

**IN THE SUPREME COURT OF MISSOURI**

---

**No. SC 87559**

---

**RANDALL D. PETERS, Individually  
and as Personal Representative of the Estate of Constance Marie Peters, Deceased,  
Respondent,**

**v.**

**GENERAL MOTORS CORPORATION,  
Appellant.**

---

**Appeal From the Circuit Court  
of Jackson County  
Honorable Marco A. Roldan, Judge**

---

**SUBSTITUTE REPLY BRIEF OF  
APPELLANT**

---

TURNER, REID, DUNCAN,  
LOOMER & PATTON, P.C.  
Rodney E. Loomer, #24013  
Wallace S. Squibb, #43459  
PO Box 4043  
Springfield, MO 65808  
(417) 883-2102 (Phone)  
(417) 883-5024 (Fax)

BRYAN CAVE LLP  
Thomas C. Walsh, #18605  
Edward F. Downey, #28866  
One Metropolitan Square  
211 N. Broadway, #3600  
St. Louis, MO 63102  
(314) 259-2000 (Phone)  
(314) 259-2020 (Fax)

BINGHAM MCCUTCHEN LLP  
Frank M. Hinman (*pro hac vice*)  
Thomas S. Hixson (*pro hac vice*)  
Renee M. DuPree (*pro hac vice*)  
Three Embarcadero Center  
San Francisco, CA 94111  
(415) 393-2000 (Phone)  
(415) 393-2286 (Fax)

Attorneys for Appellant  
General Motors Corporation

TABLE OF CONTENTS

	<u>Page</u>
ARGUMENT.....	8
I.    No Submissible Case On Any Theory .....	10
A.    No Evidence of Defect or Cause.....	10
a.    Sero .....	11
b.    No Other Evidence of Defect or Cause.....	12
B.    Not Unreasonably Dangerous .....	16
C.    Plaintiffs’ Best Case Failed.....	17
II.   Erroneous Admission Of Sero’s Opinion.....	17
A.    Preservation.....	17
B.    Standards For Expert Testimony.....	18
1.    Unsupported by Testing .....	18
2.    Unreviewed .....	18
3.    Unacceptable Error Rate .....	19
4.    Unaccepted.....	19
5.    Unsupported .....	19
C.    Prejudice.....	20
III.  Erroneous Admission Of Dissimilar Incidents.....	20
A.    Witnesses.....	21
B.    1241s .....	22
C.    Prejudice.....	26

TABLE OF CONTENTS  
(continued)

	<u>Page</u>
IV. Erroneous Exclusion Of GM’s Rebuttal Evidence .....	27
A. The Error .....	27
B. Prejudice.....	30
V. Grossly Excessive Compensatory Awards.....	30
A. Mr. Peters’ Award .....	30
B. Mrs. Peters’ Award .....	31
VI. No Submissible Case On Punitive Liability.....	32
A. The Legal Standards.....	33
B. First Failure of Proof: No Highly Probable Risk Of Substantial Injury .....	33
C. Second Failure of Proof: No Evil Motive or Reckless Indifference .....	34
VII. Grossly Excessive Punitive Award .....	37
A. Legal And Constitutional Standards .....	37
B. Measure 1: Comparison to Other Awards.....	37
C. Measures 2-4: The BMW and Letz Factors .....	37
D. Improper Measure: GM’s Financial Condition.....	39
VIII. Offset and Prejudgment Interest.....	39
CONCLUSION .....	40
CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c) & (g) .....	43

## TABLE OF AUTHORITIES

Page

### CASES

<i>Alcorn v. Union Pac. R.R. Co.</i> , 50 S.W.3d 226 (Mo.banc 2001).....	32, 36
<i>Barnes v. Tools &amp; Mach. Builders, Inc.</i> , 715 S.W.2d 518 (Mo.banc 1986) .....	16
<i>Bass v. General Motors Corp.</i> , 150 F.3d 842 (8th Cir. 1998).....	13
<i>Bhagyandoss v. Beiersdorf, Inc.</i> , 723 S.W.2d 392 (Mo.banc 1987) .....	34, 35, 36
<i>Blake v. Irwin</i> , 913 S.W.2d 923 (Mo.App.W.D. 1996).....	28
<i>Buckman Co. v. Plaintiffs' Legal Comm.</i> , 531 U.S. 341 (2001) .....	37
<i>Callahan v. Cardinal Glennon Hosp.</i> , 863 S.W.2d 852 (Mo.banc 1993).....	31
<i>Cooper Indus., Inc. v. Leatherman Tool Group, Inc.</i> , 532 U.S. 424 (2001) .....	38
<i>Dillman v. Missouri Highway &amp; Transp. Comm'n</i> , 973 S.W.2d 510 (Mo.App.E.D. 1998) .....	21
<i>Eagleburger v. Emerson Elec. Co.</i> , 794 S.W.2d 210 (Mo.App. 1990).....	25
<i>Ellis v. Kerr-McGee Chem., L.L.C.</i> , No. ED 74835, 1999 WL 969278 (Mo.App.E.D. 1999) .....	31
<i>Emery v. Wal-Mart Stores, Inc.</i> , 976 S.W.2d 439 (Mo.banc 1998) .....	30, 31, 32
<i>Firestone v. Crown Ctr. Redevelopment Corp.</i> , 693 S.W.2d 99 (Mo.banc 1985) .....	31
<i>General Elec. Co. v. Joiner</i> , 522 U.S. 136 (1997) .....	20
<i>General Motors Corp. v. Moseley</i> , 447 S.E.2d 302 (Ga. Ct. App. 1994) .....	23
<i>Govreau v. Nu-Way Concrete Forms, Inc.</i> , 73 S.W.3d 737 (Mo.App.E.D.	

TABLE OF AUTHORITIES

(continued)

	<u>Page</u>
2002) .....	22
<i>Graham v. County Med. Equip. Co., Inc.</i> , 24 S.W.3d 145 (Mo.App.E.D. 2000) .....	31
<i>Green v. Fleishman</i> , 882 S.W.2d 219 (Mo.App.W.D. 1994).....	28
<i>Gross v. Gross</i> , 840 S.W.2d 253 (Mo.App.E.D. 1992).....	18
<i>Hodges v. Oberdorfer Motors, Inc.</i> , 634 S.W.2d 205 (Mo.App.E.D. 1982).....	30
<i>Hoover’s Dairy Co. v. Mid-America Dairymen</i> , 700 S.W.2d 426 (Mo.banc 1985) .....	33
<i>Jones v. Ford Motor Co.</i> , 559 S.E.2d 592 (Va. 2002) .....	25
<i>Kansas City v. Keene Corp.</i> , 855 S.W.2d 360 (Mo. 1993) .....	33
<i>Keener v. Dayton Elec. Manuf. Co.</i> , 445 S.W.2d 362 (Mo. 1969) .....	13
<i>King v. Unidynamics Corp.</i> , 943 S.W.2d 262 (Mo.App.E.D. 1997).....	31
<i>Klein v. General Elec. Co.</i> , 714 S.W.2d 896 (Mo.App.E.D. 1986) .....	13
<i>Lane v. Lensmeyer</i> , 158 S.W.3d 218 (Mo.banc 2005) .....	17
<i>Larabee v. Washington</i> , 793 S.W.2d 357 (Mo.App.W.D. 1990).....	31
<i>Letz v. Turbomeca Engine Corp.</i> , 975 S.W.2d 155 (Mo.App.W.D. 2001).....	37, 38
<i>Lohman v. Norfolk &amp; Western Railway Co.</i> , 948 S.W.2d 659 (Mo.App.W.D. 1997).....	31
<i>Lopez v. Three Rivers Elec. Coop., Inc.</i> , 26 S.W.3d 151 (Mo.banc 2000) .....	34
<i>May v. AOG Holding Corp.</i> , 810 S.W.2d 655 (Mo.App.S.D. 1991) .....	37

TABLE OF AUTHORITIES  
(continued)

	<u>Page</u>
<i>McGuire v. Seltsam</i> , No. WD61448, 2004 Mo.App. LEXIS 328 (Mo.App.W.D. March 16, 2004) .....	19
<i>Mische v. Burns</i> , 821 S.W.2d 117 (Mo.App.W.D. 1991) .....	29
<i>Mobley v. Webster Elec. Coop.</i> , 859 S.W.2d 923 (Mo.App.S.D. 1993) .....	10
<i>Newman v. Ford Motor Co.</i> , 975 S.W.2d 147 (Mo.banc 1998).....	22, 25
<i>Oliver v. Cameron Mut. Ins. Co.</i> , 866 S.W.2d 865 (Mo.App.E.D. 1993).....	30
<i>Pacific Mut. Life Ins. Co. v. Haslip</i> , 499 U.S. 1 (1991) .....	38
<i>Pasalich v. Swanson</i> , 89 S.W.3d 555 (Mo.App.W.D. 2002) .....	28
<i>Patrick v. Alphin</i> , 825 S.W.2d 11 (Mo.App.E.D. 1992) .....	30
<i>Perkins v. Runyan Heating &amp; Cooling Serv.</i> , 933 S.W.2d 837 (Mo.App.W.D. 1996).....	29
<i>Peters v. General Motors Corp.</i> , No. WD62807, 2006 WL 88563 (Mo.App.W.D. Jan. 17, 2006) .....	passim
<i>Pierce v. Platte-Clay Electrical Cooperative, Inc.</i> , 769 S.W.2d 769 (Mo. 1989) .....	25
<i>Rauscher v. General Motors Corp.</i> , 905 S.W.2d 158 (Mo.App.E.D. 1995).....	15
<i>Romo v. Ford Motor Co.</i> , 113 Cal.App.4th 738 (2003) .....	38
<i>Sebree v. Rosen</i> , 393 S.W. 2d 590 (Mo.banc 1965).....	24
<i>Shine v. Southwestern Bell Tel.</i> , 737 S.W.2d 203 (Mo.App.E.D. 1987).....	30
<i>Spuhl v. Shiley, Inc.</i> , 795 S.W.2d 573 (Mo.App.E.D. 1990).....	10

TABLE OF AUTHORITIES

(continued)

Page

<i>State Bd. of Registration for the Healing Arts v. McDonagh</i> , 123 S.W.3d 146 (Mo.banc 2003).....	18, 19, 37
<i>State ex rel State Highway Com. v. Casey</i> , 490 S.W.2d 373 (1973).....	26
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003) .....	38, 39
<i>State v. Teague</i> , 64 S.W.3d 917 (Mo.App.S.D. 2002) .....	22
<i>Stevens v. Durbin-Durco, Inc.</i> , 377 S.W.2d 343 (Mo.banc 1964) .....	17
<i>Strick v. Stutsman</i> , 633 S.W.2d 148 (Mo.App.W.D. 1982) .....	15
<i>Uder v. Missouri Farmers Ass’n, Inc.</i> , 668 S.W.2d 82 (Mo.App.W.D. 1983) .....	13, 15
<i>Vaughn v. Michelin Tire Corp.</i> , 756 S.W.2d 548 (Mo.App.S.D. 1988) .....	24
<i>Vititoe v. Lester E. Cox Med. Centers</i> , 27 S.W.3d 812 (Mo.App.S.D. 2000).....	29
<i>Wadlow v. Lindner Homes. Inc.</i> , 722 S.W.2d 621 (Mo.App.E.D. 1986).....	13
<i>Weatherford v. H.K. Porter, Inc.</i> , 560 S.W.2d 31 (Mo.App.St.L.D. 1977) .....	13
<i>Webster v. Boyett</i> , 496 S.E.2d 459 (Ga. 1998) .....	23
<i>Whitted v. Healthline Mgmt., Inc.</i> , 90 S.W.3d 470 (Mo.App.E.D. 2002).....	28
<i>Williams v. Deere &amp; Co.</i> , 598 S.W.2d 609 (Mo.App.S.D. 1980) .....	15
<i>Williams v. Ford Motor Co.</i> , 411 S.W.2d 443 (Mo.App.St.L.D. 1966).....	15
<i>Williams v. Nuckolls</i> , 644 S.W.2d 670 (Mo.App.E.D. 1982).....	15
<i>Winkler v. Robinett</i> , 913 S.W.2d 817 (Mo.App.W.D. 1995) .....	15, 16
<i>Zhang v. American Gem Seafoods, Inc.</i> , 339 F.3d 1020 (9th Cir. 2003) .....	38

TABLE OF AUTHORITIES

(continued)

Page

**STATUTES**

Mo.Rev.Stat. § 490.065 .....	17, 19
Mo.Rev.Stat. § 490.680 .....	26
Mo.Rev.Stat. § 537.068 .....	31

**RULES**

Mo.Sup.Ct.R. 83.04 .....	8
Mo.Sup.Ct.R. 83.08(b) .....	17, 24, 28

## ARGUMENT

The Substitute Brief of Respondents (“SRB”) says almost nothing about the basis for their transfer petition – a supposed conflict raised by the Court of Appeals’ nearly unanimous *en banc* opinion – and instead takes the opportunity to raise a host of new arguments about a case that was not tried based on evidence that does not exist. We respectfully suggest that is not Rule 83.04’s purpose.

Plaintiffs’ brief rests on two main fallacies, repeated throughout: (1) GM engineers were “concerned” about the “propensity” of a single electrical fault like Sero’s “transient” to bypass myriad protective devices and cause sudden acceleration in the real world; and (2) only pedal error or a defective cruise control can cause sudden acceleration. No evidence supports either premise and undisputed evidence disproves both.

In fact, after some 18 months’ careful consideration, the Court of Appeals stated, as to premise (1):

GM was aware that the [cruise control] device might malfunction under certain laboratory conditions, but as Mr. Sero testified, no one has ever been able to cause the device to actuate a vehicle throttle without opening it and applying voltage directly to the device at specific locations, bypassing the protective resistor devices.

*Peters v. General Motors Corp.*, No. WD62807, 2006 WL 88563, at \*21 (Mo.App.W.D. Jan. 17, 2006) (punitive liability section). Besides, Wallingford admitted that had the

cruise control been activated, the Oldsmobile would not have miraculously come to rest on the planter with the engine idling. Substitute Brief of Appellant (“SAB”):61-62

As to premise (2), the Court said:

Mr. Peters’ contention is erroneous. \* \* \* Evidence was presented that sudden and unexpected acceleration can have multiple causes in addition to cruise control malfunction and pedal error.

*Id.*, at \*5. Plaintiffs’ erroneous contentions infect and negate their arguments on submissibility, Sero, other incidents, and punitive liability. We discuss them further below.

On the actual facts and law, Plaintiffs have little, and often nothing, to say. Plaintiffs’ brief ignores or misconstrues the evidence and controlling, settled law; attempts to reverse burdens of proof Plaintiffs failed to meet; and fundamentally fails to come to grips with their failures of proof and the errors that led to this outrageous award.<sup>1</sup>

We address Plaintiffs’ responses, to the extent offered, in the order of the SAB.

---

<sup>1</sup> Faced with insurmountable legal obstacles, Plaintiffs attack GM for supposed “mischaracterization” (SRB:39), “evasiveness” (SRB:52), “untru[ths]” (SRB:52), “subterfuge” (SRB:86), and “misstate[ments]” (SRB:106). Plaintiffs’ accusations are unwarranted; we address them in turn below, but note that after their lengthy review the 11 Judges below (including the dissent) found no such problems.

## **I. No Submissible Case On Any Theory**

Plaintiffs failed to prove defect or causation, thus failed to prove liability on any theory. Plaintiffs are incorrect that GM “abandoned its argument that the trial court erred in submitting Plaintiffs’ failure to warn claim to the jury.” (SRB:37-38) Without proof of a defect, there is nothing to warn about. *See Spuhl v. Shiley, Inc.*, 795 S.W.2d 573, 580 (Mo.App.E.D. 1990); *Mobley v. Webster Elec. Coop.*, 859 S.W.2d 923, 930 (Mo.App.S.D. 1993). Plaintiffs’ contention that the Court should disregard “defendant’s evidence” (SRB:37) misses the point. Plaintiffs’ experts disproved their case (and proved the inadmissibility of their other incident evidence) from their own mouths.

### **A. No Evidence of Defect or Cause**

Plaintiffs begin with revisionism: “Sero’s testimony was not offered to show the specific defect.” (SRB:34) But Plaintiffs told the jury:

What Mr. Sero will tell you is that the design of this circuit board, and you'll see him point to a specific spot on the circuit board, that a single electrical fault on a specific spot on the circuit board can cause the throttle to be actuated.

(T:252-53[opening])

Nevertheless, Plaintiffs continue: “Plaintiffs’ claim of defect was not based upon any specific malfunction that was discussed by Mr. Sero. Plaintiffs’ claim of defect was based on the testimony of Mr. Wallingford and Dr. Blatt.” (SRB:77, 44, 48) In fact, Plaintiffs’ case explicitly rested on Sero’s transient signal opinion: “Sam Sero told you things that were very important about this cruise system.” (T:1504[closing])

[H]e actually pointed to it and said, here's the problem. It's the design. We have some points here where if electrical charges get in the wrong place, which they do, you're going to have the potential for a single electrical fault.

(T:1460[closing]) Plaintiffs' closing mentioned Sero 16 times, Wallingford once (in passing), and Blatt not at all. (T:1448-70, 1504-10)

Plaintiffs' proof, built around Sero's "transient" theory, failed to make a submissible case as a matter of law. (SAB:57-63; Subpart a, below) Their new, untried theory, supposedly based on Wallingford and Blatt, is no better. (Subpart b, below)

**a. Sero**

Sero's defect and causation opinion, inadmissible to begin with and largely abandoned on appeal, was (unproved) speculation about what could happen, not evidence of what did happen – here or anywhere. (PEX:586 pp.159-62[Sero]) Plaintiffs admit as much. (SRB:56 ("Sero testified that a single electrical fault *can* occur"; "transient signals *can* travel into the cruise control"; Sero testified "regarding the *potential* for a single electrical fault") (emphases added)) Sero did not try to reconcile the theory with the evidence, but just said such a link was "conceivable." (PEX:586 p.235[Sero]) He also did not explain how a transient could have caused the Oldsmobile to accelerate, bypassing its real world protective devices, yet leave no physical evidence. It couldn't. (PEX:586 pp.190-91[Sero]) Plaintiffs do not even argue it could.

Plaintiffs nevertheless claim, repeatedly, that Sero's testimony "confirmed the concerns of GM's own engineers regarding the propensity of the three-mode cruise

control to experience sudden acceleration incidents.” (SRB:44, 26, 39, 48, 55, 56, 57) That “propensity” is a fallacy, invented in Plaintiffs’ latest brief and unsupported by a shred of evidence. (SRB:20-26) Meads had “duplicate[d]” sudden acceleration through a single electrical fault only by “hot wir[ing]” – not simulating real world conditions where a variety of protective devices are present. (SAB:43) Sero did the same thing, but even under artificial lab conditions could not generate acceleration. (SAB:31) Thus his testing could not “confirm” anything except that his theory was wrong. (SRB:26-27) All who had studied it, including NHTSA and “GM’s own engineers,” agreed it was wrong. (SAB:33-36) No one – Sero, Meads, Rozanski, Hughes, Crawford, or anyone else – has known a single-fault cruise control acceleration – “transient” or otherwise – to happen in the real world, anywhere, ever. (SAB:43) Plaintiffs’ contrary assertion does not gain veracity by repetition or emphasis.

**b. No Other Evidence of Defect or Cause**

Having disclaimed the “specific,” “very important” “problem” Sero “pointed to,” Plaintiffs now argue some unspecified “defective condition” must have caused the accident because Wallingford and Blatt eliminated pedal misapplication after the tree, leaving only some unexplained “malfunction in the cruise control” as the acceleration source. (SRB:38-45) Plaintiffs’ new “circumstantial evidence” theory also fails.

Circumstantial evidence alone suffices only where “[c]ommon experience tells us that some accidents do not ordinarily occur in the absence of a defect.” (SRB:40)<sup>2</sup> Further, “the circumstances proved must point reasonably to the desired conclusion and tend to exclude any other reasonable conclusion,” “without resort to conjecture and speculation.” *Weatherford v. H.K. Porter, Inc.*, 560 S.W.2d 31, 34 (Mo.App.St.L.D. 1977).

This is not such a case. First, Plaintiffs’ circumstantial evidence did not tend to exclude the other reasonable conclusion that the car – initially accelerated by pedal error – had sufficient momentum plus idle power after hitting the tree to reach its resting point. (T:1242, 1288[Moff.]) Plaintiffs’ assertion that “[p]edal misapplication is very rare” (SRB:13) is out of context. Young testified sudden acceleration, which he attributed to pedal error, is very rare. (T:1368-69, 1392, 1417[Young]) Without dispute pedal error causes most sudden acceleration. (SAB:29, 34; DEX:1062 p.49)

---

<sup>2</sup> Plaintiffs’ cases (SRB:38-42) involved a defect finding based on expert testimony, *see Uder v. Mo. Farmers Ass’n, Inc.*, 668 S.W.2d 82, 92 (Mo.App.W.D. 1983) ; *Bass v. General Motors Corp.*, 150 F.3d 842, 849-50 (8th Cir. 1998); *Klein v. General Elec. Co.*, 714 S.W.2d 896, 900 (Mo.App.E.D. 1986); or are otherwise inapposite. *See Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362, 366 (Mo.banc 1969) (reversal for improper jury instruction); *Wadlow v. Lindner Homes, Inc.*, 722 S.W.2d 621, 625 (Mo.App.E.D. 1986) (defect claim supported venue).

Second, Plaintiffs' premise is false. Wallingford's theory of "mechanical acceleration" after the tree depended on Sero's discredited and abandoned defect theory. (T:426-27, 492, 501-04[Wall.]; SAB:30) Thus Wallingford, by relying on Sero for his opinion's basis, proved himself out of court too.

Plaintiffs' response splits hairs and misses the point:

Wallingford relied upon Sero's testimony regarding how many RPMs the engine would run at if the cruise control was activated [but] did not rely upon Sero's testimony regarding *how* the cruise control was activated. Thus, Wallingford's testimony does not rely upon the validity of Sero's mechanism of defect.

(SRB:39) Nonsense. Without dispute Wallingford's necessary acceleration came from the cruise control, supposedly powered at 80% of "full authority" throughout the accident sequence. Sero's purported transient signal was the only proffered basis for the cruise's activation and that acceleration. The transient signal opinion, now disclaimed, was no submissible evidence. Therefore, Wallingford's acceleration hypothesis, dependent on Sero, was literally baseless and itself no submissible evidence.

Besides, Wallingford admitted that cruise control-supplied acceleration – "nearly wide open throttle" – was "inconsistent" with the Oldsmobile's "interaction when it contacted the planter." (T:513-15[Wall.]) Thus Wallingford proved himself out of court on his own, too. Plaintiffs do not address that, but go on to confirm it. Wallingford testified the high "RPMs the engine would run at if the cruise control was activated" – *by*

*any cause* – (SRB:39) were “inconsistent” with the accident facts. Therefore without dispute the cruise could not have been activated, by any cause. Accordingly, Plaintiffs’ new, unspecified cruise control “defective condition” fails as a matter of law on any theory.

Third, Plaintiffs’ conclusion does not follow. This is not a case where “[c]ommon experience tells us that some accidents do not ordinarily occur in the absence of a defect.” *Uder*, 668 S.W.2d at 93; *contrast Rauscher v. General Motors Corp.*, 905 S.W.2d 158, 160 (Mo.App.E.D. 1995) (car “subject to unpredictable stalls and stops” while driving); *Williams v. Deere & Co.*, 598 S.W.2d 609, 612 (Mo.App.S.D. 1980) (tractor “placed in park on level ground” rolled over); *Williams v. Ford Motor Co.*, 411 S.W.2d 443, 448 (Mo.App.St.L.D. 1966) (new car “does not turn in the direction it is steered”). Rather, undisputed evidence tells us that the vast majority of accidents like this are caused by pedal error. (SAB:29, 34)<sup>3</sup>

Moreover, without dispute other potential causes of cruise control malfunction – water leakage, wear and chafing, corrosion, loose debris – have no causal connection to GM’s design. (SAB:43 & n.10; DEX:646 p.101656) *See Williams v. Nuckolls*, 644 S.W.2d 670, 673-74 (Mo.App.E.D. 1982). Plaintiffs never attempted to prove, or even

---

<sup>3</sup> Plaintiffs’ new theory is effectively *res ipsa loquitur*. But that theory was not submitted to the jury, *see Winkler v. Robinett*, 913 S.W.2d 817, 821 (Mo.App.W.D. 1995); and could not have been. *See Strick v. Stutsman*, 633 S.W.2d 148, 151-52, 154 (Mo.App.W.D. 1982) (discussing standard for *res ipsa*).

argue, that all, or even most, cruise control malfunctions are causally related to GM. Sero's transient signal theory, though speculative and unsupported, and now largely abandoned, was Plaintiffs' only attempt at proving causation. *See Winkler*, 913 S.W.2d at 821-22 (nomissible case where expert causation opinion too speculative and circumstantial evidence does not prove causation).

Plaintiffs' response (SRB:44-45) reverses the burden of proof. Plaintiffs must prove circumstances that "tend to exclude any other reasonable conclusion." (SRB:45) It also misconstrues the record. GM never "conceded" the accident was caused by pedal error or a *defective* cruise control. It also ignores the context of any concession; from start to finish Plaintiffs' case was tried upon the "specific" "transient signal" cruise control defect Sero "pointed to."

Plaintiffs' defect and causation theory – old or new– fails as a matter of law.

### **B. Not Unreasonably Dangerous**

In any case, no evidence proved the 3-mode cruise *unreasonably* dangerous as a legal matter: Sero's transient defect has never manifested in the real world, or even his lab; Sero has never attempted to calculate any probability that it could; and even if it ever did, it could be immediately stopped by braking. (SAB:55-57)

Plaintiffs do not dispute any of that, but claim "[t]he evidence did not establish that Mrs. Peters had the time or opportunity to apply the brake." (SRB:47) That reverses the burden of proof again; unreasonable danger is an element of plaintiffs' claim, not "a defense" or a question of "comparative fault." (SRB:47) *See Barnes v. Tools & Mach. Builders, Inc.*, 715 S.W.2d 518, 522 (Mo.banc 1986). It is also incorrect: without

dispute the Oldsmobile took more than three seconds to travel 118 feet from the Peters' driveway to the tree. (SAB:24 & n.5) It is also irrelevant: A single accident does not prove a product unreasonably dangerous because "any product, regardless of its type or design, is capable of producing injury." *Stevens v. Durbin-Durco, Inc.*, 377 S.W.2d 343, 347 (Mo.banc 1964); cases cited at SAB:67.

### **C. Plaintiffs' Best Case Failed**

If Plaintiffs did not make a submissible case, outright reversal is appropriate. (SAB:67) Plaintiffs do not disagree.

## **II. Erroneous Admission Of Sero's Opinion**

Sero's disproved *ipse dixit* was classic inadmissible junk science. (SAB:70-74) Plaintiffs offer little defense of it, largely ignore the standards governing it, and instead raise a new "waiver" argument. They are wrong on all counts.

### **A. Preservation**

Plaintiffs' waiver argument, not raised in the Court of Appeals, should not be considered. Mo.Sup.Ct.R. 83.08(b) (substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief"); *Lane v. Lensmeyer*, 158 S.W.3d 218, 229-30 (Mo.banc 2005) (refusing to consider new argument).

The error was preserved. Plaintiffs ignore what really happened. Sero's testimony was central to Plaintiffs' case and everyone knew it. GM filed a 16-page motion to exclude it under *Daubert*, *Frye*, and § 490.065. After that motion and others relating to Meads and Rozanski were denied, GM stated and the trial court acknowledged that "all the objections we made are continuing," and the court admitted the Sero videotape

“pursuant to, not only the current objection, but also dependent on the pretrial matters.” (T:543, 544, 549) “Having heard argument on the initial motion in limine, the trial court clearly understood the basis of the re-submitted objection at trial.” *Gross v. Gross*, 840 S.W.2d 253, 260 (Mo.App.E.D. 1992). Plaintiffs should not be allowed to pretend otherwise.

## **B. Standards For Expert Testimony**

Sero’s methodology fails each *McDonagh* criterion. *State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 149 (Mo.banc 2003).

### **1. Unsupported by Testing**

Plaintiffs do not dispute testing is “important” “in determining . . . admissibility”, or that none shows Sero’s transient signal could produce sudden acceleration in the real world. (SAB:70-71) *McDonagh*, 123 S.W.3d at 157.

Plaintiffs say Sero “conducted testing”, but ignore its result. While his “oscilloscope” “detect[ed] current flows in the cruise control . . . in the ‘off’ position” (RB:67), nothing happened. (PEX:586 pp.161-62, 169-70[Sero]; SAB:31) The purpose of testing a theory is to determine whether it is based on reliable science. *McDonagh*, 123 S.W.3d at 155. Sero’s test showed his was not.

### **2. Unreviewed**

Plaintiffs do not deny that no peer reviewed literature, by anyone, suggests Sero’s transient theory is possible in the real world. (SAB:71-72) *McDonagh*, 123 S.W.3d at 155.

### **3. Unacceptable Error Rate**

Sero's opinion, disproved in his lab, has a known error rate of 100%, and an unlimited potential error rate. (SAB:72-73) *McDonagh*, 123 S.W.3d at 155. Plaintiffs do not respond.

### **4. Unaccepted**

Sero's transient theory has been universally rejected in the scientific community. (SAB:73) Plaintiffs respond that general (non-)acceptance is not relevant to admissibility (SRB:58-59), but it is. *McDonagh*, 123 S.W.3d at 157.

### **5. Unsupported**

Sero's opinion was not based on "facts or data" "of a type reasonably relied upon by experts in the field," an independent requirement. *McDonagh*, 123 S.W.3d at 156. All "facts or data" refuted it. (SAB:73-74)

Plaintiffs contend "[q]uestions concerning the sources and bases of an expert's opinion affect the weight rather than the admissibility of the opinion." (SRB:54, citing cases) They further argue that Sero's conclusions reached from those sources and bases are *also* irrelevant to admissibility. (SRB:54) Plaintiffs overreach: on their arguments Mo.Rev.Stat. § 490.065 has no purpose.

Both arguments are incorrect. Under *McDonagh*, expert "opinions based upon assumptions not supported in the evidence" are inadmissible because "Section 490.065.3 . . . imposes an independent duty on the court to determine whether the facts and data relied on [by the expert] are . . . reasonably reliable." *McGuire v. Seltsam*, No. WD61448, 2004 Mo.App. LEXIS 328, at \*6-7, \*10 (Mo.App.W.D. Mar. 16, 2004).

Further, “conclusions and methodology are not entirely distinct from one another. . . . [N]othing . . . requires a [trial] court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Sero’s subjective *ipse dixit* assumed and concluded contrary to the evidence, his own testing, and the scientific community.

Plaintiffs’ assertion that “Sero based his opinion on his testing of the Cutlass and his examination of the circuit board used in the three-mode cruise control” (SRB:59) just confirms the problem. It is not good science to rely on a test that disproves the opinion it was run to support, nor to overlook the safety feature the examination was intended to examine. (SAB:31-32) Thus, Sero fails Plaintiffs’ own test (SRB:59) – “the facts on which the opinion is based” conclusively disproved it.

We repeat: If Sero’s transient signal opinion is not junk science, nothing is.

### **C. Prejudice**

Sero’s testimony was “very important,” indeed critical to Plaintiffs’ case. Its erroneous admission was plainly prejudicial; Plaintiffs do not argue otherwise. (SAB:74)

### **III. Erroneous Admission Of Dissimilar Incidents**

Plaintiffs were permitted to rely on hundreds of sudden acceleration reports proved dissimilar by their proponents and common sense. That was error, and highly prejudicial. Plaintiffs’ response evades the problem but ends up proving it.

## A. Witnesses

Other incidents are inadmissible to prove defect unless Plaintiffs show they are “of like character, occurring under substantially the same conditions, and . . . *resulting from the same cause.*” *Dillman v. Mo. Highway & Transp. Comm’n*, 973 S.W.2d 510, 512 (Mo.App.E.D. 1998); cases cited at SAB:76-77.

Plaintiffs concede no evidence showed any cruise control malfunction, much less the alleged transient, caused their witnesses’ incidents. (SRB:77-83) Six of the seven (and the hearsay mechanic) said they pressed the brake “as hard as [they] could,” “all the way to the floor,” but the car did not stop. (SAB:39-41) That proves the testimony “obviously dissimilar” and, thus, inadmissible. *Peters*, 2006 WL 88563, at \*5. For everyone agreed Mrs. Peters did not press the brake; had she, it undisputedly would have stopped the incident, even if her cruise control were activated to begin with. (SAB:32)

Plaintiffs concede the standard they must meet (SRB:78), but try to dodge it. Thus, they say, the witnesses “eliminated pedal error and mechanical cause,” so their incidents must have “resulted from the same cause.” (SRB:79) That is wrong twice over. First, none of the witnesses purported to “eliminate” any of the myriad mechanical causes of sudden acceleration. Only one mentioned any possible cause – a warped floor mat. (SAB:40) Second, even if those witnesses did not press the accelerator, they pressed the brake, hard. Without dispute, that meant whatever happened was not caused by the defect alleged here. (SAB:77)

Plaintiffs argue about that inarguable fact (SRB:79), but elsewhere prove it true: “the defect witnesses testified that . . . brake application had not terminated the sudden

acceleration incident.” (SRB:47) Without dispute brake application would have stopped this incident based on Plaintiffs’ theory of its cause. Therefore, whatever caused this incident was, beyond dispute, not what caused those other incidents, for braking would have stopped them if the same cause caused them. Accordingly their admission, contrary to undisputed evidence, was erroneous as a matter of law. *See State v. Teague*, 64 S.W.3d 917, 922 (Mo.App.S.D. 2002). Certainly their admission was “against the logic of the circumstances.” *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 151 (Mo.banc 1998).

**B. 1241s**

To admit other incidents for notice, Plaintiffs must prove each sufficiently similar “to call defendant’s attention to the dangerous condition that resulted in the litigated accident,” although they need not be “identical.” *Govreau v. Nu-Way Concrete Forms, Inc.*, 73 S.W.3d 737, 742 (Mo.App.E.D. 2002). Plaintiffs did not make that showing as to the hundreds of hearsay 1241 reports, or any of them. To the contrary, many reports themselves, along with Wallingford and Sero, expressly proved dissimilarity. Thus, they were no more admissible for notice than defect, but the trial court admitted them to show GM somehow had notice of the defect alleged here, and so to support punitive liability. Plaintiffs proceeded to use them to prove defect too. That was error several times over. (SAB:79-84)

Plaintiffs start with misdirection: The “1241s were being offered to establish notice of sudden acceleration incidents, not notice of defective cruise controls.” (SRB:29, 60, 72) That is incorrect. Plaintiffs’ theory, start to finish, was based on a

“specific” cruise control defect – Sero’s transient charge. It is also self-defeating. GM’s supposed “notice” of alleged incidents with unknown causes and no connection to the alleged “dangerous condition that resulted in the litigated accident” is not relevant to anything. Plaintiffs’ “notice” argument still just “begs the question, notice of what?” *General Motors Corp. v. Moseley*, 447 S.E.2d 302, 307 (Ga.Ct.App.1994), *abrogated on other grounds by Webster v. Boyett*, 496 S.E.2d 459 (Ga. 1998).

Plaintiffs also misconstrue the record. It is not true that “each” of the 1241s “did not involve pedal error” (SRB:61); Wallingford admitted he could not rule it out in some. (T:491; SAB:37; SRB:30) It is also not correct that each 1241 “driver had placed the car into reverse or drive from park.” (SRB:61) Some involved a “double event” that did not occur here. (SAB:37) Others reported drivers with a foot on the brake, everyone agreed not the case here; and without dispute dozens involved no cruise control at all, so under no theory had any relevance whatsoever.<sup>4</sup>

Besides, the presence of a cruise control, while necessary, is not sufficient. It is undisputed most cars have one, but its presence does not remotely suggest, let alone carry the burden of proving, that it caused any other incident, let alone each one. Indeed, all

---

<sup>4</sup> Plaintiffs’ quibbles (SRB:61, 77) about the number without cruise are wrong and anyway miss the point. First, Wallingford did not know whether “virtually all” meant 70, 80, or 90%, so by his estimate 21-63 of the report vehicles had no cruise. (T:391-92) Second, it was *Plaintiffs’* burden to prove similarity as to each and every other incident, including the obvious, dispositive criterion that the car had a cruise control.

cars have drivers, so by Plaintiffs' reasoning pedal error as or more likely caused those other incidents. That is the problem with admitting them. Plaintiffs have no answer.

Instead, Plaintiffs offer another false, but repeated, premise: "GM stipulated that sudden acceleration incidents can have only two causes: pedal error and the cruise control." (SRB:34, 45, 69, 70) That is incorrect. First, there was no such stipulation. *See Peters*, 2006 WL 88563, at \*5. The single snippet of argument Plaintiffs cite (SRB:45, 70) was not an agreement, was not relied on, and therefore was not binding. *See Vaughn v. Michelin Tire Corp.*, 756 S.W.2d 548, 557 (Mo.App.S.D. 1988).<sup>5</sup> Second, it would not help Plaintiffs if it were. According to the "stipulation," the incidents in cars without cruise controls were caused by pedal error, so they were inadmissible on any theory.

Third, in any event, the undisputed evidence is to the contrary. *See Sebree v. Rosen*, 393 S.W.2d 590, 602 (Mo.banc 1965). GM agreed only that the pedal or cruise control could have opened the throttle "in *this* case." *Peters*, 2006 WL 88563, at \*5. However, many events could have caused sudden acceleration in the unproved other incidents – including pedal error, warped floor mats, stuck throttle cables, or brake or transmission malfunctions. *See id.* Moreover, cruise control malfunction can have many causes; many have nothing to do with any defect, much less the transient theory alleged here. (SAB:80 n.21) Plaintiffs' assertion that those other causes did not cause this

---

<sup>5</sup> It was also not made to "the jury." (SRB:69) It was also not raised below and so should not be considered. Mo.Sup.Ct.R. 83.08(b).

accident (SRB:34, 44) just proves our point. Those other causes could have caused the other incidents, so Plaintiffs failed to prove them similar to this one.

GM does not “essentially argue[ ] that this Court’s decision in *Newman* should be overruled.” (SRB:72) *Newman*, GM’s argument and the Court of Appeal’s decision are perfectly consistent. Plaintiffs’ strawman demonstrates their legal error. In *Newman*, plaintiff’s seat back collapsed in a rear-end collision, causing her to “ramp” backward out of the seat. *Newman*, 975 S.W.2d at 151-52. Plaintiff was allowed to offer evidence of *five* incidents involving collapsed seat backs in rear-end accidents to demonstrate ramping. *Id.* at 151. Thus, the other incidents’ cause was exactly the same as plaintiff’s accident’s. *Id.* at 152; *see also Eagleburger v. Emerson Elec. Co.*, 794 S.W.2d 210, 219 (Mo.App.S.D. 1990) (“undisputed that the decedent was electrocuted, that the source of the electricity was the power line near the tree, and that the electricity was conducted by the [ladder]”; 426 other incidents where aluminum ladders contacted power lines admissible); *Pierce v. Platte-Clay Electrical Cooperative, Inc.*, 769 S.W.2d 769, 773-74 (Mo. 1989) (plaintiff’s tractor hit an unmarked guy wire; *two* other incidents involving “contact between farm machinery and guy wires” admissible); *Jones v. Ford Motor Co.*, 559 S.E.2d 592, 602 (Va. 2002) (*four* other incidents admissible where proponents specifically testified to similar circumstances and causation). Here, by contrast, the hundreds of 1241s do not mention the cruise control, much less the claimed transient charge, as their cause; thus provide no notice of anything relevant; and are inadmissible. *See Jones*, 559 S.E.2d at 602 (unsworn written complaints inadmissible for failure to prove similarity).

They are also hearsay. Plaintiffs say they were admitted only for notice (SRB:68), but urged the jury to consider them to prove defect. (SAB:41-42) *Cf. State ex rel State Highway Com. v. Casey*, 490 S.W.2d 373, 377 (1973). Indeed, Plaintiffs argue they were admissible to “refute[ ] GM’s defense.” (SRB:76) Thus, Plaintiffs were required, but failed, to establish an exception for each level of hearsay in each report. *See* Mo.Rev.Stat. § 490.680 (2004); cases cited at SAB:83.

Plaintiffs devote many pages to the history of the trial court’s sanction order, but it does not cure the problem. (SRB:62-68) The parties’ discovery disputes were addressed before trial. They are irrelevant here. So, in the end, is Plaintiffs’ lengthy analysis of the trial court’s discretion. Even if allowable, the sanction order did not address the 1241s’ dissimilarity, did not address other levels of hearsay in them, and approximately half of the reports introduced at trial were not subject to it anyway. (SAB:83-84; LF 596-641) Therefore, on its face, the order failed to provide a basis for the 1241s’ admission.

### **C. Prejudice**

Plaintiffs do not dispute that admitting seven witnesses’ dissimilar but frightening stories on the central and hotly contested issues in the case was prejudicial. (SAB:84-85)

They assert, however, that because “74 of the notice OSI’s involved W cars with cruise controls,” they were admissible, and there was no harm in admitting 139 more. (SRB:77) That is wrong twice over. First, the mere presence of a cruise control means nothing. (pp.22-23, above) Second, Plaintiffs ignore what really happened. They told the jury from beginning to end those “hundreds of consumer complaints” would “prove

to you that the car was responsible for this accident.” If you have “any doubts” just “ask for” them. “What better proof is there”? (T:236, 243-44, 1453-54)

Reversal is required.

**IV. Erroneous Exclusion Of GM’s Rebuttal Evidence**

The exclusion of Moffatt’s opinion – offered to support his previously disclosed opinion and rebut Plaintiffs’ repeated assertion that both it and GM’s entire case hinged on whether one or two of the Oldsmobile’s tires crossed the landscape timbers – unfairly bolstered Plaintiffs’ case, prejudiced GM’s, and requires reversal. (SAB:86-90)

**A. The Error**

Plaintiffs’ headline is erroneous. (SRB:84, citing T:1280) GM did not say Moffatt’s two-tire opinion was “brand new.” It explained Moffatt’s revised calculation, based on both tires crossing the timbers, was new, but merely supported his unchanged opinion: “This is not a new opinion.” (T:1281-83)

In fact, the opinion did not change at all. *Peters*, 2006 WL 88563, at \*17-18. Plaintiffs’ recitation of the purported “new” opinion is self-defeating:

<u>Trial Opinion</u>	<u>Deposition Opinion</u>
“that the Cutlass traveled 95 feet, across the street, over curbs on either side of the street, uphill, climbing a planter that was approximately one foot off the ground, all with no acceleration ... <i>even if two tires</i>	that the Cutlass traveled 95 feet, across the street, over curbs on either side of the street, uphill, climbing a planter that was approximately one foot off the ground, all with no acceleration ... <i>if one tire</i>

<p>went over the planter.”</p> <p>(SRB:84-85 (emphasis added))</p>	<p>went over the planter.</p>
--	-------------------------------

Moffatt’s opinion, based on the “same” “simple mathematical calculation” he offered at deposition and trial, supported, and “d[id] not change,” his previously disclosed opinion that the car reached its resting point on its own momentum. (T:1326-28) He simply input a new number into the same equation. (T:1280-82[Moff.]) “Testimony, even when phrased in the form of an opinion, that interprets or supports opinions contained in depositions is not improper.” *Blake v. Irwin*, 913 S.W.2d 923, 931-32 (Mo.App.W.D. 1996); cases cited at SAB:87.

Plaintiffs respond, again for the first time, that GM failed to preserve the issue. (SRB:86-87) The argument should be ignored, *see* Rule 83.08(b), or, if considered, rejected. Moffatt’s sworn offer of proof showed without contradiction the opinion was not new. (SAB:47) Plaintiffs do not address that.

Plaintiffs’ cases – involving brand new opinions revealed at trial – are inapposite. *See Green v. Fleishman*, 882 S.W.2d 219, 222-23 (Mo.App.W.D. 1994) (“there was simply a 180 degree change from no opinion [at deposition] to one of negligence [at trial]”); *Whitted v. Healthline Mgmt., Inc.*, 90 S.W.3d 470, 477 (Mo.App.E.D. 2002) (at deposition, expert “was unable to pinpoint [cause of death],” yet “at trial, [he] explicitly stated that Patient’s death was caused by cell necrosis”); *Pasalich v. Swanson*, 89 S.W.3d 555, 559 (Mo.App.W.D. 2002) (expert “changed his opinion as to what caused the

damage to [plaintiff] between the time of his deposition and the time of trial”).<sup>6</sup>

The opinion was also admissible whether or not previously disclosed, on two independent grounds: GM was allowed to rebut Plaintiffs’ (erroneous) “one-tire-versus-two” premise and Plaintiffs, having raised the issue, waived the right to object. *See* cases cited at SAB:88. Plaintiffs respond by reversing the facts. They contend, without citation, that they “simply highlighted the differences” between Moffatt’s and Wallingford’s opinions; and that “GM deci[ded] to hide Moffatt’s opinion” until trial. (SRB:89) Plaintiffs are incorrect: (1) There is no evidence “GM deci[ded] to hide” anything; and (2) Plaintiffs told jurors, without factual support, that not just Moffatt’s testimony, but “GM’s entire theory,” rested on the opinion “that this car only crossed these landscape timbers with one tire.” (T:240-41, 1450-51) Plaintiffs are also incorrect that *Mische v. Burns*, 821 S.W.2d 117, 119 (Mo.App.W.D. 1991), is limited to an “improper subject of inquiry.” (SRB:92) “In Missouri, the law holds that a party who opens up a subject is held either to be estopped from objecting to its further development or to have waived his right to object to its further development.” *Id.*; *see also Perkins v. Runyan Heating & Cooling Serv.*, 933 S.W.2d 837, 840 (Mo.App.W.D. 1996).

---

<sup>6</sup> *Vititoe v. Lester E. Cox Med. Centers*, 27 S.W.3d 812, 818-19 (Mo.App.S.D. 2000), involved a fact witness, and found no obligation to supplement deposition testimony, notwithstanding that the trial testimony was directly opposite.

## **B. Prejudice**

Plaintiffs do not dispute the prejudice from excluding Moffatt's testimony, compounded by Plaintiffs' unwarranted attack on GM's credibility: If GM "will come in here and try to tell you that only one tire went over these landscape timbers, they'll try to tell you anything." (T:1450-51)

## **V. Grossly Excessive Compensatory Awards**

### **A. Mr. Peters' Award**

Plaintiffs cite no case where a consortium award approached Mr. Peters' \$10 million award; ignore some of the cases that prove it grossly excessive (SAB:91); and rely on others that confirm it is. (SRB:101) *See Oliver v. Cameron Mut. Ins. Co.*, 866 S.W.2d 865 (Mo.App.E.D. 1993) (award \$9,925,000 less than this case); *Patrick v. Alphin*, 825 S.W.2d 11 (Mo.App.E.D. 1992) (award \$9,600,000 less); *Hodges v. Oberdorfer Motors, Inc.*, 634 S.W.2d 205 (Mo.App.E.D. 1982) (award \$9,996,500 less); *Newman*, 975 S.W.2d 147 (Mo.banc 1998) (award \$9,500,000 less).

Plaintiffs argue, without citation, that "[b]ecause consortium damages are derivative of the primary-injured-party's damages, it is reasonable to consider the ratio between the two types of damages when determining whether a consortium award is excessive." (SRB:100) Plaintiffs contradict Missouri's remittitur statute, which requires consideration of *awards* (not ratios) in similar cases, *Emery*, 976 S.W.2d at 448; and Missouri's loss of consortium law, which provides that one spouse's claim is "separate and independent" of the other's. *See Shine v. Southwestern Bell Tel.*, 737 S.W.2d 203, 204 (Mo.App.E.D. 1987).

*Lohman* does not help Plaintiffs. The award was not challenged on appeal, so its amount was not “approved,” *Emery*, 976 S.W.2d at 448, and in any event was \$6.6 million lower than this one.<sup>7</sup> *Lohman v. Norfolk & Western Railway Co.*, 948 S.W.2d 659 (Mo.App.W.D. 1997). Plaintiffs do not mention that.

This award should be substantially remitted.

### **B. Mrs. Peters’ Award**

Mrs. Peters’ \$20 million award – \$8,360,319 in economic and \$11,639,681 in non-economic losses based on a 15-year life expectancy – was excessive compared to similar cases.

Plaintiffs invent another “ratio” standard, but rely on cases involving far smaller awards. See *Ellis v. Kerr-McGee Chem., L.L.C.*, No. ED 74835, 1999 WL 969278 (Mo.App.E.D. 1999) (award \$19,000,000 less than award here); *Larabee v. Washington*, 793 S.W.2d 357, 358-59 (Mo.App.W.D. 1990) (\$19,900,000 less); *King v. Unidynamics Corp.*, 943 S.W.2d 262, 266 (Mo.App.E.D. 1997) (\$19,850,000 less); *Graham v. County Med. Equip. Co., Inc.*, 24 S.W.3d 145 (Mo.App.E.D. 2000) (\$19,475,000 less).

*Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 873 (Mo.banc 1993) (SRB:98), involved medical malpractice, so § 537.068 “shall not apply” to it. *Firestone v. Crown Ctr. Redevelopment Corp.*, 693 S.W.2d 99, 110 (Mo.banc 1985) (SRB:98), refused to consider remittitur because, at the time, “[t]he doctrine [wa]s not a provision of statute or rule in Missouri.”

---

<sup>7</sup> Its unapproved, legally irrelevant “ratio” was also 25% higher than this one.

In the end, Plaintiffs rely solely on *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226 (Mo.banc 2001), but one case does not establish a “range of fair and reasonable” awards. (SRB:98) *Contrast Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439, 448 (Mo.banc 1998). When that range is considered, this \$20 million award must be remitted.

## **VI. No Submissible Case On Punitive Liability**

Plaintiffs’ punitive damage theory is that “GM knew of the hazard of sudden acceleration from an electrical fault in the three-mode cruise control system” but “failed to . . . heed the warnings of its [engineers].” (SRB:106) The theory is invented, start to finish.

To start with, there was no real world hazard. *Peters*, 2006 WL 88563, at \*21. GM’s 3-mode cruise – with its power switch, speed inhibitor, resistors, capacitors, diodes and brake shut-offs included on this car – was without dispute highly effective to prevent Sero’s hypothetical transient defect from manifesting in the real world. Sero could not even duplicate it in the lab. All who examined Sero’s theory that it could nevertheless occur in the real world – including NHTSA, GM, and Hughes – rejected it. (SAB:33-36, 45) GM cannot be punished for designing a product it believed – with good reason – was safe. (2) When GM engineers ultimately recommended the stepper cruise, GM implemented it just as they recommended, on the timetable they proposed. *Peters*, 2006 WL 88563, at \*20; SAB:43-44. GM also cannot be punished for improving its product.

Plaintiffs largely ignore all of that, and respond with theoretical concerns and speculative challenges to NHTSA’s considered judgment. None of it comes close to justifying this “extraordinary,” “harsh” remedy. The award cannot stand on any theory.

## **A. The Legal Standards**

Plaintiffs pick at the standard, insisting GM “simply misstates the law” that an “evil motive” is required. (SRB:106) However, “the defendant’s conduct in selling its product [is] outrageous because of an evil motive or reckless indifference to the rights of others.” *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 374 (Mo. 1993); cases cited at SAB:95-96.

Plaintiffs nevertheless agree they had to prove “a high degree of probability of injury” and that GM “knew the defective condition and danger” and “showed complete indifference to or conscious disregard for the safety of others.” (SRB:112, 114) They proved neither with any, much less clear and convincing, evidence. There was nothing to punish here.

## **B. First Failure of Proof: No Highly Probable Risk Of Substantial Injury**

Plaintiffs point to no evidence that their alleged transient defect had ever manifested in the real world; or that Sero verified that it manifested here, or calculated the probability that it could manifest anywhere. Thus, any risk was miniscule, the opposite of “highly probable.” *See Hoover’s Dairy Co. v. Mid-America Dairymen*, 700 S.W.2d 426, 436 (Mo.banc 1985); cases cited at SAB:99-100.

Plaintiffs have no response. Instead, they claim GM documents, Meads and Rozanski proved the risk. (SRB:106) They are way off base. Meads’ hot-wired testing produced a result the GM engineers “weren’t going to tolerate” in the real world, and GM did not tolerate it. It installed those myriad safety devices to ensure Meads’ artificial lab result never manifested in the real world. It never did. *Peters*, 2006 WL 88563, at \*21.

Plaintiffs also point to the 200-plus other incidents. (SRB:108) Those incidents remain the problem, not the answer. (Part III, above) Many failed to identify the presence of cruise control or involved braking or pedal error; none identified a cause; and none identified a defect in the cruise control, much less Sero's transient. Those dissimilar incidents, inadmissible to begin with, proved nothing relevant, much less conscious disregard of a known, probable risk by clear and convincing evidence. *See Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151, 160 (Mo.banc 2000).

**C. Second Failure of Proof: No Evil Motive or Reckless Indifference**

GM's extensive testing and engineering judgment, in conformity with regulators', shows conscious regard, not disregard, for safety, and thus negates the mental state required for punitive damages, even if the judgment were incorrect. *See Bhagvandoss v. Beiersdorf, Inc.*, 723 S.W.2d 392, 398 (Mo.banc 1987); cases cited at SAB:97-99.

Where no consumer has *ever* been injured by Plaintiffs' hypothesized transient, GM cannot be charged with knowledge that its product was dangerous, much less unreasonably so. Indeed, further reducing the "stakes" (SRB:115), even if the theoretical defect could happen in the real world, there is virtually no risk of substantial injury because the driver could and would simply stop it, easily and immediately, by pressing the brake. Plaintiffs' hyperbole – an "uncontrolled, lethal projectile" (RB:108) – ignores that undisputed fact.

Thus, GM believed, like everyone else, that the resistor array and other protective devices it installed on the three-mode cruise would prevent any such occurrence.

(SAB:35-36) That undisputed evidence hardly “tilt[s] the scales” toward punitive liability. *See Lewis*, 5 S.W.3d at 584; cases cited at SAB:101.

Plaintiffs’ assertion that the “security objectives Meads recommended” in the CPPO were “abandoned” (SRB:22) is false. GM decided against adopting the CPPO, but without dispute GM management did exactly what Meads and Rozanski proposed; it replaced the 3-mode cruise with the stepper, “across the board” and on the schedule they proposed. *Peters*, 2006 WL 88563, at \*20; SAB:102-03. That implementation, Plaintiffs admit, met the “security standards in the CPPO” (SRB:21-23), and was action, not “total inaction.” (SRB:117) Plaintiffs have no answer to the real facts.

Plaintiffs’ attack on GM’s authority (RB:114-16), based on disregard of that evidence, likewise fails. Efforts to improve a product, even if inadequate or untimely (GM’s were neither), belie conscious disregard. *See Bhagvandomoss*, 723 S.W.2d at 398; cases cited at SAB:105. Plaintiffs point to no case saying otherwise.

A defendant also cannot be faulted for failing to take immediate “drastic action” where a product’s safety is a matter of reasonable dispute. *Bhagvandomoss*, 723 S.W.2d at 399; cases cited at SAB:106. Here, NHTSA, the federal agency charged with vehicle safety, found “the probability of [sudden acceleration] resulting from cruise-control malfunction is extremely remote,” and the risk that “intermittent [electrical] failures” could actuate the throttle without leaving evidence “virtually impossible.” It also found pedal error, not any defect, the “predominant” cause of sudden acceleration. Japan’s and Canada’s agencies agreed. (SAB:33-34) Sero disagreed, but conceded reasonable engineers could differ. (PEX:586 pp.201-02, 221-22[Sero]) Thus, GM cannot be

punished. *Bhagvandos*, 723 S.W.2d at 399. Indeed, GM proposed and implemented the improved stepper *despite* continued, admittedly reasonable, debate about the validity of issues raised regarding the 3-mode system.

Plaintiffs do not dispute those findings, but instead divert. First, they claim the NHTSA report that “question[ed] the validity of Sero’s theory” issued in 1999. (SRB:109, 111) But NHTSA’s 8-year scientific study GM refers to (SAB:33-34, 98) issued in January 1989, right when design decisions relevant to Plaintiffs’ vehicle were being made. (PEX:574 pp.15-26[Roz.])

Next, Plaintiffs insist NHTSA’s reports “do not provide any basis for finding a vehicle defect-free” because it was not a “regulatory determination.” (SRB:109-10) Plaintiffs miss the point. Even assuming a defect, GM cannot rationally be found by clear and convincing evidence to have consciously disregarded a risk NHTSA found “virtually impossible.” *See Alcorn*, 50 S.W.3d at 248-49. In any event, NHTSA made a reasoned judgment after exhaustive study; Plaintiffs fail to explain why that judgment was not a “regulatory determination,” or why the distinction matters. It doesn’t. None of Plaintiffs’ cases says otherwise.

Finally, Plaintiffs claim GM failed to provide NHTSA with information relating to the proposed switch from the 3-mode to the stepper and customer complaints of sudden acceleration. (SRB:111) But without dispute GM gave NHTSA all information it requested, and later supplemented it voluntarily. (SAB:n.28) Plaintiffs’ speculation that “a fully informed NHTSA might have reached a different conclusion” had GM provided information NHTSA never requested cannot justify submission of punitive damages. *See*

*May v. AOG Holding Corp.*, 810 S.W.2d 655, 663 (Mo.App.S.D. 1991). That speculation is also contrary to Missouri law. See *McDonagh*, 123 S.W.3d at 152 (“A reviewing court will refrain from substituting its judgment for that of the [agency] on factual matters”). It is also unconstitutional. See *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 349-350 (2001); SAB:102. Plaintiffs do not address any of that.

The punitive award cannot stand on any theory.

## **VII. Grossly Excessive Punitive Award**

### **A. Legal And Constitutional Standards**

This award, the product of passion and prejudicial error, is excessive and unconstitutional by any standard and every test. (AB:98-103)

### **B. Measure 1: Comparison to Other Awards**

This punitive award is almost twice the largest affirmed in Missouri, \$26.5 million. *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155 (Mo.App.W.D. 2001); cases cited at SAB:109. Plaintiffs’ attempt to justify that excess only confirms it; their cases – three involving wrongful death – involve awards that are fractions of this one. (SRB:120)

### **C. Measures 2-4: The BMW and Letz Factors**

The award cannot withstand constitutional scrutiny.

**Reprehensibility.** GM’s conduct was not reprehensible at all, so punitive damages were improper to begin with. (SAB:110; Part VI, above) Even assuming the jury’s reprehensibility finding were supported, Plaintiffs misunderstand *BMW*. (RB:131) The question then is where GM’s conduct ranks *on the scale of reprehensible conduct*.

*See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991). This is not an intentional tort case (SRB:106), or anything close. GM tested its product extensively, studied potential problems, took steps to avoid them, and followed its engineers' recommendations. Even assuming GM were somehow on notice of a defect, and could be punished because it manifested for the first time here, GM's conduct is near (and we submit well below) the floor of reprehensibility. *Contrast Letz*, 975 S.W.2d at 178 (defendant knew of specific defect, refused to warn of or replace defective part, and made policy decisions to save \$48 million by not repairing it).

**Ratio to Actual or Likely Harm.** "When compensatory damages are substantial," a 1:1 ratio may be "the outermost limit of the due process guarantee." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003). This award is almost twice the "substantial," indeed excessive, \$30 million compensatory award, so the ratio is nearly twice that outermost limit for the most reprehensible conduct imaginable – and this is certainly not that case. (SAB:110-11)

Plaintiffs' unreviewed district court decisions provide no constitutional guidance. (SRB:122-23) *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001). The compensatory awards in their other two cases are nowhere near this one. *Romo v. Ford Motor Co.*, 113 Cal.App.4th 738 (2003) (\$5,000,000 for multiple parties in wrongful death action); *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003) (\$360,000 in intentional discrimination action). Thus, Plaintiffs again prove GM's point: The ratio should be smaller, the larger the compensatory award. (SAB:112)

**Comparison to penalties.** No legislature condemns GM’s conduct; it conformed to the judgment of the federal agency charged with regulating it. (AB:103) Deference to that judgment requires the sanction be zero. *Haslip*, 499 U.S. at 18.

Plaintiffs respond that the Missouri legislature “has condemned the actions which the jury found that GM committed in this case” as assault, “a class C felony.” (RB:133) That is remarkable. No criminal conduct was, or could have been, alleged, much less established beyond a reasonable doubt. *See State Farm*, 538 U.S. at 428.

**D. Improper Measure: GM’s Financial Condition**

Plaintiffs agree GM’s wealth cannot justify an otherwise unconstitutional award or create a “windfall” for plaintiffs, and point to no evidence of it anyway. (RB:133-34)

**VIII. Offset and Prejudgment Interest**

Plaintiffs do not contest the failure to offset Plaintiffs’ prior settlement, or any element of *Summers*’ three-part test. (SRB:125-26) The award should be reduced as described in the opening brief. (SAB:114)

## CONCLUSION

The judgment should be reversed and GM awarded relief as set forth at SAB:116.

DATED: August 22, 2006

BRYAN CAVE LLP

By: \_\_\_\_\_

Thomas C. Walsh, #18605  
Attorneys for Appellant  
General Motors Corporation

Of Counsel:

Frank M. Hinman (*pro hac vice*)  
Bingham McCutchen LLP  
Three Embarcadero Center  
San Francisco, CA 94111

Rodney E. Loomer, #24013  
Turner ,Reid, Duncan, Loomer & Patton, P.C.  
PO Box 4043  
Springfield, MO 65808

## CERTIFICATE OF SERVICE

I am over eighteen years of age, not a party in this action, and employed in Jefferson City, Missouri at 221 Bolivar Street, Jefferson City, Missouri 65101-1574. I am readily familiar with the practice of this office for collection and processing of correspondence for next business day delivery, and they are deposited that same day in the ordinary course of business.

On August 22, 2006, I served the attached:

**SUBSTITUTE REPLY BRIEF OF APPELLANT (HARD COPY AND WORD VERSION ON DISKETTE)**

- (BY FAX) by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- (BY MAIL) by causing a true and correct copy of the above to be placed in the United States Mail at San Francisco, California in sealed envelope(s) with postage prepaid, addressed as set forth below. I am readily familiar with this law firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence is deposited with the United States Postal Service the same day it is left for collection and processing in the ordinary course of business.
- (EXPRESS MAIL/OVERNIGHT DELIVERY) by causing a true and correct copy of the document(s) listed above to be delivered by Federal Express in sealed envelope(s) with all fees prepaid at the address(es) set forth below.
- (PERSONAL SERVICE) by causing a true and correct copy of the above documents to be hand delivered in sealed envelope(s) with all fees fully paid to the person(s) at the address(es) set forth below.

Mark J. Evans, Esq.  
Bradley D. Kuhlman, Esq.  
Evans & Kuhlman  
105 E. 5th Street, Suite 102  
Kansas City, MO 64106

Michael Blanton, Esq.  
Swanson & Midgley  
2420 Pershing Road, Suite 400  
Kansas City, MO 64081

Edward D. Robertson, Esq.  
Anthony L. DeWitt, Esq.  
Bartimus, Frickleton, Robertson  
& Gorny, P.C.  
715 Swifts Highway  
Jefferson City, MO 65109

I declare that I am an attorney of record for Appellant General Motors Corporation, that I directed the service that was made and that this declaration was executed on August 22, 2006, at Jefferson City, Missouri.

---

Edward F. Downey, #28866  
Attorneys for Appellant  
General Motors Corporation

**CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c) & (g)**

Comes now Edward F. Downey and hereby certifies, pursuant to Rule 84.06(c) & (g) as follows:

1. That this brief includes the information required by Rule 55.03.
2. That this brief complies with the limitations contained in Rule 84.06(b).
3. That there are 7,750 words contained in this brief.
4. That the enclosed computer disk has been scanned for viruses and is certified to be virus-free.

Dated: August 22, 2006

BRYAN CAVE LLP

By: \_\_\_\_\_  
Edward F. Downey, #28866  
Attorneys for Appellant  
General Motors Corporation

