidence of all 11 post-shield leaks and fires, Ford's counsel argued as though there had been no post shield leaks or fires at all:

> "Mr. Emison [plaintiff Newton's counsel] said in his closing argument that the upgrade kit and the countermeasures that were taken by Ford Motor Company in the fall of 2002 and 2003 worked in limited -- very limited circumstances. During the course of the trial, it was suggested that they were Band-Aids. They were minimized. They were trivialized….
>
> We created this exhibit to simply deal with the question, the very simple question, the very simple question, is the upgrade kit a Band-Aid. Does the upgrade kit only work under limited circumstances?....
>
> [E]very one of those leakage modes was addressed by the upgrade kit. This is limited circumstances?

> ***[E]very one of the leakage modes***, with the exception of the Lynn Ross incident, which nobody knows enough about to be able to say this with any certainty one way or the other, ***every one of those leakage modes was addressed by the upgrade kit.*** This is limited circumstances?
>
> This is limited circumstances, according to the Plaintiffs. This isn't good enough, according to the Plaintiffs. It's not good enough to take every known field incident, sit down with law enforcement and say, "We are going to protect the front of the tank. We're going to protect the back of the tank. We're going to take these measures, and then we're going to crash test it at 75 miles an hour, something no one has ever done, but it ain't good enough and it's limited. It's limited. That's what they're saying."

(TR4213-4216)(emphasis added). Ford's argument misstated the evidence the jury had seen or heard on two occasions during the trial.

Because Ford's counsel's argument was contrary both to the Cischke evidence and took full advantage of the protection afforded by the trial court's erroneous ruling, Plaintiffs' counsel again sought permission to argue the post-shield punctures and fires in rebuttal.

> MR. EMISON: Very quickly. Mr. Feeney has argued that these accidents are happening every day and that there are no problems and that the axle shields are working. Now, I understand your ruling with respect to what

you said on the 11 accidents and my part of it, but the jury was not instructed to not consider -- that is in evidence. Whether it was read by mistake or not, it was read into evidence and not withdrawn. That's part of the record in this case.

Now, you told me I couldn't argue it, which I understand.

COURT: I understand what you're saying.

MR. EMISON: And he has certainly opened it up that I should be able to argue that in rebuttal.

***

Court: I don't think the door has been opened.

TR4242-43. The trial court thus denied Plaintiffs the opportunity to argue the evidence of post-upgrade kit punctures and fires in closing – again.

The trial court's order denying a new trial confirms that Plaintiff Nolte's counsel had prepared a PowerPoint presentation that included a slide referring to the post-upgrade kit punctures and fires. Before Nolte's portion of closing argument began, the trial court *sua sponte* and preemptively ordered Nolte's counsel to remove the slide and ordered that there could be no argument concerning the post-upgrade leaks and fires.

Mr. Davis [Plaintiff Nolte's counsel, who argued after Mr. Emison, Plaintiff Newton's counsel] was prepared to make a similar argument with the use of a demonstrative exhibit. That argument and exhibit were excluded based upon the Court's ruling relative to Mr. Emison. Clearly,

fairness dictates that the record reflect that this argument issue should be deemed preserved by both the Newton and Nolte Plaintiffs.

LF1457, fn. 13.

C. The Trial Court's Ruling Was Prejudicial to Plaintiffs.

In an instruction context, "prejudice is the potential for confusing or misleading the jury." State v. Sours, 946, S.W.2d 747, 750 (Mo. App. 1997). In other contexts, prejudice exists when there is "a reasonable probability that … the result of the proceedings would have been different" Nicklasson v. State, 105 S.W.3d 482 (Mo. banc 2003), or "adversely affects the jury in reaching its verdict." Gage v. Morse, 933 S.W.2d 410, 421 (Mo. App. S.D. 1996).

An important consideration relating to the prejudice analysis is the closeness of the question to a central issue of the case. Aliff v. Cody, 26 S.W.3d 309, 321 (Mo.App. W.D.2000). The closer to the core of the case the more difficult it is to find no prejudice.

By any of these tests, prejudice resulted from the trial court's ruling in this case.

First, there is a mandated presumption in this state that the jury follows the trial court's instruction. Kuehne v. State, 107 S.W.3d 285, 298 (Mo. App. W.D. 2003). Here that presumption requires the conclusion that the jury followed the trial court's instruction to disregard argument concerning evidence supporting Plaintiffs' theory of the case altogether.

Second, by its ruling during closing argument, the trial court effectively gutted Plaintiffs' theory that the plastic shields did not resolve the design defect. This was the core issue in the case from Plaintiffs' side. The trial court's ruling left the jury with only Ford's argument to consider – "the upgrade kits work; all leakage modes were addressed by the upgrade kits; we didn't need to move the fuel tank." 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.

Third, in the face of these facts, there is a reasonable probability that had the Plaintiffs been allowed to argue the evidence supporting their theory, the jury might have reached a different conclusion. When evidence that is in the case, that is material and that is relevant to the Plaintiffs' theory of the case, cannot be argued, fitted into the mosaic of the trial, and made a part of the jury's deliberations, actual prejudice exists. What occurred in this trial was elemental prejudice.

In its Order denying a new trial, the trial court concluded that it had committed error in denying Plaintiffs the opportunity to argue the post-Newton/Nolte CVPI fuel tanks leaks and fires.

First, the trial court said:

> Mr. Feeney [Ford's counsel], utilizing in part the testimony of Ridenour and Cupka, argued that Ford Motor Company had effectively addressed

> the issues embraced by these pre-Newton accidents, by the use of the shield upgrade kit.

(Trial Court's Order: LF1462). This argument was, of course, the argument that Sue Ciscke's evidence refuted.

Second, ignoring the liability focus of Mr. Emison's argument, to which the objection was made, the trial court admitted:

> Upon reflection the Court believes that the proffered argument by Mr. Emison should have been allowed in the nature of fair retaliation to Mr. Feeney's argument and likely such argument was further appropriate to counter or contradict some of the themes present in the testimony of Mr. Cupka and Mr. Ridenour.

(Order-LF1462). Despite admitting that it had taken from the Plaintiffs "fair retaliation" and the ability to "contradict some of the themes" presenting Ford's evidence, the trial court concluded that "[t]he jury knew that there had been leaks of CVPI's with the upgrade kits during the course of the ***crash testing***. The jury also knew that a shield upgrade kit did not prevent the Newton fire." (LF1466)(emphasis added). From this premise, which ignores that the leaks and fires occurred in real world situations where the plastic shields failed to protect the fuel storage system, the trial court concluded that "the denial of this argument did not constitute prejudice that affected the result of the trial." LF1466. This was because, the trial court concluded,

the argument Plaintiffs were prohibited from making went to punitive damages only or to causation. (LF1466). As to the former, the trial court was fundamentally incorrect. The question whether the plastic shields effectively ameliorated the pre-existing design defect is a first-order *liability* question, not an issue related solely to Ford's state of mind (which is the punitive damages issue).

As to causation – whether the design flaw caused or contributed to cause the fire – the trial court's ruling ignored Plaintiffs' evidence that remedying the design flaw by moving the tank to the proper, protected position would have also moved the filler neck and the anti-leak components to a similarly protected location – this fire would not have occurred.

The trial court's stated rationale is, of course, little more than a *post-hoc* justification by the trial court – a justification that is no more complex and no more compelling than this: The trial court made a mistake, realized it, then placed itself in the jury box, substituting itself for the members of the jury and *ipsi dixit*, concluded that the mistake did not matter. In doing so, the trial court determined which evidence was and was not important and which theory of the case it (the trial court) would have credited had it been sitting as a member of the jury. And because it would have decided the case in a manner consistent with the verdict despite the mistake, it assumed that all of the jurors were exactly like the trial court – and would have made the identical decision had each of them been fully informed and heard Plaintiffs' prohibited argument supporting Plaintiffs' theory and Plaintiffs' "fair retaliation."

As Judge Holliger noted below: "Whether a party has been prejudiced by trial court error must be judged from that party's theories." If Appellants' theory of the case was that the shields were not *effective* because of the position of the fuel storage system, it was the evidence of the shield's *ineffectiveness* that became the key liability issue for the design defect claim under Appellants' theory. If the jury believed, as Ford argued (and as Plaintiffs were prohibited from rebutting or addressing with the most compelling evidence against Ford's position), that the plastic shields were a complete remedy to the design defect, the jury had no reason to consider the evidence that the design defect created by the fuel tank placement still existed. Thus, for Plaintiffs' theory to be credited – or even considered by the jury – argument about the failure of the shield to remedy the defect was essential. Yet the trial court told the jury to disregard any argument about the evidence that showed that the shields did not work to stop leaks and fires.

"The essential purpose of closing argument is to advise the jury and opposing counsel of each party's position, i.e. how that party views the issues and what that party would like the jury to do." State v. Davis, 126 S.W.3d 398, 402 (Mo. App. 2004). Accord, T. Mauet & W. Wolfson, TRIAL EVIDENCE 439 (2d ed.2001)("The purpose of closing arguments is to give the parties a final opportunity to review with the jury the admitted evidence, discuss what it means, apply the applicable law to that evidence, and argue why the evidence and law compel a favorable verdict").

Within the context of damages, the Supreme Court has spoken clearly about the importance of closing argument, the myriad of factors that may influence a jury, and the presumption of error when a party is deprived of full closing argument. Tune, 883 S.W.2d at 21. The Tune rationale applies with equal force to arguments regarding liability.

> All of the various factors that inure in a jury verdict potentially have an impact upon the amount of the verdict any given jury returns in a given case. These would include the evidence, the applicable law, and the argument on damages. Any error in any of these factors in a jury trial will be prejudicial to the defendant if it results in an increase in the amount of the verdict, even though such increased verdict may not be excessive. However, it is usually impossible to determine whether or how much such an error contributes to the verdict. Given the fact such errors have occurred, it is more reasonable to assume that they contributed to an increase in the damages than to assume the contrary.

Id. And here, given the errors the trial court admitted, it is "more reasonable to assume that they contributed" to the liability verdict "than to assume the contrary."

Tune adopted the rule "that the party responsible for error relating to argument on the issue of damages is charged with a rebuttable presumption that the error was prejudicial." Id. Tune based its rule on reasoning adopted in other cases decided by Missouri appellate courts.

Lester v. Sayles, 850 S.W.2d 858, 864 (Mo. banc 1993) noted the virtual inability of a court to determine whether legal error is actually prejudicial.

> In this and most other cases, it is extremely difficult for either party to establish the presence or absence of actual prejudice, given the time-honored prohibition against the use of juror testimony to impeach a verdict.

Id. Because of the difficulty in determining whether actual prejudice exists, and because of this Court's appropriate concerns for fair trials, a rebuttable presumption of prejudice exists when, as here, legal error infects a trial. As Tune notes, this rebuttable presumption rule is the rule courts have historically applied when legal error exists.

> The rule in Lester is also in keeping with the common practice in other areas of the law. For example, error in "[t]he exclusion of evidence is presumed prejudicial unless otherwise shown." McMillin v. McMillin, 633 S.W.2d 223, 226 (Mo.App.1982). See also Reed v. Reed, 101 Mo. App. 176, 70 S.W. 505, 506 (1902) ("The error is presumed to be prejudicial where it is not shown to be harmless."). Though not always so clearly stated, this is the general rule when reviewing the admission or exclusion of evidence. See e.g., State Farm Mut. Auto. Ins. Co. v. Allen, 744 S.W.2d 782, 787 (Mo. banc 1988) (no prejudice in erroneous exclusion of testimony when later witness gave same testimony); Hansome v.

Northwestern Cooperage Co., 679 S.W.2d 273, 276 (Mo. banc 1984) (no reversible error in excluding cumulative evidence).

Tune, 883 S.W.2d at 21.

In the end, the trial court's error, which it compounded in its order denying the Plaintiffs a new trial, is a failure to draw a distinction between evidence in a case and argument to the jury concerning the evidence. The former is mere fact; the latter is about meaning. Meaning is what a jury must understand to fit the evidence within each side's theory of the case.

This distinction between evidence and argument based on error relating to the evidence is the basis for the decision in Stokes v. National Presto Industries, Inc., 168 S.W.3d 481, 484 (Mo. App. 2005). In Stokes, a 13-month-old child pulled over a deep fryer and dumped hot oil on himself, suffering severe burns. Plaintiffs were permitted to put on evidence of three similar incidents involving the identical product, but the trial court prohibited introduction of other similar incident evidence involving non-identical products before the jury. This Court held that the trial court erred in precluding introduction of the other similar, non-identical incidents and that the error was materially prejudicial.

Stokes reached this conclusion despite the defendant's argument that the jury learned of "more than 100 incidents involving deep fryers and children during the last several years, including three deaths and 40 serious injuries." Id. at 484. The material

prejudice flowed from the closing argument. “National Presto [the defendant] took advantage of the circuit court's erroneous ruling to argue to the jury” that plaintiffs had failed to show evidence of other incidents involving the defendant’s product. Id.

Here, the trial court completely ignored Stoke’s *ratio decidendi*, focusing instead on the question whether the jury heard other evidence that supported Plaintiffs’ theory, rather than on the limitations improperly placed on the Plaintiffs in making their argument based on evidence before the jury and on Ford’s argument, which took full advantage of the protection afforded it by the trial court’s error. And that error was compounded by the trial court’s instruction to the jury to disregard argument concerning all 11 post-shield-upgrade CVPI fuel leak and/or fuel fire incidents. Armed with this protection from the trial court Ford took full advantage. It argued that “every one of those leakage modes was addressed by the upgrade kit.”

As Stokes noted in finding material prejudice: “Stokes' hands were tied during closing arguments to rebut National Presto's misleading argument.” Id. at 485. The trial court similarly tied the hands of the Plaintiffs in this case, while freeing Ford to misstate the evidence the jury had heard and to argue its innocence based on that error.

The Stokes’ decision is fully supported by the commentators on the importance of closing argument to the plaintiff.

> [T]he destructive tactics of the defendant will only too often detract from the value of the plaintiff's testimony. At the end of the case, therefore, the

> task of the plaintiff's attorney is to reiterate the essential theory of his client's cause for the benefit of the jury. Counsel must do this both by marshaling the plaintiff's testimony to support that theory and by showing the weakness of the defendant's testimony. The weapon with which these objectives are achieved is the plaintiff's summation.

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Where other similar incident evidence is improperly admitted, reversal is required. Peters v. General Motors Corp. 200 S.W.3d 1 (Mo. App. W.D. 2006). It follows that if a trial court permitted argument on other similar incident evidence *not* in the case, reversal would be required. The mirror image of that argument should also be true – that where a trial court denies argument on relevant, material evidence that is in the case, a party has suffered prejudicial error.

C. Conclusion

Either counsel's argument to the jury in closing about the evidence matters or it does not. Either juries obey judicial instruction to them or they do not. Justice suggests that there is more than ample doubt in this case about the trial court's decision of no prejudice despite the error. If Tune is applied, Ford had the burden of showing a lack of prejudice and failed to make the requisite showing. Alternatively, this Court can conclude, as did Judges Holliger and Spinden, that "there is sufficient evidence of prejudice to undermine any confidence in the verdict."

Reversal and remand for a new trial are the appropriate holding in this case.

II.

THE TRIAL COURT ERRED IN EXCLUDING PLAINTIFFS' EVIDENCE REGARDING THE STATEMENT OF FORD EMPLOYEE, JOE DIERKER, INDICATING THAT SUBIA MULATTE WAS AN INVESTIGATOR WITH EXPONENT WHO DEVELOPS CRASH TESTS THAT CAN BE USED TO REFUTE PLAINTIFFS' ALLEGATIONS, AND IN DENYING PLAINTIFFS' MOTION FOR NEW TRIAL ON THE SAME BASIS, BECAUSE THIS EVIDENCE SHOULD HAVE BEEN ADMITTED FOR PURPOSES OF IMPEACHMENT AND CONTRADICTION, IN THAT THIS EVIDENCE CONSTITUTED PRIOR INCONSISTENT STATEMENTS OR ADMISSIONS OF FORD AND PRIOR INCONSISTENT STATEMENTS OR ADMISSIONS OF A PARTY ARE ADMISSIBLE FOR THE PURPOSE OF IMPEACHING OR CONTRADICTING TESTIMONY OR EVIDENCE PRESENTED BY THAT PARTY.

A. Standard Of Review.

A trial court has substantial discretion in excluding evidence and limiting the scope of cross-examination; a trial court's judgment will be reversed only when the exclusion or limitation constitutes an abuse of discretion. United Missouri Bank, N.A. v. Grandview, 179 S.W.3d 362, 367 (Mo. App. 2005); Brown v. Yettaw, 116 S.W.3d 733, 736 (Mo. App. 2003).

"Limitations exist on the trial court's discretion to control the extent and scope of cross-examination that seeks to elicit substantive evidence. The trial court may not exclude relevant and material facts simply because counsel seeks to elicit such facts on cross-examination." Long v. St. John's Regional Health Center, 98 S.W.3d 601, 606 (Mo. App. 2003) (Internal citations omitted); accord Haffey v. Generac Portable Products, L.L.C., 171 S.W.3d 805, 809 (Mo. App. 2005). "The trial court's discretion regarding impeachment of a witness is also limited. The trial court may not prevent cross-examination on a proper subject." Long, 98 S.W.3d at 606 (Internal citations omitted). In short, "[a] trial court has considerable discretion in deciding whether to admit or exclude evidence, but ***it is error to exclude competent evidence on a material issue of fact***." Fidelity & Deposit Co. v. Fleischer, 772 S.W.2d 809, 818 (Mo. App. 1989)(emphasis added).

The trial court abused its discretion in this case by excluding evidence that impeached and contradicted Ford and its witness, Mr. Ridenour. The court refused to admit Joe Dierker's notebook, which indicates that Subia Mulatte is an investigator with Exponent who will develop crash tests for Ford that Ford can use to refute the allegations of plaintiffs in litigation.

B. Factual Background.

Exponent performs crash tests for Ford. Ford used Exponent's crash tests extensively at trial. Indeed, the trial court specifically noted that Exponent's crash tests were "a big part" of Ford's case and recognized that it was entirely appropriate for

Plaintiffs to challenge Exponent's credibility. (TR1342, 3432-33, 3439). There is no question that the credibility of Exponent, and the credibility of the crash tests Exponent developed for Ford, were major issues in this case. Exponent was one of Ford's primary witnesses. Although Exponent never took the stand, Exponent made frequent appearances at trial through its crash tests.

Despite the court's recognition that Exponent's crash tests were a major element of Ford's defense, the court nonetheless limited Plaintiffs impeachment of Ford's and Exponent's credibility and prevented contradiction of Ridenour's testimony that Ford used to bolster Exponent's credibility.

During Ford's examination of its corporate representative, Mr. Ridenour, it elicited testimony to bolster Exponent's credibility and present Exponent as an independent testing facility. Mr. Ridenour testified at length about Exponent's abilities and accomplishments. (TR3537-43). Having testified to what a great company Exponent is, Mr. Ridenour then answered a series of questions that went to the very heart of Exponent's credibility as an independent testing agent:

> Q. And have you been involved in crash testing vehicles on behalf of Ford Motor Company using the Exponent test facility?
>
> A. Sure. I do that a couple times a year.

Q. And have you ever known Exponent or any of the engineers at Exponent or any of the Ph.D.s that are there -- do you find them to be reliable?

A. Very.

Q. Do you find them to fudge test results for your benefit because you're paying for the test?

A. Never. I wouldn't pay for a test that they did that and they know that. And they have a reputation to protect.

Q. Are you aware of any claim that has ever been asserted against Exponent that they're in the business of testing for money and if someone hires them and pays them, they're going to them favorable results?

A. We wouldn't use them if that was the case.

Q. Do you think the Department of Justice would use them if that was the case? Or the Army?

A. I do not.

(TR3544). In short, Mr. Ridenour testified unequivocally that Exponent does not, and would not, create a crash test that was favorable to Ford's position in litigation merely because Ford desired such a test.

Given that Ford's corporate representative vouched for the reliability, credibility and independence of Exponent, Plaintiffs properly sought to attack Exponent's credibility and establish that Exponent was not independent from Ford. Plaintiffs sought to admit a portion of a notebook created by Joe Dierker, a Ford design engineer who worked on the CVPI platform. In this notebook, Mr. Dierker identifies Subia Mulatte, a vice president with Exponent, as someone who will create crash tests for Ford that can be used to refute plaintiff's allegations in litigation. Plaintiffs sought to establish that, contrary to Mr. Ridenour's assertions, Exponent **does** create crash tests for Ford that are specially tailored to help support Ford's position in litigation. This evidence impeached the testimony of Ford's Mr. Ridenour; it also would have raised legitimate concerns about Ridenour's credibility as well as concerns about Exponent's independence – allowing the jury to see Exponent as a paid proponent of Ford's litigation strategy.

Ford objected to this evidence, claiming the jury would be confused by the introduction of this evidence because Mulatte's name had not previously been presented to the jury. This argument was part of a carefully planned tactic by Ford—first advanced when Ford sought to redact Mulatte's name from earlier testimony the jury heard, (TR2674) precisely because Ford planned to make this argument.

Ford's argument about Mulatte's name misstated the record. Mr. Mulatte's name had come up in the questioning of Mr. Ridenour shortly before Plaintiffs attempted to introduce Mr. Dierker's notebook into evidence. (TR3557) Ford did not object to the questioning regarding Mulatte until Plaintiffs attempted to talk about the notebook. To

the extent that the jury experienced any confusion, that confusion was caused by the fact that Ford allowed Plaintiffs to begin questioning Mr. Ridenour about Subia Mulatte, but then successfully prevented Plaintiffs from explaining Mr. Mulatte's significance to the jury. Undoubtedly, after Plaintiffs questioned Mr. Ridenour about his familiarity with Subia Mulatte, the jury wondered who Mr. Mulatte was.

Unfortunately, Plaintiffs were prevented from providing that explanation. The trial court sustained the objection, pretermitting argument because "I got a guy on the phone." TR3559. By sustaining the objection, the trial court prevented Plaintiffs from questioning Ford's witness about either Joe Dierker's notebook or Subia Mulatte.

The trial court erred in excluding the notebook and in prohibiting cross-examinination of Mr. Ridenour regarding Mulatte and Dierker's notebook. This evidence and cross-examination should have been admitted for purposes of impeachment and contradiction. Ford's testimony regarding Exponent went to the heart of the credibility of Ford's crash tests – one of Ford's primary pieces of evidence. Because the credibility of Exponent, and the crash tests that Exponent custom designed for Ford, were paramount issues in this case, the trial court abused its discretion by excluding this evidence.

C. The Impeachment Evidence Was Admissible And Proper For Cross-Examination.

"The purpose of impeachment is to impair or destroy a witness's credibility or render questionable the truth of his particular testimony." Wainright v. State, 143 S.W.3d 681, 689 (Mo. App. 2004) (Internal quotation marks omitted). "Generally, anything which has the legitimate tendency of throwing light on the accuracy, truthfulness, and sincerity of a witness, including facts and circumstances, is proper for determining the credibility of a witness." Capra v. St. Charles, 932 S.W.2d 851, 855 (Mo. App. 1996); see also Haffey, 171 S.W.3d at 809. "[E]vidence that is otherwise inadmissible may be admissible to impeach a witness's testimony." Kuehne v. State, 107 S.W.3d 285, 294 (Mo. App. 2003).

In this case, the evidence regarding Subia Mulatte and Joe Dierker's notebook was admissible for the purpose of testing the accuracy and truth of Mr. Ridenour's testimony regarding Exponent's independence. Mr. Ridenour testified that Exponent would not create an inaccurate crash test merely to assist Ford, and that Ford would not use Exponent's services if Exponent were willing to cater to Ford's interests in this way. Mr. Dierker's notebook directly places Mr. Ridenour's assertion in question in that it tends to show that Subia Mulatte, a vice president at Exponent with whom Mr. Ridenour was personally familiar, was willing to custom design crash tests for Ford that were needed to refute the allegations of plaintiffs' in litigation. In short, this evidence tends

to indicate that Mr. Ridenour's testimony regarding the independence of Exponent was either inaccurate or untrue.

In addition to challenging the accuracy of Mr. Ridenour's testimony, the evidence regarding Subia Mulatte and Joe Dierker's notebook was also admissible directly to challenge the credibility of Exponent and the credibility of the crash tests that Exponent created for Ford. A party is not limited to impeaching the testimony of a witness. Rather, a party may impeach any evidence that is presented by the opposing party. See, e.g., Guthrie v. Missouri Methodist Hospital, 706 S.W.2d 938, 942-43 (Mo. App. 1986) (Noting that a party's records could be impeached by evidence presented by the opposing party.); see also Waters v. Barbe, 812 S.W.2d 753, 759 (Mo. App. 1991) ("A party may use admissions made by the adverse party against its interest to impeach that party's testimony or other evidence."). As previously noted, the Exponent crash tests were a crucial component of Ford's defense. Thus, Plaintiffs should have been allowed to present the evidence regarding Subia Mulatte and Joe Dierker's notebook in order to impeach the credibility of Exponent and the credibility of the crash tests that Exponent created for Ford.

Ford may argue that, regardless of whether the evidence regarding Subia Mulatte and Joe Dierker's notebook was admissible, the exclusion of that evidence did not constitute an abuse of discretion. However, in the context of impeachment regarding a central issue, the exclusion of proper impeachment evidence **does** constitute an abuse of discretion as a matter of law.

A trial court "ha[s] no authority to prevent impeachment of [a] witness[] on matters related to a paramount issue or that affected their accuracy, veracity, or credibility." Black v. State, 151 S.W.3d 49, 56 (Mo. banc 2004). "'Where a witness' prior inconsistent statement relates specifically to a paramount issue in the case, the ***trial court does not have discretion to prevent the impeachment of the witness through use of that statement***.'" Haffey, 171 S.W.3d at 810 (emphasis added); accord, Black, 151 S.W.3d at 55-56; Long, 98 S.W.3d at 606. "The trial court's discretion regarding the cross-examination of witnesses, including the impeachment of a witness for prior inconsistent statements, is reviewable only for abuse. The court, however, should not foreclose inquiry on a proper subject." Jefferson-Gravois Bank v. Cunningham, 674 S.W.2d 561, 565 (Mo. App. 1984).

The limited discretion of the trial court to exclude proper impeachment evidence reflects the special role that the jury plays in assessing the credibility of witnesses. "While the determination of a witness's competency to testify is for the trial court, the credibility of a witness's testimony is for the fact finder to determine." Capra, 932 S.W.2d at 855. "Because the jury is to assess credibility, it is entitled to any information which might bear significantly on the veracity of a witness." Wainright, 143 S.W.3d at 689 (internal quotation marks omitted); see also Kuehne, 107 S.W.3d at 294. "The jury is entitled to know everything that might affect a witness' credibility and the weight to be given his testimony." Weatherly v. Miskle, 655 S.W.2d 842, 844 (Mo. App. 1983). As these cases recognize, it is the jury's job to determine whether a particular piece of

impeachment evidence undermines the credibility of a witness or other evidence, and the trial court should not circumvent the jury's role by limiting the information that is provided to the jury for purposes of impeachment.

In this case, there is no serious dispute that the notebook evidence was proper for impeachment. Nor is there any serious dispute that this impeachment evidence undermined the credibility of evidence crucial to Ford's defense. Given that the evidence was proper for impeachment, and went to impeach evidence pertaining to a paramount issue, the trial court should not have circumvented the jury's role in assessing the credibility of Ford's evidence.

The jury was entitled to the information regarding Subia Mulatte and Joe Dierker's notebook, and the manner in which that evidence tended to undermine the accuracy of Mr. Ridenour's testimony and the credibility of Exponent and its crash tests. Without that evidence, the jury was not able to properly assess the veracity of Mr. Ridenour and the credibility of Exponent and its crash tests.

Ford may also attempt to argue that Joe Dierker's notebook was not admissible for purposes of impeachment because it did not constitute a prior statement of Mr. Ridenour or Ford. In reality, the portion of Joe Dierker's notebook that discusses Subia Mulatte is a prior statement and admission of Ford that was made through Mr. Dierker as Ford's agent.

"Where a party admits to a material fact, relevant to an issue in a case, the same is competent against him as substantive evidence of the fact admitted and is entitled to considerable weight." Mitchell Engineering Co. v. Summit Realty Co., Inc., 647 S.W.2d 130, 141 (Mo. App. 1982); see also Coulter v. Michelin Tire Corp., 622 S.W.2d 421, 433 (Mo. App. 1981). "A party may [also] use admissions made by the adverse party against its interest to impeach that party's testimony or other evidence." Waters, 812 S.W.2d at 759; see also Coulter, 622 S.W.2d at 433.

When the admission in question is an admission of a corporation, the inconsistent admission is necessarily established by the testimony of the corporation's employees. "A corporation can only speak and act through agents." Tietjens v. General Motors Corp., 418 S.W.2d 75, 85 (Mo. 1967); see also Enke v. Anderson, 733 S.W.2d 462, 469 (Mo. App. 1987). "A statement by an employee may be received in evidence as an admission by a party where the employer is party to litigation and the statement is relevant to the issues involved, provided the employee, in making the admission, was acting within the scope of his authority." Brawley & Flowers, Inc. v. Gunter, 934 S.W.2d 557, 562 (Mo. App. 1996); see also Henson v. Board of Education, 948 S.W.2d 202, 209 (Mo. App. 1997). The Missouri Supreme Court has recognized that relatively low-level employees can have authority to make statements that will be binding upon their employer. Bynote v. National Super Markets, Inc., 891 S.W.2d 117, 123 (Mo. banc 1995).

Here, Ford's admission is contained in Joe Dierker's notebook. It is uncontested that Joe Dierker is an employee of Ford and that he made his statements in a notebook that was produced by Ford. Nor is there any question that Mr. Dierker had authority to make the statements regarding Subia Mulatte. The statements are included in a notebook that is part of Mr. Dierker's notes made in the course of his position as a design engineer. Furthermore, the statements are consistent with statements that would be made by a design engineer in relation to crash testing.

Obviously, the statements do not shed a positive light upon Ford or Exponent. However, the fact that the statements reflect negatively upon the employer does not mean that the employee lacked authority to make the statements. To the contrary, it certainly appears that Joe Dierker was making his statement regarding Subia Mulatte, and Mr. Mulatte's willingness to custom design crash tests to obtain favorable results for Ford, in an effort to benefit Ford and to carry out his duties for Ford as his employer. In short, Joe Dierker had the authority to make a binding admission on behalf of Ford and Mr. Dierker did so in his statement regarding Subia Mulatte.

Joe Dierker's statement regarding Subia Mulatte constitutes an admission against interest that is binding against Ford and that is inconsistent with the subsequent statements of Mr. Ridenour, another of Ford's agents. This statement went to impeach a primary piece of evidence in relation to Ford's defense and the trial court improperly excluded this evidence.

"Any evidence which is logically probative, including admissions, is competent and admissible unless otherwise excluded by some policy rule or legal principle." Mitchell Engineering Co., 647 S.W.2d at 141. "The trier of fact has the discretion to determine whether statements made by a party constitute admissions and the weight and value to be accorded to the statements." Cummings v. Tepsco Tennessee Pipe and Supply Corp., 632 S.W.2d 498, 501 (Mo. App. 1982); see also Bolivar Farmers Exchange v. Eagon, 467 S.W.2d 95, 98 (Mo. App. 1971).

The trial court circumvented the jury's role in this case by determining whether Mr. Dierker's statement constituted an admission and by determining the relative weight of that admission. In circumventing the jury's role as trier of fact, and excluding relevant impeachment evidence, the trial court abused its discretion.

D. The Evidence Regarding Subia Mulatte And Joe Dierker's Notebook Was Admissible For Purposes Of Contradiction.

In addition to being admissible for purposes of impeachment, the evidence regarding Subia Mulatte and Joe Dierker's notebook was admissible for purposes of contradiction. "A party may introduce evidence to rebut that of his or her adversary, and for this purpose any competent evidence to explain, repel, counteract, or disprove the adversary's proof is admissible." Govreau v. Nu-Way Concrete Forms, Inc., 73 S.W.3d 737, 743 (Mo. App. 2002); Budding v. Garland Floor Co., Inc., 939 S.W.2d 419, 426 (Mo. App. 1996).

Missouri courts have consistently recognized that the same evidence may be used for both impeachment and contradiction. The distinction lies in the purpose for which the evidence is used. "'Impeachment is directed to the credibility of a witness for the purpose of discrediting the witness and ordinarily furnishes no factual evidence, whereas contradiction is directed to the accuracy of a witness' testimony and supplies additional evidence." Govreau, 73 S.W.3d at 743 (Internal quotation marks omitted); Budding, 939 S.W.2d at 426.

In this case, the evidence regarding Subia Mulatte and Joe Dierker's notebook was admissible for purposes of contradiction, regardless of whether that evidence served to impeach the testimony of Mr. Ridenour. As noted previously, Mr. Ridenour testified unequivocally that Exponent does not tailor its test results to the evidentiary needs of Ford. Joe Dierker's statement regarding Subia Mulatte directly contradicts that assertion. Thus, even if Joe Dierker's statement would not have been admissible solely for purposes of impeachment, it was admissible as rebuttal evidence based upon Mr. Ridenour's comments regarding Exponent's independence as a testing facility.

Because Joe Dierker's statement was admissible for purposes of contradiction, and served to contradict a primary piece of evidence presented by Ford, the trial court abused its discretion in excluding this evidence.

E. Prejudice Resulted From The Court's Error.

"The exclusion of proper evidence is presumed prejudicial unless otherwise shown." Aliff v. Cody, 26 S.W.3d 309, 321 (Mo. App. 2000); see also Tune, 883

S.W.2d at 22; State v. Boyd, 143 S.W.3d 36, 46 (Mo. App. 2004); McMillin, 633 S.W.2d at 226. This is particularly true where the excluded evidence "'goes to the very heart of the plaintiff's case.'" Richcreek v. General Motors Corp., 908 S.W.2d 772, 778 (Mo. App. 1995). "That there was other evidence of the same general character does not necessarily render the error in exclusion of th[e] evidence harmless." Richcreek, 908 S.W.2d at 778. Once the appellant has established that the exclusion of evidence was error, the respondent bears the burden of overcoming the presumption of prejudice by establishing that the error was harmless. See Tune, 883 S.W.2d at 22; State v. Norman, 145 S.W.2d 912, 920 (Mo. App. 2004); McMillin, 633 S.W.2d at 226.

In this case there is no question that Plaintiffs suffered substantial prejudice as a result of the trial court's abuse of it discretion. The trial court prevented Plaintiffs from impeaching one of Ford's most important types of evidence (crash tests created by Exponent). The trial court also prohibited Plaintiffs from offering evidence to rebut Mr. Ridenour's evidence. Clearly, if the jury had believed that the crash tests used by Ford were entitled to little or no weight given their lack of credibility, this would have substantially impacted the jury's analysis. Given that the trial court's error involves the exclusion of evidence pertaining to paramount issues in this case, Ford cannot establish that the trial court's error was harmless.

F. Conclusion

The trial court committed reversible error in that it abused it discretion in sustaining Ford's objection to Plaintiffs use of the evidence discussed. Reversal and remand for a new trial is required.

III.

THE TRIAL COURT ERRED IN EXCLUDING PLAINTIFFS' EVIDENCE REGARDING THE GRUSH-SAUNBY REPORT, AND IN DENYING PLAINTIFFS' MOTION FOR NEW TRIAL ON THE SAME BASIS, BECAUSE THIS EVIDENCE SHOULD HAVE BEEN ADMITTED FOR PURPOSES OF IMPEACHMENT AND CONTRADICTION, IN THAT THIS EVIDENCE CONSTITUTED PRIOR INCONSISTENT STATEMENTS OR ADMISSIONS OF FORD AND PRIOR INCONSISTENT STATEMENTS OR ADMISSIONS OF A PARTY ARE ADMISSIBLE FOR THE PURPOSE OF IMPEACHING OR CONTRADICTING TESTIMONY OR EVIDENCE PRESENTED BY THAT PARTY.

A. Standard Of Review.

A trial court has substantial discretion in excluding evidence and limiting the scope of cross-examination, and a trial court's judgment must be reversed only when the exclusion or limitation constitutes an abuse of discretion. United Missouri Bank, N.A., 179 S.W.3d at 367; Brown, 116 S.W.3d at 736.

Although a trial court has substantial discretion in excluding evidence and limiting the scope of cross-examination, the trial court's discretion is not unlimited. “Limitations exist on the trial court's discretion to control the extent and scope of cross-examination that seeks to elicit substantive evidence. The trial court may not exclude

relevant and material facts simply because counsel seeks to elicit such facts on cross-examination." Long, 98 S.W.3d at 606 (internal citations omitted); see also Haffey, 171 S.W.3d at 809. "The trial court's discretion regarding impeachment of a witness is also limited. The trial court may not prevent cross-examination on a proper subject." Long, 98 S.W.3d at 606 (Internal citations omitted). In short, "[a] trial court has considerable discretion in deciding whether to admit or exclude evidence, but it is error to exclude competent evidence on a material issue of fact." Fidelity & Deposit Co., 772 S.W.2d at 818.

B. Factual Background.

The trial court abused its discretion in this case by excluding evidence that served to impeach and contradict Ford and its witness, Mr. Ridenour. Specifically, the trial court refused to admit the Grush-Saunby Report that contradicted the testimony of Ford's agent, Mr. Ridenour, and constitutes an admission and prior inconsistent statement of Ford.

1. The Grush-Saunby Report.

The Grush-Saunby Report is a 1973 Ford memo prepared by two Ford employees, E. S. Grush and C. S. Saunby. The Report documents that Ford placed cost over safety in designing its vehicles. (LF1087). Ford sent it to NHTSA in response to a proposed NHTSA federal motor vehicle safety standard regarding fuel system integrity.

(LF1087). The Report addressed proposed design changes intended to improve fuel system safety and reduce the number of fire-related deaths and injuries that resulted from then-current fuel system designs. (LF1087-88). The Report includes a cost/benefit analysis by Ford which values a human life at $200,000 and values a personal injury at $67,000. (LF1090, 1092). The Report estimates the cost of vehicle modifications to meet the proposed minimum federal vehicle safety standards at $11 per vehicle. (LF1092-93). The Report then compares the cost of implementing the proposed safety standard to the benefit gained by saving lives and avoiding fire-related injuries. (LF93). The Report estimates that it would cost $137 million dollars to implement the proposed safety changes, whereas the benefit (based on the figures that Ford used to estimate the value of human life and personal injury) would only be $50 million dollars. (LF1093). Based on these figures, the Report concludes that it would not be "cost effective" to make the changes necessary to save lives and avoid fire-related injuries. (LF1093).

2. Ford's evidence.

During its direct examination of Mt. Ridenour, Ford's corporate representative and expert, Ford asked Mr. Ridenour to discuss a 1971 memorandum in which Ford analyzed the cost of making certain design changes to improve the safety of vehicle fuel systems. The 1971 report showed that the installation of a sheet metal barrier that would protect the fuel tank and estimated the cost of installing that barrier at $9.95 per

vehicle. (TR3507-09). Mr. Ridenour testified that Ford **never** factors cost over safety in designing a vehicle. (TR3510).

3. Plaintiff's cross-examination of Ridenour.

On cross-examination, Plaintiffs attempted to question Mr. Ridenour about the 1971 memorandum. (TR3505-10). When Plaintiffs attempted to cross-exam Mr. Ridenour using the Grush-Saunby Report, Ford objected. The trial court sustained the objection. (TR3512). Although Ford's counsel did not specifically state the basis for its objection, and the trial court did not specifically state the basis for its ruling sustaining the objection, it appeared from the trial court's questions that the court was concerned by the fact that the Grush-Saunby Report was published in 1973. (TR3511-12).

4. Relevance of the Grush-Saunby Report.

The trial court erred in excluding the Grush-Saunby Report because it was admissible for purposes of impeachment and contradiction. Ford testified, through its corporate representative, that it **never** factors cost over safety. The Grush-Saunby Report is clear evidence of at least one instance in which Ford **did** factor cost over safety. The Report expressly concludes that the safety modifications in question are not "cost-effective." This was compelling impeachment evidence and should have been admitted and submitted to the jury. The trial court's exclusion of this evidence constituted an abuse of discretion.

C. The Grush-Saunby Report Was Admissible For Purposes Of Impeachment.

"The purpose of impeachment is to impair or destroy a witness's credibility or render questionable the truth of his particular testimony." Wainright, 143 S.W.3d at 689 (internal quotation marks omitted). "Generally, anything which has the legitimate tendency of throwing light on the accuracy, truthfulness, and sincerity of a witness, including facts and circumstances, is proper for determining the credibility of a witness." Capra, 932 S.W.2d at 855; see also Haffey, 171 S.W.3d at 809. "[E]vidence that is otherwise inadmissible may be admissible to impeach a witness's testimony." Kuehne, 107 S.W.3d at 294.

The Grush-Saunby Report was admissible for the purpose of testing the accuracy and truth of Mr. Ridenour's testimony that Ford never factors cost over safety. Mr. Ridenour testified unequivocally that Ford **never** factors cost over safety. However, the Grush-Saunby Report provides an example of at least one instance in which Ford **did** factor cost over safety. If this evidence had been submitted to the jury it obviously would have impaired Mr. Ridenour's and Ford's credibility.

Ford may argue that, regardless of whether the Grush-Saunby Report was admissible, the exclusion of Report did not constitute an abuse of discretion. However, in the context of impeachment regarding a paramount issue, the exclusion of proper impeachment evidence **does** constitute an abuse of discretion.

A trial court "ha[s] no authority to prevent impeachment of [a] witness[] on matters related to a paramount issue or that affected their accuracy, veracity, or

credibility." Black, 151 S.W.3d at 56. "'Where a witness' prior inconsistent statement relates specifically to a paramount issue in the case, the trial court does not have discretion to prevent the impeachment of the witness through use of that statement.'" Haffey, 171 S.W.3d at 810; see also Black, 151 S.W.3d 55-56; Long, 98 S.W.3d at 606.

The limited discretion of the trial court to exclude proper impeachment evidence reflects the special role that the jury plays in assessing the credibility of witnesses. "While the determination of a witness's competency to testify is for the trial court, the credibility of a witness's testimony is for the fact finder to determine." Capra, 932 S.W.2d at 855. "Because the jury is to assess credibility, it is entitled to any information which might bear significantly on the veracity of a witness." Wainright, 143 S.W.3d at 689 (internal quotation marks omitted); see also Kuehne, 107 S.W.3d at 294. "The jury is entitled to know everything that might affect a witness' credibility and the weight to be given his testimony." Weatherly, 655 S.W.2d at 844.

In this case, the jury was entitled to know that Ford had expressly factored cost over safety and concluded that certain safety measures were not "cost-effective." To repeat: Ford, through its corporate representative, unequivocally testified that it **never** factors cost over safety. The Grush-Saunby Report is impeaching evidence that Ford was being less than forthright when it made this statement. This directly affected Ford's credibility and the jury should have had this information to assess Ford's credibility. The trial court improperly circumvented the jury's job of assessing the credibility of Ford and its corporate representative by keeping this evidence from the jury.

Ford may attempt to argue that the Grush-Saunby Report was not legally relevant because its creation was too remote in time and involved a different safety feature. This argument holds little weight given the context in which Plaintiffs attempted to use the Grush-Saunby Report and the broad and unequivocal nature of Ford's statement.

As noted previously, Mr. Ridenour made his statement – that Ford **never** factors cost over safety – while discussing the **1971** memorandum that Ford had previously used in questioning Mr. Ridenour. Thus, the time-frame of the Grush-Saunby Report, which was created in 1973, is closely related to the time-frame of the 1971 memorandum that was being discussed. Clearly, if the 1971 memorandum was not too remote in time to be relevant, then the 1973 Grush-Saunby Report was not too remote in time to be relevant. Ford testified that it **never** factors cost over safety. By any reasonable interpretation, the word "never" includes 1973, the year that the Grush-Saunby Report was created.

As for the particular safety feature involved, it makes no difference that the Grush-Saunby Report did not involve the exact same safety feature that was at issue in this case. Ford's cost-benefit analysis was not limited to a particular type of safety feature. Ford stated that it **never** factors cost over safety—period. Thus, any instance in which Ford had factored cost over safety would be legally relevant for impeachment regardless of the safety feature that was involved. Moreover, the Grush-Saunby Report discussed design changes that were intended to prevent fire-related deaths and injuries. Although the Grush-Saunby Report did not involve the same precise safety feature, it

did involve the cost-benefit analysis of a safety feature that was intended to prevent the same type of injuries that were at issue in this case. Therefore, the Grush-Saunby Report was particularly well-suited for purposes of impeaching Mr. Ridenour's testimony that Ford **never** factors cost over safety.

"Logically, relevant evidence should not be excluded unless it pertains to collateral matters, which would result in confusion of the issues or would cause prejudice wholly disproportionate to the value and usefulness of the offered evidence." Payne v. Cornhusker Motor Lines, Inc., 177 S.W.3d 820, 836 (Mo. App. 2005). The Grush-Saunby Report was not collateral (in terms of impeachment) and there was little danger that the jury would be confused or that disproportionate prejudice would result if the Report was admitted into evidence. The fact that the report addressed a different safety feature actually helps to limit the risk of confusion or disproportionate prejudice. The jury would presumably understand that the subject matter of the Grush-Saunby Report had no direct connection to the facts of the instant case, and that the Report was being offered only for purposes of impeachment. Obviously, the admission of the Report would have tended to establish that Ford was not truthful in its testimony. However, there is nothing improper or disproportionate about this type of evidence. In short, the Grush-Saunby Report was logically and legally relevant for purposes of impeachment and should have been admitted for that purpose.

Ford may also attempt to argue that the Grush-Saunby Report was not admissible for purposes of impeachment because it did not constitute a prior statement of Mr.

Ridenour or Ford. In reality, the Grush-Saunby Report is a prior statement and an admission of Ford that was made through Ford's agents.

"Where a party admits to a material fact, relevant to an issue in a case, the same is competent against him as substantive evidence of the fact admitted and is entitled to considerable weight." Mitchell Engineering Co., 647 S.W.2d at 141; see also Coulter, 622 S.W.2d at 433. "A party may [also] use admissions made by the adverse party against its interest to impeach that party's testimony or other evidence." Waters, 812 S.W.2d at 759; see also Coulter, 622 S.W.2d at 433 (Mo. App. 1981).

When the admission in question is an admission of a corporation, the inconsistent admission is necessarily established by the testimony of the corporation's employees. "A corporation can only speak and act through agents." Tietjens, 418 S.W.2d at 85; see also Enke, 733 S.W.2d at 469. "A statement by an employee may be received in evidence as an admission by a party where the employer is party to litigation and the statement is relevant to the issues involved, provided the employee, in making the admission, was acting within the scope of his authority." Brawley & Flowers, Inc., 934 S.W.2d at 562; see also Henson, 948 S.W.2d at 209. The Missouri Supreme Court has recognized that relatively low-level employees can have authority to make statements that will be binding upon their employer. Bynote, 891 S.W.2d at 123.

In the instant case, Ford's admission is established by the statements made in the Grush-Saunby Report by the Report's authors, E. S. Grush and C. S. Saunby. It is uncontested that these gentlemen were employees of Ford at the time that they authored

the Report. Nor is there any question that these gentlemen had authority to make the statements that they did in the Report. Indeed, it appears from the face of the Report that these gentlemen were specifically commissioned or directed to prepare the Report on Ford's behalf. Thus, the statements in the Grush-Saunby Report are admissions of Ford in that the statements were made by employees of Ford who were acting within the scope of their authority at the time that they made the statements.

"Any evidence which is logically probative, including admissions, is competent and admissible unless otherwise excluded by some policy rule or legal principle." Mitchell Engineering Co., 647 S.W.2d at 141. "The trier of fact has the discretion to determine whether statements made by a party constitute admissions and the weight and value to be accorded to the statements." Cummings, 632 S.W.2d at 501; see also Bolivar Farmers Exchange, 467 S.W.2d at 98.

The trial court circumvented the jury's role in this case by determining whether the statements in the Grush-Saunby Report constituted admissions and by determining the relative weight of those admissions. In circumventing the jury's role as trier of fact, and excluding relevant impeachment evidence, the trial court abused its discretion.

D. The Grush-Saunby Report Was Admissible.

In addition to being admissible for purposes of impeachment, the Report was admissible for contradiction. "A party may introduce evidence to rebut that of his or her adversary, and for this purpose any competent evidence to explain, repel, counteract, or

disprove the adversary's proof is admissible." Govreau, 73 S.W.3d at 743; Budding, 939 S.W.2d at 426.

Missouri courts have consistently recognized that the same evidence may be used for both impeachment and contradiction. The distinction lies in the purpose for which the evidence is used. "'Impeachment is directed to the credibility of a witness for the purpose of discrediting the witness and ordinarily furnishes no factual evidence, whereas contradiction is directed to the accuracy of a witness' testimony and supplies additional evidence." Govreau, 73 S.W.3d at 743 (Internal quotation marks omitted); Budding, 939 S.W.2d at 426.

In this case, the Grush-Saunby Report was admissible for purposes of contradiction, regardless of whether that evidence served to impeach the testimony of Mr. Ridenour. As noted, Mr. Ridenour testified unequivocally that Ford **never** factors cost over safety. The Grush-Saunby Report directly contradicts that assertion. Even if the Grush-Saunby Report would not have been admissible for impeachment, it was admissible as rebuttal evidence based upon Mr. Ridenour's testimony regarding cost-safety analysis.

Because the Grush-Saunby Report was admissible for purposes of contradiction, and served to contradict a primary piece of evidence presented by Ford, the trial court abused its discretion in excluding this evidence.

E. Prejudice Resulting From The Trial Court's Error.

"The exclusion of proper evidence is presumed prejudicial unless otherwise shown." Aliff, 26 S.W.3d at 321; see also Tune, 883 S.W.2d at 22; Boyd, 143 S.W.3d at 46; McMillin, 633 S.W.2d at 226. This is particularly true where the excluded evidence "'goes to the very heart of the plaintiff's case.'" Richcreek, 908 S.W.2d at 778. "That there was other evidence of the same general character does not necessarily render the error in exclusion of th[e] evidence harmless." Richcreek, 908 S.W.2d at 778. Once the appellant has established that the exclusion of evidence was error, the respondent bears the burden of overcoming the presumption of prejudice by establishing that the error was harmless. See Tune, 883 S.W.2d at 22; Norman, 145 S.W.2d at 920; McMillin, 633 S.W.2d at 226.

Here Plaintiffs suffered substantial prejudice as a result of the trial court's abuse of its discretion. Plaintiffs were prevented from adequately impeaching Ford's corporate representative and, by extension, Ford. Plaintiffs were also prevented from presenting evidence that directly contradicted the testimony that Ford elicited from Mr. Ridenour. The statements in the Grush-Saunby Report were strong evidence for purposes of impeachment in that they directly contradicted Ford's unequivocal assertion to the jury. If the jury believed that Ford was not being honest or accurate in its testimony, this would have substantially impacted the jury's analysis. The trial court's committed error by excluding evidence relevant to central issues in this case; Ford cannot establish that the error was harmless.

F. Conclusion

The trial court committed reversible error in that it abused it discretion in sustaining Ford’s objection to Plaintiffs' use of the evidence discussed. Reversal and remand for a new trial is required.

IV.

THE TRIAL COURT ERRED IN REFUSING TO EXERCISE ITS DISCRETION TO DETERMINE THE ADMISSIBILITY OF EVIDENCE AND TESTIMONY CONCERNING THE ENTIRE NHTSA ODI REPORT BECAUSE THE EVIDENCE WAS INHERENTLY PREJUDICIAL TO PLAINTIFFS IN THAT IT CONTAINED OPINIONS AND CONCLUSIONS THAT WERE TRUSTWORTHY AND WOULD NOT HAVE BEEN ADMISSIBILE IF THEY HAD BEEN OFFERED AS TESTIMONY BY THEIR AUTHORS.

A. Standard Of Review.

Review of the trial court's decision to admit evidence is for abuse of discretion. State v. Daniels, 129 S.W.3d 273, 281 (Mo. App. 2005).

B. The Trial Court Failed To Determine The Trustworthiness Of The ODI Evidence.

The National Highway Traffic Safety Administration's ("NHTSA's") Office of Defects Investigation ("ODI") conducted an investigation, No. SQ01-014, related to post-rear-end collision fires related to the Ford Panther platform beginning on November 27, 2001. The report closed October 3, 2002, prior to the Newton/Nolte accident.

Evidence from the ODI Report and admission of the Report itself was error and prejudiced Plaintiffs. The trial court's sole basis for admitting the ODI Report was blind obedience to § 490.220 RSMo. (2005) and Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47 (Mo. banc 1999). Neither §490.220 nor Rodriguez precludes the Court from considering whether evidence should be excluded because it is irrelevant or because its prejudicial effect outweighs its probative value.

To the extent that Rodriguez interprets §490.220 to mandate the admission of federal reports without regard to trustworthiness, relevance, or prejudice, Rodriguez should be re-examined. No other evidence escapes the exercise of trial court discretion to protect parties from inherently prejudicial evidence. FEDERAL RULE OF EVIDENCE § 803(8)(c), which Rodriguez cites as support for its ruling, requires the trial court at least to examine the evidence where the "circumstances indicate lack of trustworthiness." F.R.EVID. 803(8)(c). Business records may be excluded if the contents would not be admissible if testified to by the maker of the record. Edgell v. Leighty, 825 S.W.2d 325 (Mo. App. 1992). Federal reports should fare no differently.

The ODI Report was irrelevant. It was a preliminary investigation, not a final report. The ODI Report contained unsubstantiated and unfounded anecdotal statistics regarding the California Highway Patrol's ("CHP") experience with the CVPI. (LF1113).

The admission of the ODI Report was also prejudicial to Plaintiffs in that it placed a "government stamp of approval" on misleading, unfounded and unduly prejudicial

statistics and expert opinions. This prejudicial effect far outweighed whatever probative value it provided the jury.

1. The ODI Report contained improper and misleading data and conclusions and should have been excluded.

During its investigation, ODI failed to perform any independent testing. Rather, ODI merely reviewed materials from other sources concerning not only the CVPI, but also other Panther platform vehicles and vehicles from other manufacturers. ODI examined information concerning only 26 Panther platform incidents (a fraction of the 45 incidents presented to the jury as other similar incidents involving Panther platform vehicles).

The ODI Report also included irrelevant, unsubstantiated and unfounded anecdotal statistics regarding the CHP's experience with the CVPI. (LF1113). The "data" compiled by ODI represented "approximations" from the memory of a single CHP representative. The key passage stated as follows:

> The CHP operates a fleet of 4,200 vehicles including 2700 CVPI vehicles. Vehicles in the CHP fleet are retired after 40-42 months of use. 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. The average impact speed for these crashes is between 45-55 mph, but some are significantly greater. According to the CHP representative's memory,

> there were only two incidents in the past few years of fuel tank failure following a rear crash.

(LF1113). ODI acknowledged that this information was compiled as the result of an "informal survey," that was based upon a single contact at CHP and was based upon that contact's "memory." (LF1113).

The ODI Report contains a list of "Findings" that are essentially expert opinions. (LF1119). The ODI Report indicates that ODI closed its investigation based upon its findings. (LF1103). The ODI Report also includes a section titled "Reason for Closing" which states as follows:

> Under the present circumstances, it is unlikely that further investigation would produce sufficient evidence to demonstrate the existence of a safety-related defect in the subject vehicles. Therefore, this investigation is closed based on the evidence available at this time.

(LF1120).

The Court should also have excluded the statistical findings related to a comparison of the CVPI to "All Other Sedans" ("AOS"). AOS included all four-door sedans on the road, without limitation of fuel system or otherwise. To make matters worse, the ODI analysis with regard to AOS included all crashes (frontal, side, rollover, and one-car incidents). This analysis was not focused on the CVPI and did not compare relative rear-impact crash safety. As such, the results of this analysis are irrelevant,

misleading, lacks foundation and were unduly prejudicial to the Plaintiffs at trial. This evidence would never have been admitted as another similar incident. It should not be admitted simply because it was contained in a federal report.

Ford vigorously argued these erroneous and misleading statistics to the jury:

> The National Highway Traffic Safety Administration looked at this question. First thing they did was compare the Crown Victoria to the only comparable car that was used for police use. That was the GM B-body.
>
> ***
>
> Then they went one step further. And this to me – if you remember no other statistic, this is the one you ought to remember, because this one shows that fatal fires per fatal vehicles – this is right out of FARS – that the Crown Victoria Police Interceptor and the Panthers as a whole with their behind-the-axle fuel tanks have a fatal fire per fatal vehicle risk which is identical to the rest of the fleet. All other sedans.

TR4238. Ford's argument placed a governmental stamp of approval on misleading and irrelevant statistics. Had ODI not included these erroneous statistics in its ***preliminary*** investigation, there is absolutely no theory under which Ford could have admitted this "data."

Plaintiffs were required to present substantial foundation and subjected to strict scrutiny by the court for each of the other similar incidents identified and presented by the Plaintiffs. There was no such foundation for the incidents utilized in the ODI Report – in fact, there was nothing close. Had any party in this case attempted to admit any of this statistical evidence contained in the ODI Report on its own merit, it would not have been a close call in its exclusion – there is absolutely no rationale under which it could have been admitted.

It is unimaginable that Rodriguez intended to sanction the sort of anecdotal, unreliable, unfounded and misleading double and triple hearsay that is contained within the ODI Report. The fact that ODI chose to utilize these unreliable statistics in its preliminary investigation does not render the information either relevant or reliable, and it should have been excluded.

2. The "Findings" and "Reason for Closing" should have been excluded.

The ODI Report contains "Findings" and "Reason for Closing" which nothing more than improper expert opinions of ODI on this subject. These findings are wholly irrelevant, misleading, lack foundation, and unduly prejudiced Plaintiffs at trial. For instance, the reason for closing stated, "[u]nder the present circumstance, it is unlikely that further investigation would produce sufficient evidence to demonstrate the existence of a safety-related defect in the subject vehicles. Therefore, this investigation is closed based on all the evidence available at this time."

As outlined above, the "evidence available at [the] time" of the ODI Report consisted of an incomplete and misleading preliminary investigation conducted by the ODI. Moreover, the report was closed on October 3, 2002, well before the accident in this matter occurred. Thus, any findings of this report are irrelevant in the trial of this case and served to mislead the jury concerning whether the accident in this case was considered in the ODI Report.

Even more significantly, the report's "Findings" clearly express expert opinion for which no foundation was laid and, therefore, these findings should not have been admitted as substantive evidence. The investigators and drafters of the ODI Report were not listed as experts by Ford. During the course of trial Ford was allowed to display these findings to the jury and Ford's counsel vigorously argued the findings to the jury.

Regardless of the implications of section 490.220 or Rodriguez, evidence may be excluded if its prejudicial effect outweighs its probative value. The prejudicial effect of these findings clearly outweighed any probative value. Counsel for Ford repeatedly referred to the "safety experts at NHTSA" and the "safety experts in Washington." This undue prejudice was inflicted again and again as Ford's counsel vigorously argued its effect during closing arguments:

- "And, of course, NHTSA closed their investigation." TR4246.

- "… how in the world can you find an automobile manufacturer responsible for what is tantamount to intentional wrongdoing when you've got a federal agency and their safety experts in October of 2002 closing an investigation into these cars that were designed without the upgrade kit shields, without the trunk pack, and finding that 'further investigation would not produce sufficient evidence to demonstrate the existence of a safety-related defect in the subject vehicles.'" TR4246-47.

- "I mean, how is it conceivable to say that, therefore, the car company was acting in conscious disregard, deliberately set out to result in conduct that would injure people when you've got a bunch of safety experts in Washington saying that this car does not – by continuing to investigate, you will not find evidence of a safety-related defect." TR4247.

- Ford vigorously argued that, to side with Plaintiffs means that "[t]he safety experts at NHTSA, who said, 'No further investigation would result in a finding of a safety-related defect,' don't know what they're talking about." TR4308.

The improper admission of the statistics, findings and reason for closing of the ODI Report were consistently and effectively, and most important, ***improperly***, used by Ford throughout trial to place an official mark of approval by the "safety experts in

Washington" upon the CVPI and the Panther platform. The jury was left with the firm (mis)perception that the "safety experts in Washington" had examined the Panther platform, examined other similar incidents and concluded that the CVPI did contain a safety defect. The improper use of the ODI Report permeated the trial and unduly prejudiced Plaintiffs in the eyes of the jury and warrants a new trial.

C. Conclusion

The trial court erred in admitting prejudicial evidence to the detriment of the Plaintiffs. Reversal is required. To the extent that Rodriguez mandates a different conclusion, it should be re-examined and overruled.

V.

THE TRIAL COURT ERRED IN PROHIBITING PLAINTIFFS FROM QUESTIONING MR. RIDENOUR REGARDING HIS INVOLVEMENT IN THE DESIGN AND INVESTIGATION OF THE FORD PINTO, AND IN DENYING PLAINTIFFS' MOTION FOR NEW TRIAL ON THE SAME BASIS, BECAUSE THIS EVIDENCE SHOULD HAVE BEEN ADMITTED AS DIRECT EVIDENCE OF NOTICE OF A DANGEROUS CONDITION AND FOR PURPOSES OF IMPEACHMENT, IN THAT THIS EVIDENCE ESTABLISHED THAT FORD HAD NOTICE OF A DANGEROUS CONDITION IN THE FUEL SYSTEM THAT WAS USED IN THE CVPI AND EVIDENCE REGARDING THE ISSUE OF NOTICE OF A DANGEROUS CONDITION AND EVIDENCE OF A DANGEROUS CONDITIONS SHOULD BE ADMITTED WHEN IT IS BOTH LOGICALLY AND LEGALLY RELEVANT, AND THIS EVIDENCE SERVED TO IMPEACH MR. RIDENOUR'S CREDIBILITY AS A FUEL SYSTEM DESIGN EXPERT AND EVIDENCE SHOULD BE ADMITTED FOR PURPOSES OF IMPEACHMENT WHEN THE EVIDENCE GOES TO A PARAMOUNT ISSUE IN THE CASE.

A. Standard Of Review.

"The admissibility of evidence is within the discretion of the trial court and the trial court's decision is reviewed for an abuse of discretion." Alberswerth v. Alberswerth, 184 S.W.3d 81, 100 (Mo. App. 2006). An appellate court should reverse a trial court's determination regarding the exclusion of logically relevant evidence "only when the exclusion of evidence shocks the sense of justice or indicates an absence of careful consideration." In the Matter of Care and Treatment of Cokes v. State, 183 S.W.3d 281, 285 (Mo. App. 2005)(emphasis added); see also Stokes, 168 S.W.3d at 483.

Although the trial court has substantial discretion regarding the exclusion of evidence, the trial court's discretion is subject to certain boundaries. "Limitations exist on the trial court's discretion to control the extent and scope of cross-examination that seeks to elicit substantive evidence. The trial court may not exclude relevant and material facts simply because counsel seeks to elicit such facts on cross-examination." Long, 98 S.W.3d at 606 (Internal citations omitted); see also Haffey, 171 S.W.3d at 809; Reno v. Wakeman, 869 S.W.2d 219, 223 (Mo. App. 1993). "The trial court's discretion regarding impeachment of a witness is also limited. The trial court may not prevent cross-examination on a proper subject." Long, 98 S.W.3d at 606 (Internal citations omitted).

In this case, the trial court abused its discretion in two separate ways with regard to the exclusion of evidence regarding the Ford Pinto: (1) the trial court failed to

carefully consider the issue of legal relevance with regard to the issue of notice, and (2) the trial court failed to allow Plaintiffs to impeach Mr. Ridenour regarding the paramount issue of his credibility as an expert witness on fuel system design.

B. The Trial Court Abused Its Discretion And Failed To Carefully Consider Legal Relevance.

"To be admissible evidence must be relevant, both logically and legally. Evidence is logically relevant if it tends to prove or disprove a fact in issue or corroborate other evidence. Evidence is legally relevant when its probative value, or usefulness, outweighs its prejudicial effect, such as unfair prejudice, confusion of the issues, undue delay or waste of time, and in the case of jury trial, misleading the jury." Jerry Bennett Masonry, Inc. v. Crossland Const. Co., Inc., 171 S.W.3d 81, 98-99 (Mo. App. 2005)(internal citations and quotation marks omitted); see also Whelan v. Missouri Public Service, 163 S.W.3d 459, 462 (Mo. App. 2005).

"Logically relevant evidence should not be excluded unless it pertains to collateral matters, which would result in confusion of the issues or would cause prejudice wholly disproportionate to the value and usefulness of the offered evidence." Payne, 177 S.W.3d at 836. "'Legal relevance involves a process through which the probative value of the evidence (its usefulness) is weighed against the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence (the cost of evidence).'" Whelan, 163

S.W.3d at 462; see also Porter v. Toys 'R' Us-Delaware, Inc., 152 S.W.3d 310, 318 (Mo. App. 2004).

There is no question that the evidence regarding the Ford Pinto was logically relevant. The trial court had previously recognized that evidence regarding the Pinto was "relevant to show that Ford had awareness of the problems with fuel tank location consistent with [Plaintiffs'] theory." (TR972-73). Similarly, the trial court noted that "the fact that Ford knew of this and the fact that Ford looked into it and studied these things, that's all -- I think that's relevant evidence for a variety of reasons." (TR977). The court further indicated that this was an appropriate line of inquiry for Plaintiffs: "So, in the generic, you putting on evidence that Ford had a behind-the-axle test and it leaked and it was a problem, I think probably that's relevant evidence the jury has a right to see, okay?" (TR978).

Having concluded that evidence regarding the Pinto was logically relevant, the trial court allowed Plaintiffs to discuss the Pinto during their examination of their expert, Mr. Wallingford. (TR1249-50). However, when Plaintiffs attempted to question Mr. Ridenour, Ford's corporate representative, regarding his involvement with the design and investigation of the Pinto, the court had a change of heart and forbid Plaintiffs from even mentioning the Pinto. (TR3193-3201).

Plaintiffs explained that it was appropriate to question Mr. Ridenour regarding the Pinto because Mr. Ridenour was the design engineer who signed off on parts that were used in the fuel system of the Pinto. (TR3193-94). Plaintiffs further explained

that Mr. Ridenour had served as the head person in the Pinto investigations and that he had investigated more Pinto accidents than anyone else at Ford. (TR3197). Nevertheless, the trial court forbad Plaintiffs from even mentioning the Pinto because the court believed that the mere name "Pinto" had negative connotations that would result in prejudice. (TR3195-96). As the court subsequently explained its rationale:

> Pinto, to me as a layperson, means late '60s, '70s, lots of lawsuits, lots of problems, time bomb vehicle. Okay? Just as a lay person. I don't know if that's fair. Okay? But that's the connotation.
>
> And I have no idea, realistically, what Mr. Ridenour did. I have no idea what those lawsuits were about. I have no idea of whether those were -- what the Pinto deal is, but Pinto is -- to me, Pinto is -- when you talk about Pinto lawsuits, it connotes a controversial kind of thing, and I think the probative value of you impeaching him with that, whatever it's worth, versus its potential prejudicial effect, is greatly outweighed. And that's why I don't think you need to do it.

(TR3306).

These facts clearly indicate that the trial court's ruling, excluding evidence of or reference to the Pinto during the cross-examination of Mr. Ridenour, was based upon legal relevance, not logical relevance. In other words, the trial court agreed that the evidence was logically relevant, but the trial court concluded that the evidence should

nonetheless be excluded due to the risk of unfair prejudice. As explained below, this conclusion was not the result of careful consideration and, therefore, constitutes an abuse of discretion.

It is important to recognize that "relevant and material evidence may not be excluded solely because it tends to prejudice the jury against a party." Johnson v. Creative Restaurant Management, 904 S.W.2d 455, 459 (Mo. App. 1995); see also Brown v. Hamid, 856 S.W.2d 51, 56 (Mo. App. 1993). Rather, evidence may only be excluded on the basis of prejudice if the prejudice is unfair in the sense that it would confuse the issues or mislead the jury. Jerry Bennett Masonry, Inc., 171 S.W.3d at 98-99. Thus, in considering whether the evidence regarding the Pinto was properly excluded, this Court must consider whether the prejudice associated with the Pinto evidence is unfair prejudice or is simply the prejudice that arises from virtually all evidence that is presented by an opposing party.

The trial court appeared to believe that the Pinto evidence was unfairly prejudicial simply because there are negative connotations associated with the name "Pinto." A negative connotation, in and of itself, is not a sufficient basis for excluding logically relevant evidence. The trial court recognized that the Pinto evidence was logically relevant because the Pinto used the same general fuel system design as the CVPI and the testing and crash history of the Pinto indicated that Ford had notice of the dangers associated with use of this particular fuel system. Despite recognizing the significance of the Pinto evidence, the trial court ruled that Plaintiffs could not question

Mr. Ridenour about this evidence because, in doing so, Plaintiffs would inevitably have to mention the similarly designed vehicle by its name.

Obviously, Plaintiffs cannot present evidence regarding the design, testing and crash history of the Pinto without occasionally using the word "Pinto." But it is unreasonable to exclude otherwise relevant evidence regarding a similarly designed vehicle with similar defects simply because that other vehicle has a notorious history. 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 defective vehicles.

Even if some unfair prejudice would normally result from the use of the word "Pinto," no such prejudice could have resulted in this case because evidence regarding the Pinto had already been admitted into evidence at the time that Plaintiffs attempted to question Mr. Ridenour about his involvement with the Pinto.

Missouri courts have consistently held that, where a particular piece of evidence is potentially prejudicial, no prejudice results from the presentation of that evidence if the same evidence has already been previously admitted. See, e.g., State v. Strong, 142 S.W.3d 702, 721 (Mo. banc 2004)(no prejudice resulted from the use of graphic photographs when those same photographs had previously been admitted into evidence);

Bryan v. State, 134 S.W.3d 795, 800 (Mo. App. 2004)(no prejudice resulted from testimony of a witness where the same information had previously been conveyed to the jury through testimony of other witnesses); State v. Stewart, 18 S.W.3d 75, 91 (Mo. App. 2000)(no prejudice results from the admission of evidence when "evidence already properly before the court establishes essentially the same facts."); State v. Crump, 986 S.W.2d 180, 188-89 (Mo. App. 1999)(no prejudice resulted from the admission of evidence when the trial court had already admitted similar evidence).

In this case, the trial court had previously allowed the admission of Pinto evidence and had allowed Plaintiffs to use the word "Pinto" in the examination of Plaintiffs' expert, Mr. Wallingford. The court then concluded, during the cross-examination of Mr. Ridenour, that the mere use of the word "Pinto" is unfairly prejudicial. It is not clear why the word "Pinto" *was not* unfairly prejudicial during the examination of Mr. Wallingford, but *was* unfairly prejudicial during the cross-examination of Mr. Ridenour. Presumably the negative connotations that the court believed are associated with this word were in existence throughout the trial. However, regardless of whether the word "Pinto" was unfairly prejudicial or not, the Pinto evidence had already presented to the jury prior to the time that the trial court excluded similar evidence during the cross-examination of Mr. Ridenour. Thus, the jury had already been exposed to the word "Pinto" and any further exposure would not have resulted in prejudice to Ford.

C. The Trial Court Failed To Allow Plaintiffs To Impeach Mr. Ridenour Regarding His Credibility.

"The purpose of impeachment is to impair or destroy a witness's credibility or render questionable the truth of his particular testimony." Wainright, 143 S.W.3d at 689 (internal quotation marks omitted). "Generally, anything which has the legitimate tendency of throwing light on the accuracy, truthfulness, and sincerity of a witness, including facts and circumstances, is proper for determining the credibility of a witness." Capra, 932 S.W.2d at 855; accord Haffey, 171 S.W.3d at 809. "[E]vidence that is otherwise inadmissible may be admissible to impeach a witness's testimony." Kuehne, 107 S.W.3d at 294.

In this case, the evidence regarding Mr. Ridenour's close association with the design and investigation of the Pinto was clearly admissible for the purpose of challenging Mr. Ridenour's credibility as an expert in fuel system design.

In addition to testifying as Ford's corporate representative at trial, Mr. Ridenour also testified as Ford's expert regarding the fuel system in the CVPI. (TR3069-70). In discussing his qualifications as an expert, Mr. Ridenour testified at length about his experience as a fuel system engineer for Ford during the early 1970s. (TR3071). Mr. Ridenour testified that he spent five years during that period "designing fuel systems and fuel system components for Ford cars in North America." (TR3071). In that capacity, he had both component responsibility and systems responsibility. (TR3071). His work involved "the design and release of fuel systems and fuel system components."

(TR3072). His responsibilities included "actually participating in a decision-making process on the packaging and location of fuel tanks." (TR3072-73). Mr. Ridenour also testified that he was very familiar with testing that Ford did during this period regarding fuel tank location and that he had personal knowledge regarding "how Ford viewed that testing, why it was done, and what Ford did as a result of it." (TR3075).

In the course of discussing his qualifications as an expert in fuel system design, Mr. Ridenour mentioned a number of specific vehicles for which he participated in the fuel system design, including the Thunderbird, Lincoln Mark, Maverick, Comet, Granada, Monarch, and Versailles. (TR3071-73). Conspicuously absent from this discussion was any reference to the Ford Pinto which Mr. Ridenour was also associated with. (TR3071-73, 3196-98).

When Plaintiffs sought to question Mr. Ridenour about his experience with the Ford Pinto, one of the reasons that Plaintiffs gave for addressing this issue was the relevance of this issue to Mr. Ridenour's qualifications as an expert on fuel system design. In this regard, Plaintiffs' counsel made the following offer of proof:

> MR. DAVIS: The offer of proof would be this: That right now, so far, he's brought out the history of Mr. Ridenour and he asks what cars he worked for in the '70s. He said, "The Granada platform."

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.

After he worked on the fuel systems as an engineer where he was a nameplate designer, where he signed off on it, then he became involved for design analysis as the head person for Pinto investigations. He said in his depositions that he investigated more Pinto accidents than anyone else in the company ever. And he said he would go out and get underneath the cars.

And in the Pinto cases, while I would make it abundantly clear they're not even the same kind of car -- it's a small car, not a big car -- they generically talked about placement of fuel tanks, locations, filler necks and filler neck problems, and that he would talk about those issues.

* * *

This is Plaintiffs' Exhibit 722, which is already in. This is the Chiara memo. The Chiara memo is all about the Pinto cases and it's referred to in the reported decisions.

Without getting into outcomes of Ford Pintos, without getting into a whole lot of other issues, I think there is relevant stuff in there. The relevant stuff, just without talking about it anymore, may just be what he did

during these years that's already been brought up and, I think, opened the door.

He asks, "What platforms did you work on during the 1970s as a fuel engineer?" And one of them was the Pinto. In fact, he was the design engineer who would sign off on Pinto fuel system parts.

Now, we could say that without any more. The word "Pinto" has been named in this case. The word "Pinto" shouldn't be necessarily taboo.

(TR3196-98).

Plaintiffs subsequently made a second attempt to convince the court that this was a proper subject of cross-examination:

MR. DAVIS: Your Honor, I have scaled back my wants and desires on this matter, but I have also went and gotten the transcript. In the transcript from yesterday, they were talking about Mr. Ridenour working for Ford during the '70s, working in fuel system design. And they're going through that period and the question was asked, quote, And could you tell the jury some of the models that you have been involved specifically in that part of your experience work at Ford, end quote.

And he listed these things and he didn't list his work on the Pinto. And –

COURT: Okay.

MR. DAVIS: I think as a matter of cross-examining an expert, I can bring this up.

(TR3304-05). Plaintiffs then proceeded to quote to the trial court testimony from other cases in which Mr. Ridenour had admitted that he was involved in the design of the Pinto, was a lead investigator regarding the defects in the Pinto's fuel system, and had investigated more Pinto crashes than anyone else at Ford. (TR3307-11).

As noted previously, the trial court rejected Plaintiffs' arguments regarding the propriety of questioning Mr. Ridenour about the Pinto, and forbid Plaintiffs from even mentioning the Pinto because the court believed that the mere name "Pinto" had negative connotations that would result in prejudice. (TR3195-96).

Plaintiffs should have been allowed to question Mr. Ridenour about his substantial involvement with the design and investigation of the fuel system in the Pinto. Mr. Ridenour was offered at trial as an expert in fuel system design. Clearly, the fact that Mr. Ridenour was closely associated with one of the most famously defective fuel systems ever designed was relevant to the issue of Mr. Ridenour's credibility as an expert in the area of fuel system design.

A trial court "ha[s] no authority to prevent impeachment of [a] witness[] on matters related to a paramount issue or that affected their accuracy, veracity, or credibility." Black, 151 S.W.3d at 56. This is particularly true in the case of an expert witness, for Missouri courts have consistently recognized that, in cross-examining an

expert, "wide latitude is allowed to test his qualifications, credibility, skill or knowledge and the value and accuracy of his opinion." Powell v. Normal Lines, Inc., 674 S.W.2d 191, 196 (Mo. App. 1984); see also Nelson v. Waxman, 9 S.W.3d 601, 604 (Mo. banc 2000).

The limited discretion of the trial court to exclude proper impeachment evidence reflects the special role that the jury plays in assessing the credibility of witnesses. "While the determination of a witness's competency to testify is for the trial court, the credibility of a witness's testimony is for the fact finder to determine." Capra, 932 S.W.2d at 855. "Because the jury is to assess credibility, it is entitled to any information which might bear significantly on the veracity of a witness." Wainright, 143 S.W.3d at 689 (internal quotation marks omitted); see also Kuehne, 107 S.W.3d at 294. "The jury is entitled to know everything that might affect a witness' credibility and the weight to be given his testimony." Weatherly, 655 S.W.2d at 844. As these cases recognize, it is the jury's job to determine whether a particular piece of impeachment evidence undermines the credibility of a witness or other evidence, and the trial court should not circumvent the jury's role by limiting the information that is provided to the jury for purposes of impeachment. Once again, this is particularly true in the case of an expert witness.

In this case, the trial court improperly prevented the jury from hearing all of the pertinent evidence regarding Mr. Ridenour's credibility as an expert witness. Mr. Ridenour was offered as an expert on the issue of fuel system design. Thus, Mr.

Ridenour's close association with the design and investigation of one of the most famously defective fuel systems ever designed was an issue that went directly to Mr. Ridenour's credibility as an expert. The jury was entitled to have the information regarding Mr. Ridenour's close association with the design and investigation of the Pinto, and to take that information into account in assessing Mr. Ridenour's credibility.

The trial court's error is especially egregious in this case because, although the trial court prevented Plaintiffs from addressing Mr. Ridenour's association with one vehicle line from that 1970s that went directly to Mr. Ridenour's credibility, the court allowed Ford to question Mr. Ridenour about numerous other vehicles and platforms from the same time period.

In qualifying Mr. Ridenour as an expert in fuel system design, Ford questioned Mr. Ridenour about his participation in the design of a number of vehicles in the early 1970s. Mr. Ridenour mentioned a number of specific vehicles for which he participated in the fuel system design, including the Thunderbird, Lincoln Mark, Maverick, Comet, Granada, Monarch, and Versailles. Mr. Ridenour conveniently omitted the Pinto from this list. When Plaintiffs attempted to rectify that omission, the trial court prevented Plaintiffs from doing so. Thus, the jury was left with the mistaken impression that Mr. Ridenour's substantial design experience during the 1970s did not include any fuel system designs that subsequently turned out to have serious problems. In short, Ford only told the jury half of the story and the trial court prevented Plaintiffs from telling the jury the other half of the story.

Given that the issue of Mr. Ridenour's design experience during the 1970s was introduced into the case by Ford, it was inherently unfair for the trial court to prevent Plaintiffs from exploring this issue by cross-examining Mr. Ridenour regarding his experience with all pertinent vehicles, including the Pinto.

D. Prejudice Resulted From The Court's Error.

"The exclusion of proper evidence is presumed prejudicial unless otherwise shown." Aliff, 26 S.W.3d at 321; see also Tune, 883 S.W.2d at 22; Boyd, 143 S.W.3d at 46; McMillin, 633 S.W.2d at 226. This is particularly true where the excluded evidence "'goes to the very heart of the plaintiff's case.'" Richcreek, 908 S.W.2d at 778. "That there was other evidence of the same general character does not necessarily render the error in exclusion of th[e] evidence harmless." Richcreek, 908 S.W.2d at 778. Once the appellant has established that the exclusion of evidence was error, the respondent bears the burden of overcoming the presumption of prejudice by establishing that the error was harmless. See Tune, 883 S.W.2d at 22; Norman, 145 S.W.2d at 920; McMillin, 633 S.W.2d at 226.

The Pinto evidence went to a primary issue in the case in that it served to establish Ford's notice of the danger associated with a similarly designed fuel system. Indeed, the trial court expressly recognized that the Pinto evidence was relevant for this purpose. Plaintiffs suffered substantial prejudice as a result of the trial court's exclusion of this evidence because evidence regarding notice of the danger associated with a similar fuel system because this evidence went to a core issue in this case. Given the

significance of the issue of notice in this action, and the clear error of the trial court in excluding significant evidence on this issue, Ford cannot establish that the trial court's error was harmless.

The Pinto evidence also went to impeach Mr. Ridenour's credibility as an expert on the issue of fuel system design. This was also a primary issue in the case. Moreover, the Pinto evidence was particularly relevant because Ford introduced evidence regarding Mr. Ridenour's experience in fuel system design with regard to other vehicles during the 1970s and the Pinto evidence served to place Ford's evidence into context. Plaintiffs suffered substantial prejudice as a result of the trial court's exclusion of this evidence because evidence regarding Mr. Ridenour's close association with the design and investigation of one of the most famously defective fuel systems ever designed goes directly to the issue of Mr. Ridenour's credibility as a fuel system design expert. Given the significance of Mr. Ridenour's credibility as a fuel system design expert, and the clear error of the trial court in excluding significant evidence on this issue, Ford cannot establish that the trial court's error was harmless.

E. Conclusion

The trial court committed reversible error in that it abused it discretion in refusing to permit the cross-examination of Ford’s witness on issues related to the Ford Pinto. Because the error was prejudicial, reversal and remand for a new trial is required.

VI.

THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR NEW TRIAL ON THE BASIS OF CUMULATIVE ERROR BECAUSE A NEW TRIAL SHOULD HAVE BEEN GRANTED ON THE BASIS OF CUMULATIVE ERROR IN THAT THERE WERE MULTIPLE POINTS OF ERROR IN THE TRIAL OF THIS ACTION AND THE CUMULATIVE PREJUDICE FROM THESE MULTIPLE ERRORS RESULTS IN PREJUDICE EVEN IF THE INDIVIDUAL ERRORS DID NOT RESULT IN PREJUDICE.

"The effect of cumulative errors may be prejudicial, requiring the judgment be set aside and the cause remanded." State v. Strughold, 973 S.W.2d 876, 892 (Mo. App. 1998). "An appellate court may grant a new trial based on the cumulative effects of errors, even without a specific finding that any single error would constitute grounds for a new trial." Koontz v. Ferber, 870 S.W.2d 885, 894 (Mo. App. 1993); see also Crawford v. Shop-N Save Warehouse, Inc., 91 S.W.3d 646, 652 (Mo. App. 2002); Smith v. Wal-Mart Stores, Inc., 967 S.W.2d 198, 205 (Mo. App. 1998); Stucker v. Rose, 949 S.W.2d 235, 239 (Mo. App. 1997). The multiple errors in this case resulted in prejudice that requires reversal even if the individual errors do not require reversal.

As noted previously, during the course of trial in this action the trial court made a number of erroneous rulings regarding the admission or exclusion of evidence, the

limitation of cross-examination and the limitation of argument. Specifically, the trial court made the following erroneous rulings:

- The trial court improperly ruled that Plaintiffs were not entitled to refer to OSI evidence that was presented by defendants and that Plaintiffs were not entitled to engage in arguments based upon that evidence;

- The trial court ruled that all portions of the ODI Report were admissible despite the fact that portions of the ODI Report were clearly irrelevant and highly prejudicial;

- The trial court excluded Plaintiffs' evidence regarding Joe Dierker's notebook and prevented Plaintiffs from using that evidence to impeach the credibility of Mr. Ridenour, Ford and Exponent;

- The trial court excluded the Grush-Saunby Report and prevented Plaintiffs from using that evidence to impeach the credibility of Mr. Ridenour and Ford;

- The trial court excluded evidence regarding the Ford Pinto and prevented Plaintiffs from using that evidence to impeach the credibility of Ford's expert, Mr. Ridenour.

Plaintiffs believe that each of the above-noted errors individually warrants reversal. However, even if none of these errors individually warranted reversal, the cumulative

effect of the prejudice resulting from these errors warrants reversal. In this regard, it is important to note that the errors do not go to collateral or insignificant issues.

The OSI evidence was one of the most important types of evidence used by Plaintiffs and Plaintiffs were improperly limited in their ability to make use of certain OSI evidence even though that evidence was presented to the jury by Ford. The ODI Report contained conclusions and opinions that were grossly prejudicial and that would never have been deemed admissible were they not included within a public record. Joe Dierker's notebook served to impeach Ford, one of Ford's primary witnesses (Mr. Ridenour) and the company that created the crash tests that Ford substantially relied upon at trial (Exponent), and it was improper to prohibit Plaintiffs from using this impeachment evidence. The Grush-Saunby Report directly contradicted Ford's unequivocal assertion that it **never** factors cost over safety, and Plaintiffs should have been allowed to use this highly pertinent impeachment evidence. Finally, the Pinto evidence served dual purposes: (1) to establish Ford's notice of the dangers associated with a fuel system that places the tank aft of the axle, and (2) to impeach the credibility of Ford's fuel system design expert.

The above-noted errors had a significant cumulative impact upon the trial of this case. If the court had not made the above-noted rulings, then information presented to the jury and the inferences that the jury took from that information would have differed considerably. Specifically, the jury's perspective on the case would have been changed in the following ways:

- The jury would have been aware that there were other fuel-leak fires in the CVPI after Ford implemented the upgrade kit, thereby substantially undermining Ford's upgrade kit defense.

- The jury would never have heard the irrelevant and prejudicial conclusions contained in the ODI Report and been left with the mistaken impression that the ODI Report had any direct bearing on Ford’s liability.

- The jury would have heard the impeaching evidence regarding Joe Dierker's notebook and would have been aware that Exponent custom designs crash tests of questionable value for Ford — one of Ford's primary types of evidence here.

- The jury would have learned, by means of the Grush-Saunby Report, that Ford was not truthful when it testified that it **never** factors cost over safety, and the jury would have been able to take this into account when considering Ford's credibility on other issues.

- The jury would have received evidence about Ford's notice of the potential danger of locating the fuel tank aft of the axle through the testimony of a corporate representative who was intimately familiar with Ford's prior experience with this issue in the Ford Pinto.

- The jury would have received impeaching evidence regarding the close association of Ford's fuel system design expert with a famously defective fuel system, and could have taken that information into account when assessing the expert's credibility.

Again, each of the above-referenced errors is independently sufficient to warrant reversal. However, even if this Court does not believe that these errors were independently sufficient to warrant reversal, the prejudice that resulted from the cumulative effect of these errors certainly warrants reversal. These errors went to key issues in this case and the cumulative impact of these errors likely altered the outcome of this case.

CONCLUSION

For all of the reasons stated herein, the judgment in favor of Ford should be reversed and this matter should be remanded for a new trial.

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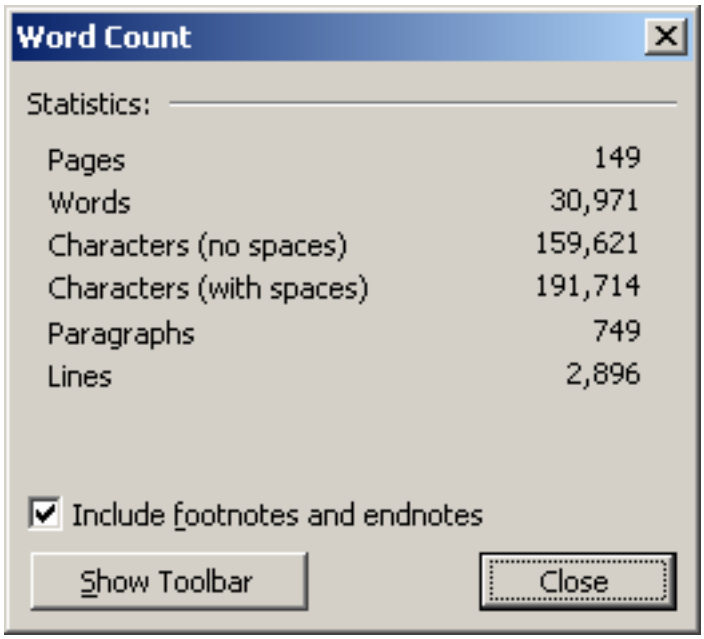
CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c) in that beginning with the Table of Contents and concluding with the last sentence before the signature block the brief contains 30,971 words. The word count was derived from Microsoft Word.



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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and accurate copy of the foregoing document was served via prepaid United States mail and by electronic mail where an electronic mail address is shown this 17th day of November, 2008, to the following:

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