

IN THE SUPREME COURT OF MISSOURI

RANDALL D. PETERS,)	
Individually and as Next Friend)	
For Constance Marie Peters,)	
)	
Respondent,)	
)	
v.)	SC87559
)	
GENERAL MOTORS CORPORATION)	
)	
Appellant.)	

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

**BRIEF OF AMICUS CURIAE
MISSOURI ASSOCIATION OF TRIAL ATTORNEYS**

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INTEREST OF THE AMICUS CURIAE

The issues implicated by the opinion of the Western District Court of Appeal ("Court of Appeals") in this case are of vital importance and interest to others besides the immediate parties, including the Missouri Association of Trial Attorneys ("MATA"). MATA is also deeply concerned about the radical proposals that have been presented to this Court in the amicus brief that has been filed on behalf of General Motors Corporation by The Product Liability Advisory Council, Inc. ("PLAC") and the Missouri Organization of Defense Lawyers ("MODL").

MATA is a non-profit, professional organization consisting of approximately 1,400 trial attorneys in Missouri, most of whom represent citizens of the state of Missouri. For over fifty years, MATA lawyers have vigilantly worked to protect their clients and Missouri citizens from injustice. In doing so, MATA strives to promote the administration of justice, to preserve the adversary system, and to apply its knowledge and experience in the field of law to advance the interests and protect the rights of individuals. MATA's members and their clients will be directly affected by the Court's decision in this case.

MATA members regularly represent clients in product liability litigation in the state of Missouri. One of the primary types of evidence used in product liability litigation is evidence of other similar incidents ("OSI evidence"). OSI evidence is regularly used in product liability actions to establish the existence of a defect or to establish notice of incidents similar to that which was caused by the defect in the subject case.

The Court of Appeals' opinion in this case substantially alters existing Missouri law with regard to admission of OSI evidence. Specifically, the Court of Appeals' opinion alters (1) the standard for admission of OSI evidence in the trial court, and (2) the standard of review that an appellate court applies in determining whether a trial court abused its discretion by allowing the admission of OSI evidence.

The amicus brief filed by PLAC and MODL goes even further than the Court of Appeals' opinion and essentially proposes that OSI evidence not be allowed in product liability cases at all. Thus, PLAC and MODL propose reversing a substantial body of Missouri case law.

The Court of Appeals' opinion also deviates from existing Missouri law in that the opinion holds that an expert should be allowed to offer new opinions from the stand during trial even though the expert did not previously disclose those opinions to the opposing party during discovery. In reaching this conclusion, the Court of Appeals rejects the substantial discretion that is generally afforded the trial court in making such determinations.

The substantial modifications of existing Missouri law that are set forth in the Court of Appeals' opinion, and the radical modifications to Missouri law that are proposed by PLAC and MODL, would have a significant impact upon MATA members and their clients in future product liability litigation in Missouri courts. Thus, MATA presents this amicus brief to address these issues on behalf of MATA's members and their clients.

STATEMENT OF FACTS

Amicus Curiae Missouri Association of Trial Attorneys adopts Respondent's Statement of Facts.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF OTHER SIMILAR INCIDENTS FOR THE PURPOSE OF ESTABLISHING A DEFECTIVE CONDITION AND FOR THE PURPOSE OF ESTABLISHING NOTICE OF OTHER SUDDEN ACCELERATION INCIDENTS THAT WERE NOT THE RESULT OF PEDAL MISAPPLICATION BECAUSE THE ADMISSION OF SUCH EVIDENCE IS CONSISTENT WITH MISSOURI LAW AND THE TRIAL COURT ADMITTED THE EVIDENCE PURSUANT TO AN ADMISSION PROCEDURE THAT COMPLIES WITH THE STANDARDS SET FORTH UNDER MISSOURI LAW.

A. This Court Should Reject The Analysis Of The Court Of Appeals' Opinion In That The Court Of Appeals' Opinion Modifies The Existing Standard For The Admission Of Evidence Of Other Similar Incidents.

The Court of Appeals' opinion alters existing Missouri law regarding the admission of OSI evidence in three significant respects: (1) the court requires a plaintiff to establish that the products involved in the similar incidents suffered from the exact

same defect as the subject product, (2) the court requires a plaintiff to make the showing of similarity solely by means of direct evidence, and (3) the court requires that similar incidents that are admitted for purposes of notice or knowledge involve the exact same product configuration. These requirements stand in stark contrast to existing Missouri law regarding the admission of OSI evidence.

Missouri courts have consistently recognized that OSI evidence can be used in a product liability action for the following purposes: (1) to prove the existence of a particular defect or defective condition, (2) to show that the defect caused the injury in question, (3) to show the risk that was created by the defendant's conduct, or (4) to show that the defendant had notice of other incidents similar to the incident in which the plaintiff was injured. See, e.g., Govreau v. Nu-Way Concrete Forms, Inc., 73 S.W.3d 737, 741-42 (Mo. App. 2002). "In products liability cases, evidence of an accident similar in nature to that which injured the plaintiff is admissible provided the evidence is relevant and sufficiently similar to the injury-causing incident so as to outweigh the concerns of undue prejudice and confusion of the issues." Thornton v. Gray Automotive Parts Co., 62 S.W.3d 575, 583 (Mo. App. 2001). "To be similar, each occurrence must be (1) of like character, (2) occur under substantially the same circumstances, and (3) result from the same cause." Thornton, 62 S.W.3d at 583. "The two occurrences do not need to be completely symmetrical, however." Id.

"When determining the relevance of evidence of similar occurrences, the court must consider the purpose for which the evidence is sought to be used [and] whether it is sufficiently similar for that purpose." Gerow v. Mitch Crawford Holiday Motors, 987

S.W.2d 359, 365 (Mo. App. 1999). When OSI evidence is offered only for the purpose of establishing notice, the standard for admission is less demanding. Stacy v. Truman Medical Center, 836 S.W.2d 911, 926 (Mo. Banc 1992).

The Court of Appeals' opinion substantially deviates from the above-referenced standards regarding the admission of OSI evidence.

- 1. The Court of Appeals deviated from existing Missouri law by holding that a plaintiff is required to establish that the products involved in similar incidents suffered from the exact same defect as the subject product.**

Missouri courts require that a plaintiff in a product liability action, in order to present OSI evidence, must first establish that the similar incidents resulted from the same general cause. See, e.g., Stokes v. National Presto Industries, Inc., 168 S.W.3d 481, 484 (Mo. App. 2005); Thornton, 62 S.W.3d at 583; Gerow, 987 S.W.2d at 364-65. In this case, this means that Plaintiffs were required to establish that the seven similar incidents that were admitted on the issue of defect were caused by sudden accelerations that occurred under similar circumstances (i.e. sudden acceleration with no pedal misapplication). However, the Court of Appeals required Plaintiffs to go further and establish that the cruise controls in the vehicles involved in the similar incidents were actually defective and that the defect caused the other similar incidents. The higher standard of admissibility imposed by the Court of Appeals is entirely inconsistent with existing Missouri law.

Missouri courts have consistently recognized that OSI evidence is proper in a product liability action. See, e.g., Stokes, 168 S.W.3d at 484; Thornton, 62 S.W.3d at 583. Indeed, Missouri courts recognize that OSI evidence is admissible “to prove the existence of a particular physical condition or defect.” Gouvreau, 73 S.W.3d at 741-42. However, MATA is not aware of a single Missouri case in which a court has held that the plaintiff must establish the existence of a defect in the similar incident as a prerequisite to admissibility of the similar incident.

Clearly, if OSI evidence is admissible to establish the existence of a defect, then the existence of a defect will generally not have been established prior to the admission of the OSI evidence. This is simply a matter of common sense. Why would the plaintiff offer OSI evidence to establish the existence of a defect if the plaintiff had already definitively established the existence of a defect?

The Court of Appeals’ opinion turns common sense on its head by requiring a plaintiff to establish the existence of a defect before presenting evidence that supports a finding of defect. This is like saying that a plaintiff has to definitively establish negligence before the plaintiff will be allowed to present evidence of negligence. It simply doesn’t make any sense. Nevertheless, the Court of Appeals adopted this cart-before-the-horse rule as the standard for admission of OSI evidence in a product liability action in Missouri. This new rule proposed by the Court of Appeals is a substantial deviation from existing Missouri law. Indeed, MATA is not aware of a single Missouri case that supports the new standard for admission of OSI evidence that was applied by the Court of Appeals in this case.

Under the new standard proposed by the Court of Appeals, a plaintiff would be required to establish the existence of defect with regard to historical events before using those events to establish the existence of a defect in the present event. The Court of Appeals' analysis would require a mini-trial with respect to each similar incident in which the plaintiff would be required to establish the very fact (i.e. the existence of defect) that the plaintiff is attempting to establish in his case-in-chief. Clearly, the Court of Appeals' analysis regarding the admissibility of OSI evidence contradicts both existing law and common sense.

In short, the Court of Appeals' analysis deviates from existing Missouri law by requiring a plaintiff, as a prerequisite to the admission of OSI evidence, to establish the existence of a defect in the similar incidents. This Court should reject the new standard proposed by the Court of Appeals.

2. The Court of Appeals deviated from existing Missouri law by holding that a plaintiff is required to establish the substantial similarity of similar incidents through direct evidence only.

The Court of Appeals has also proposed a substantial revision to existing Missouri law by holding that the admissibility of OSI evidence can only be established by direct evidence, not by circumstantial evidence. This holding directly contradicts numerous Missouri cases that have recognized that circumstantial evidence may be used to establish the existence of a defect. See, e.g., Rauscher v. GM Corp., 905 S.W.2d 158, 160-61 (Mo. App. 1995); Wadlow v. Lindner Homes, Inc., 722 S.W.2d 621, 625 (Mo. App. 1986);

Klein v. General Elec. Co., 714 S.W.2d 896, 900 (Mo. App. 1986); Patterson v. Foster Forbes Glass Co., 674 S.W.2d 599, 604 (Mo. App. 1984); Uder v. Missouri Farmers Association, Inc., 668 S.W.2d 82, 93 (Mo. App. 1984); Williams v. Deere and Co., 598 S.W.2d 609, 612 (Mo. App. 1980); Williams v. Ford Motor Co., 411 S.W.2d 443, 447-48 (Mo. App. 1966).

In this case, the circumstances of each of the seven incidents that Plaintiffs offered on the issue of defect were such that the existence of a defect could be inferred from the facts of the incidents and from GM's admission that sudden acceleration incidents are either caused by pedal misapplication or cruise control malfunction. Nevertheless, the Court of Appeals held that the seven similar incidents were not admissible because Plaintiffs had failed to establish similarity by means of direct evidence (i.e. direct proof that the vehicles involved in the similar incidents had defective cruise controls). The standard imposed by the Court of Appeals is inconsistent with the well-recognized principle that circumstantial evidence may be used to establish the existence of a defect. Furthermore, the standard imposed by the Court of Appeals is inconsistent with general principles regarding the admission of OSI evidence. "It is not necessary that there be direct proof of the similarity." 32A C.J.S. Evidence § 771.

3. The Court of Appeals deviated from existing Missouri law by holding that OSI evidence that is presented solely on the issue of notice or knowledge must involve products that are identical to the product in issue.

In this case the trial court admitted 213 customer complaints into evidence solely on the issue of notice or knowledge of sudden acceleration incidents. Of these 213 customer complaints, 74 of the complaints specifically indicated that the vehicle in question was equipped with a cruise control. The other 139 customer complaints did not indicate one way or the other whether the vehicle was equipped with a cruise control. The Court of Appeals held that the 139 customer complaints that did not specifically note the presence of a cruise control were improperly admitted into evidence. The Court of Appeals' analysis of this issue failed to take into account a number of significant factors.

First, the Court of Appeals failed to adequately consider the purpose for which the customer complaints were being offered into evidence. “When determining the relevance of evidence of similar occurrences, the court must consider the purpose for which the evidence is sought to be used [and] whether it is sufficiently similar for that purpose.” Gerow, 987 S.W.2d at 365; see also 32A C.J.S. Evidence § 771 (“Whether an occurrence is sufficiently similar to the matter in litigation to warrant admissibility may depend on the underlying theory of the case.”).

In this case, the customer complaints were being offered to establish that GM had notice or knowledge of other sudden acceleration incidents that did not involve pedal

misapplication. All 213 of the customer complaints served to establish such notice, regardless of whether the vehicle in question had cruise control.

Apparently the Court of Appeals believed that the presence of a cruise control was crucial to the issue of similarity because the Plaintiffs were alleging a defect in the cruise control on the subject vehicle. However, this conclusion fails to recognize the purpose for which the customer complaints were being offered. If the customer complaints had been offered to establish the existence of a defect, then clearly the presence of the defective component would be a prerequisite to admission. But the customer complaints were not offered to establish defect. Rather, the customer complaints were offered for the limited purpose of establishing GM's notice or knowledge of other sudden acceleration incidents that were not the result of pedal misapplication. The presence or absence of a cruise control has no impact upon whether the incidents in question would serve to place GM on notice of other sudden acceleration incidents that were not the result of pedal misapplication.

The Court of Appeals also failed to adequately allow for the fact that a lower standard of admission applies to OSI evidence that is offered on the issue of notice. When OSI evidence is offered only for the purpose of establishing notice (as here), the standard for admission is less demanding. As Judge Elwood Thomas wrote for the Supreme Court in Stacy v. Truman Medical Center, 836 S.W.2d 911 (Mo. Banc 1992), regarding the admission of notice OSI's:

The proponent probably will want to show directly that the defendant had knowledge of the prior accidents, but the nature, frequency

or notoriety of the incidents may well reveal that defendant knew of them or should have discovered the danger by due inspection. Since all that is required is that the previous injury or injuries be such as to call defendant's attention to the dangerous situation that resulted in the litigated accident, the similarity in the circumstances of the accidents can be considerably less than that which is demanded when the same evidence is used for one of the other valid purposes.

Id. at 926; accord Benoit v. Missouri Highway and Transp. Comm., 33 S.W.3d 663, 670 (Mo. App. 2000).

Missouri courts have applied this lower standard of admissibility in product liability cases to allow admission of OSI evidence even when the specific incidents may not have involved the exact same cause. In Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo. App. 1978), the plaintiff sued the defendant automotive manufacturer under the theory that the vehicle was defective because a component of the fast idle cam was subject to break and, when broken, could cause the accelerator to stick. Id. at 658. At trial, the court allowed the plaintiff to admit evidence of 29 customer complaints of a jammed throttle “which **might have been attributable** to fast idle cam breakage.” Id. at 663. The court held that “[e]vidence that such reports had been received by Ford was admissible on the issue of knowledge.” Id. Similarly, the customer complaints were properly admitted in this case for the purpose of establishing GM's knowledge of other sudden acceleration incidents that were not the result of driver input.

The customer complaints were properly admitted on the issue of notice or knowledge because this case involved both negligence and failure to warn claims. "Where the theory of recovery is negligence, any knowledge or warning that defendant had of the type of accident in which plaintiff was injured clearly aids the jury in determining whether a reasonably careful defendant would have taken further precautions under all the facts and circumstances, which include the knowledge of defendant of prior accidents." Stacy, 836 S.W.2d at 926; accord Govreau, 73 S.W.3d at 742; Benoit, 33 S.W.3d at 669-70. GM was aware of a large number of customer complaints involving sudden acceleration incidents that were not the result of pedal misapplication. GM's knowledge of these incidents is relevant to establish that GM should have taken further precautions to determine what caused these incidents and to eliminate the cause for these incidents.

Finally, the Court of Appeals erred in assuming that OSI evidence is only admissible when the similar incidents involve exactly similar products. The recent decision in Stokes v. National Presto Industries, Inc., 168 S.W.3d 481 (Mo. App. 2005) illustrates that such exact similarity is not required.

In Stokes, the plaintiff attempted to admit evidence of other incidents in which a child had pulled over a deep fryer in order to establish the defendant's notice or knowledge of such incidents. Id. at 483. Some of these incidents involved the exact same model as the product in issue and some of these incidents involved different models. Id. The trial court held that the incidents involving the same model were admissible, but that the incidents involving similar models were excluded. Id. The

appellate court held that the trial court had abused its discretion in excluding the incidents involving similar models on the issue of notice or knowledge. Id.

If similar incidents are admissible even though they involve a different model, then surely similar incidents are admissible when the vehicles in question vary by the options that are included on the vehicle.

B. This Court Should Reject The Analysis Of The Court Of Appeals' Opinion In That The Court Of Appeals' Opinion Modifies The Existing Standard Of Appellate Review Regarding The Admission Of Evidence Of Other Similar Incidents.

In addition to modifying the existing standard for admission of OSI evidence at the trial level, the Court of Appeals' opinion also significantly alters the applicable standard of appellate review regarding the admission of OSI evidence. The Court of Appeals substituted its own judgment for that of the trial court, rather than reviewing the process that the trial court actually employed in order to make its determination regarding the admissibility of the OSI evidence. This method of review directly contradicts the standard set forth by this Court in Newman v. Ford Motor Co., 975 S.W.2d 147 (Mo. Banc 1998).

In Newman, this Court recognized that "[t]rial courts have wide discretion on the issue of admission of evidence of similar occurrences." Id. at 151. This Court further indicated that the discretion of the trial court is sufficiently broad that "[t]his Court's review is limited to whether the trial court determined that the evidence was relevant and

that the occurrence bore sufficient resemblance to the injury-causing accident.” Id. at 151-52; see also Pierce v. Platte-Clay Elec. Coop., Inc., 769 S.W.2d 769, 774 (Mo. Banc 1989) (“Our review is limited to a finding that the trial court first satisfied itself that the evidence was relevant to an issue of the case and that the occurrences bore sufficient resemblance to the injury-causing incident.”). In light of these standards, this Court recognized that when a defendant in a product liability action challenges the trial court's decision to admit evidence of other similar incidents, the defendant "has a very difficult burden to meet." Newman, 975 S.W.2d at 151.

In Newman, this Court held that the trial court's admission of OSI evidence does not constitute an abuse of discretion when the trial court has engaged in the following steps: (1) the trial court questioned the plaintiff's expert regarding the similarity of the other incidents, (2) the expert testified regarding the factors that were important to his determination of similarity, and (3) the expert testified that the other incidents were similar based upon application of the identified factors. Id. at 152.

In this case, Plaintiffs and the trial court exactly followed the procedure for the admission of OSI evidence that this Court set forth in Newman. Plaintiffs provided testimony of their expert witness regarding the similarity of the other similar incidents, Plaintiffs' expert identified specific criteria for determining whether the other incidents were similar, and Plaintiffs' expert testified that the other incidents were similar pursuant to the factors that had been identified. Based upon this detailed record, the trial court concluded that the OSI evidence was admissible. Nevertheless, the Court of Appeals

found that the trial court abused its discretion in admitting the OSI evidence. The Court of Appeals reached this conclusion by applying an entirely new standard of review.

Rather than considering the process that the trial court used to make its determination of admissibility – as dictated by Newman – the Court of Appeals engaged in its own independent assessment regarding admissibility of the OSI evidence. In doing so, the Court of Appeals gave no deference to the trial court’s determination, or to the process that the trial court applied in making that determination, as required by Newman. In short, the Court of Appeals substituted its own judgment for that of the trial court, rather than reviewing the process that the trial court actually engaged in to make its determination regarding the admissibility of the OSI evidence. This method of review directly contradicts the standard set forth by this Court in Newman.

The appellate court also failed to give any weight to the fact that a number of the Complaints had been deemed admissible pursuant to the discovery sanction that had been issued by the trial court. Once again, the appellate court disregarded the process that was followed by the trial court in making its determination regarding admissibility of OSI evidence, and instead engaged in its own independent assessment of the admissibility of the OSI evidence. The appellate court’s method of review with regard to the OSI evidence is clearly at odds with existing case law as set forth by this Court in Newman.

C. OSI Evidence Is Admissible For Purposes Of Rebuttal Even If It Does Not Meet The Standards For Admission For Purposes Of Defect Or Notice.

GM's primary defense in this case was that sudden acceleration incidents, including the incident involved in this case, are the result of pedal misapplication. In this regard, GM's expert, Daniel Crawford, testified that unexplained sudden acceleration incidents are always the result of pedal misapplication. The similar incidents that Plaintiffs admitted into evidence in this case were admitted, in part, to rebut the assertion of GM and its experts that sudden acceleration incidents are always the result of pedal misapplication. Clearly, evidence of numerous sudden acceleration incidents in which pedal misapplication had not occurred would tend to refute the contrary assertions of GM and its experts. Furthermore, the OSI evidence was properly admitted for this purpose under Missouri law.

"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 742. "When a material part of one party's defense is to show the infrequency of an occurrence, or that an occurrence is very rare, an opponent may present relevant evidence to refute the inferences raised by that defense." Gerow, 987 S.W.2d at 365.

In this case, GM did not merely assert that it is rare for an unexplained sudden acceleration to occur that is not caused by pedal misapplication: GM asserted that this

never happens. Thus, Plaintiffs were entitled to present evidence of sudden acceleration incidents that were not the result of pedal misapplication.

D. This Court Should Reject The Radical Proposals For Modification Of Missouri Law That Are Set Forth In The Amicus Brief Filed By PLAC And MODL.

Although PLAC and MODL do not come right out and say it in their amicus brief, they are essentially arguing that this Court should prohibit the use of OSI evidence in product liability cases. In fact, they go so far as to argue that the substantial similarity test that has been consistently applied by Missouri courts is nothing but dicta. (Amicus Brief of PLAC and MODL, p. 18). If PLAC and MODL will tell this Court that all Missouri law regarding the substantial similarity test is nothing but dicta, then they will say anything in their effort to modify Missouri law. Accordingly, this Court should consider the proposals of PLAC and MODL with great caution.

Equally telling is the discussion of OSI evidence that is included in the "Summary of the Argument" section of the amicus brief filed by PLAC and MODL. In that section, PLAC and MODL refer to a number of secondary sources which note that OSI evidence is both useful and compelling in product liability cases. PLAC and MODL further note that OSI evidence is frequently used in product liability cases. PLAC and MODL then proceed from these observations to imply that OSI evidence should not be allowed in product liability cases. This is faulty reasoning.

MATA is not aware of any law which supports the proposition that a particular type of evidence should be excluded simply because it is useful, compelling and frequently used. Indeed, if that were the rule, then it would presumably be improper to admit the contract in a contract dispute or to admit a confession in a criminal case. In short, the implication that OSI evidence should be excluded simply because it is compelling and frequently used is ridiculous.

The primary thrust of PLAC and MODL's argument is that substantial similarity is not a proper basis for admission of OSI evidence because the mere fact that another incident is substantially similar does not guarantee that the other incident had the exact same cause. The problem with this argument is that it overlooks the general rule that circumstantial evidence is admissible in a product liability action and the jury may infer causation from such circumstantial evidence. See, e.g., Rauscher, 905 S.W.2d at 160-61; Wadlow, 722 S.W.2d at 625; Klein, 714 S.W.2d at 900; Patterson, 674 S.W.2d at 604; Uder, 668 S.W.2d at 93.

The probative value of OSI evidence in product liability actions has been widely recognized. "The rule with regard to other accidents evidence in products liability actions admits evidence of other accidents or similar occurrences under similar conditions and circumstances to show the probability of the defect in question; **the assumption underlying the rule is that the similarity of product and similarity of circumstance renders the comparison probative of the material issues in dispute.**"

32A C.J.S. Evidence § 772. If PLAC and MODL want to take the position that most state courts and most secondary sources are wrong about the probative value of OSI

evidence, they are certainly free to do so. However, MATA respectfully suggests that this Court should not follow PLAC and MODL down that dubious path.

Apparently recognizing that Missouri law does not support their position, PLAC and MODL devote a substantial portion of their amicus brief to discussing a random assortment of cases from other jurisdictions. In particular, PLAC and MODL engage in an extended discussion of Nissan Motor Co. v. Armstrong, 145 S.W.3d 131 (Tex. 2004). PLAC and MODL characterize Nissan as being very similar to the Peters case, but a close examination indicates that this is not necessarily so.

In Nissan, the plaintiffs brought a product liability action regarding an alleged defect in the throttle cable of a 300 ZX that caused several sudden acceleration incidents. Id. at 134-35. The trial court admitted a Nissan database of 757 customer complaints regarding sudden acceleration incidents in ZX cars. Id. at 140. The court held that these customer complaints were improperly admitted. Id. at 142. In reaching this conclusion, the court emphasized that sudden acceleration can have many causes and it was not clear which cause resulted in the sudden accelerations that occurred in the similar incidents. Id. at 141. There were no admissions or stipulations in this case that limited the scope of possible causes for sudden acceleration incidents.

If this Court wants to review a case that is truly similar to the Peters case, this Court should review Jones v. Ford Motor Co., 559 S.E.2d 592 (Va. 2002). In Jones, the plaintiff alleged that a defect in the cruise control of her Lincoln Town Car caused a sudden acceleration incident. Id. at 594. The parties agreed at trial that there were only two possible causes for a sudden acceleration incident: use of the cruise control or

application of the accelerator. Id. at 595. The plaintiff's theory was that the sudden acceleration incident was caused by a defect in the cruise control mechanism that allowed a transient signal to unexpectedly activate the cruise control. Id. at 595-96. Ford's experts testified that the sudden acceleration incident was the result of pedal misapplication. Id. at 596.

The plaintiff in Jones sought to admit four similar incidents at trial regarding sudden acceleration incidents that had occurred in Ford vehicles. Id. at 594, 596-99. Ford argued that these similar incidents should not be admitted because Ford admitted that it was aware of other persons claiming to have experienced sudden acceleration incidents. Id. at 599. The plaintiff argued that the similar incidents were still admissible on the issue of notice because Ford specifically denied that sudden acceleration incidents could occur without operator error (i.e. pedal misapplication). Id. at 599-600, 601. The trial court did not allow the admission of these similar incidents. Id. at 600.

The Supreme Court of Virginia ruled that the trial court had erred in excluding the similar incidents offered by plaintiff. Id. at 601. The court noted that the similar incidents should have been admitted because the issue of notice was relevant to the plaintiff's failure to warn claim and because "Ford specifically disavowed that its manufactured vehicles could accelerate without operator error." Id. at 600-01. The court further noted that similar incidents met the substantial similarity test given Ford's admission that sudden acceleration incidents are either caused by the cruise control or by pedal misapplication:

[T]he deposition testimony before this Court satisfies the test of substantial similarity. **Ford concedes that the speed of a car can only be controlled by one of two factors, an act by the driver or the cruise control system.**

Three of the deponents testified that they did not apply the accelerator pedals, but nonetheless, their cars accelerated.

Id. at 602.

The Jones case is similar to the Peters case in a number of significant respects. First, it involves the same allegation of defect (a transient signal causing the cruise control to surge unexpectedly). This is in contrast to Nissan in which the alleged defect was mechanical (throttle cable) rather than electrical (transient interference). The Jones case is also very similar to the Peters case in that the defendant auto manufacturer admitted in each case that sudden acceleration incidents are either caused by cruise control malfunction or pedal misapplication. Again, there is no similar admission involved in the Nissan case. In short, if this Court chooses to take guidance from similar cases in other jurisdictions, this Court should look to Jones rather than Nissan.

In a final effort to bypass the substantial similarity standard that has been consistently applied by Missouri courts, PLAC and MODL argue that a higher degree of similarity should be required in cases in which punitive damages are sought. This argument fails to recognize that admissibility of evidence and submissibility of punitive damages are two separate and distinct issues.

A claim for punitive damages may only be submitted to the jury upon clear and convincing evidence of an evil motive or reckless indifference. Blue v. Harrah's North

Kansas City, LLC, 170 S.W.3d 466, 477 (Mo. App. 2005). However, it does not follow that all evidence that is admitted in a case in which punitive damages are sought must be subjected to a higher standard for admissibility.

Evidence should be admitted pursuant to the normal standard for admission that applies in any case. If the evidence is sufficient to meet the clear and convincing standard then a claim for punitive damages may be submitted to the jury. If the evidence does not meet the clear and convincing standard then the claim for punitive damages should not be submitted to the jury. However, the issue of whether the evidence is admitted in the first instance does not turn upon the question of whether punitive damages are being sought. In short, PLAC and MODL are comparing "admissibility" apples to "submissibility" oranges. This Court should not be misled by PLAC and MODL's spurious reasoning.

II. THE TRIAL COURT DID NOT ERR IN EXCLUDING A NEW OPINION OF GM'S EXPERT, CHARLES MOFFATT, THAT WAS OFFERED FOR THE FIRST TIME AT TRIAL AND THAT HAD NOT BEEN DISCLOSED IN MOFFATT'S DEPOSITION, BECAUSE MISSOURI LAW CLEARLY ALLOWS THE TRIAL COURT, IN ITS DISCRETION, TO EXCLUDE NEW OPINION TESTIMONY UNDER SUCH CIRCUMSTANCES.

“The admissibility of evidence, including the testimony of an expert, is a matter within the discretion of the trial court.” Cooper v. Ketcherside, 907 S.W.2d 259, 260 (Mo. App. 1995). “Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.” Id.

In this case, the Court of Appeals held that the trial court abused its discretion by excluding a new opinion that GM's expert attempted to offer for the first time from the witness stand during trial. There is no question that the opinion being offered was one that had not previously been disclosed to Plaintiffs' counsel: GM's counsel acknowledged that the opinion was "brand new" and that GM's expert "never did this before." As explained below, the Court of Appeals' holding runs contrary to existing Missouri law regarding the discretion of the trial judge and the significance of pre-trial discovery of expert opinions.

The right of a party to discover the opinions of an expert, prior to trial, is expressly provided for under Missouri's rules of discovery:

A party may discover by deposition the facts and opinions to which the expert is expected to testify. Unless manifest injustice would result, the court shall require that the party seeking discovery from an expert pay the expert a reasonable hourly fee for the time such expert is deposed.

Mo.R.Civ.P. 56.01(b)(4)(b). A party has “the right to rely on the opinion [an expert] expressed in his first deposition until notified otherwise.” Pasalich v. Swanson, 89 S.W.3d 555, 563 (Mo. App. 2002).

“When an expert who has been deposed later changes his or her opinion before trial or bases it on new or different facts from those revealed at the deposition, the party intending to use the expert's testimony has the duty to disclose the new information to the opposing party, effectively updating the responses made during the deposition.” Whitted v. Healthline Management, Inc., 90 S.W.3d 470, 475 (Mo. App. 2002); accord Eagan v. Duello, 173 S.W.3d 341, 346 (Mo. App. 2005); Redel v. Capital Region Medical Center, 165 S.W.3d 168, 175 (Mo. App. 2005); Bray v. Bi-State Development Corp., 949 S.W.2d 93, 100 (Mo. App. 1997); Blake v. Irwin, 913 S.W.2d 923, 931 (Mo. App. 1996); Green v. Fleishman, 882 S.W.2d 219, 221 (Mo. App. 1994).

In this case, GM's expert failed to disclose his new opinion to opposing counsel prior to trial. Plaintiff's counsel, relying upon the opinions that GM's expert had stated in his deposition, relied heavily upon those opinions in opening statement. GM's expert then attempted to offer a new opinion at trial that ran counter to the line of analysis that

Plaintiffs had followed in their opening statement and in their case-in-chief. Given that GM had failed to disclose its expert's new opinion prior to trial, as required by Missouri law, the trial court excluded the new opinion at trial.

The Court of Appeals concluded that the trial court abused its discretion in excluding the new opinion that GM's expert attempted to offer for the first time at trial. This conclusion runs contrary to the broad discretion that is generally granted to the trial judge in such matters.

When a change in an expert's opinion is not properly disclosed, "a trial court is vested with broad discretion as to its choice of a course of action and may, in the sound exercise of its discretion, reject such evidence or impose other appropriate sanctions." Pasalich, 89 S.W.3d at 561; accord Whitted, 90 S.W.3d at 475; Cooper, 907 S.W.2d at 261; Gassen v. Woy, 785 S.W.2d 601, 604 (Mo. App. 1990). The decision to reject new or changed opinion testimony "[is] not a question of law, but rather a matter within the sound discretion of the trial court." Cooper, 907 S.W.2d at 261. Appellate courts "give great deference to the trial court's rulings on issues involving pre-trial discovery as well as the actions it adopts to remedy any non-compliance with discovery rules." Tax Increment Financing Com'n of Kansas City v. Romine, 987 S.W.2d 484, 487 (Mo. App. 1999).

The Court of Appeals' conclusion also runs contrary to basic principles of discovery practice under Missouri law.

"Allowing experts to change their opinions after deposition and before trial without notice to their adversaries would frustrate the purpose of our discovery rules

because it would prevent them from eliminating, as far as possible, concealment and surprise in litigation.” Whitted, 90 S.W.3d at 475; accord Eagan, 173 S.W.3d at 346. The courts have recognized that this principle is particularly true when the opposing party has relied upon the previously stated opinions of the expert in opening statement:

To allow an expert to change his opinion after deposition and before trial without notice to the opposing party would frustrate the purpose of Rule 56.01(b)(4)(b). Allowing such changes in opinion after an opening statement relying on the deposition opinion, without sanction, would prevent a party from discovering by deposition the actual facts and opinions to which the expert is expected to testify. It would also run counter to the purpose of discovery rules to eliminate, as far as possible, concealment and surprise in the trial of lawsuits.

Vitoe v. Lester E. Cox Medical Centers, 27 S.W.3d 812, 818 (Mo. App. 2000). In other words, when a plaintiff, in making an opening statement, has relied upon the previously stated opinions of the defendant’s expert, the defendant’s expert should not be allowed to change his opinions during the course of the trial if the plaintiff was not notified of such changes prior to trial.

The standard adopted by the Court of Appeals renders expert depositions substantially meaningless. Pursuant to that standard, there would be little point in determining the opinions of the opposing party's expert prior to trial because the expert would be free to change those opinions at trial. In short, the elements of concealment and surprise would once again become the rule in the trial of lawsuits in Missouri.

If this Court were to rule as the Court of Appeals did, and hold that the trial court abused its discretion in excluding a new expert opinion that was being offered for the first time at trial, this Court would necessarily overrule a substantial body of case law to the contrary. Furthermore, this Court would do substantial harm to the rules regarding discovery of expert opinions prior to trial. MATA respectfully suggests that this Court would be well advised to reject the standard proposed by the Court of Appeals and to apply Missouri law in its current form. Under that law, it was improper for GM's expert to offer a new opinion for the first time at trial, and it was entirely appropriate for the trial court to exclude that new opinion.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's judgment entered in accordance with the jury's verdict.