

IN THE MISSOURI SUPREME COURT

NO. SC 89610

SHONNIE NEWTON, et al.,
Appellant,

v.

FORD MOTOR COMPANY, et al.,
Respondent.

and

MICHAEL NOLTE and
BARBIE NOLTE,
Appellant,

v.

FORD MOTOR COMPANY, et al.,
Respondent.

APPELLANTS' SUBSTITUTE REPLY BRIEF

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ARGUMENT

I.

A. Introduction

“[Y]ou cannot get into the postshield accidents.”

Judge Atwell to Mr. Emison

(Tr.4224).

This is the core of the Point I issue: Plaintiffs claimed that Ford’s decision to place the fuel storage system of the Crown Victoria Police Interceptor (“CVPI” or “Panther Platform”) aft of the axle was a design defect that caused the death of Trooper Michael Newton¹ and horrible burns to Michael Nolte. Ford claimed that there was no defect, but if there was, Ford said it fixed every fuel leak mode with the installation of a plastic-shield,

¹ Ford’s brief makes much of the force of the impact in this case, attempting by inference to blur what the evidence showed. This was not a direct rear end only collision; it was a side/rear collision. Neither Trooper Newton nor Mr. Nolte suffered any broken bones from the collision. But for the fire, both would have walked away from the accident. The cause of Trooper Newton’s death and Mr. Nolte’s injuries was fire, not impact.

upgrade kit. Thus, evidence that showed Ford knew that the shields did not resolve the design defect was the critical tool that allowed Plaintiffs to pierce Ford's plastic-shield defense.

The post-shield evidence was of two kinds: pre-shield and post-shield fires/leaks. The latter allowed the jury to focus on Ford's knowledge of the plastic shield's ineffectiveness. Argument about this evidence would have allowed Plaintiffs to place their evidence in the context of Plaintiffs' theory of the case. However, the trial court denied Plaintiffs the right to argue the evidence that drew the pre-shield/post-shield distinction – and denied Plaintiffs the ability to place the evidence within their theory of the case that the shields were a band-aid, that Ford had notice that the shields did not stop leaks and fires, and that the design defect had not been remedied.

Ford put into evidence through its Vice-President-Safety, Sue Cishke, 11 *post*-shield leaks/fires. This was not other similar incident evidence (“OSI”) evidence; it was a corporate admission by a corporate officer. This evidence was never withdrawn. It could be used for any purpose. It was highlighted when Ford's other witnesses professed ignorance of the 11 *post*-shield fires and leaks under cross-examination from Plaintiffs' counsel – an ignorance that Ford used to show it did not know that its shields were impotent to cure the fuel storage system's design defects that Plaintiffs asserted.

During closing argument, Trooper Newton's counsel, Kent Emison, attempted to argue the evidence that most-clearly drew the distinction between pre-shield and post-shield leaks and fires.

Ms. Cischke, the head of safety, said, 'There have been 11 accidents with the shield that involved rear impacts that had some fuel leakage and some fire.' After the shields were put on in the fall of 2000, 11 other accidents with fuel leakage and fire with the shields.

MR. FEENEY: Objection, Your Honor.

COURT: Come on up.

* * *

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

(TR4120-21). The "last argument" of counsel addressed the evidence that drew the important distinction between pre-shield and post-shield leaks and fires, including the pre-Newton accidents. Were this not enough, the trial court also prohibited Mr. Nolte's counsel, Grant Davis, from raising the post-shield fires and leaks in his portion of closing argument – and did so prophylactically and without any objection from Ford. The trial court conceded that

Mr. Davis was prepared to make a similar argument with the use of a demonstrative exhibit. That argument and exhibit were excluded based on the Court's ruling relative to Mr. Emison.

(LF1457, fn.13). Again, before rebuttal, the trial court repeated its prohibition. "[Y]ou cannot get into the postshield accidents." (TR4224).

The trial court's ruling eliminated Plaintiffs' ability to draw the pre-shield/post-shield distinction that was in the case and was critical to Plaintiffs' liability argument. Plaintiffs' counsel honored the trial court's ruling, never again attempting to argue evidence that distinguished between pre- and post-shield leaks and fires.

Ford's brief fails to address, explain, or attempt to justify the trial court's decision to direct the jury to "disregard" all *argument* concerning evidence sorting out pre- and post-shield fires and leaks in post-shield equipped Crown Victoria Police Interceptor ("CVPI") vehicles.

B. Ford's Blurring of Critical Legal Issues and Factual Distinctions

Ford's brief uses eight fallacies to blur important distinctions in the law and the evidence proper resolution of this Point requires.

1. Fallacy: The Trial Court was Wrong when it Concluded that it Erred in Disallowing the Plaintiffs' Post-Shield Arguments.

Ford goes so far as to rewrite Trooper Newton's and Mr. Nolte's Point Relied On I to insist that the trial court "did not err in restricting Plaintiffs' closing argument to other incidents that pre-dated the Newton accident." In doing so, Ford tries to redeem what the trial court itself concluded was error:

[U]pon reflection the Court believes that the proffered argument by Mr. Emison should have been allowed in the nature of fair retaliation to Mr. Feeney's argument and likely such argument was further appropriate to counter or contradict some of the themes present in the testimony of Mr. Cupka and Mr. Ridenour. (LF1462)(emphasis added). And what argument was not allowed? The trial court prohibited argument about post-shield accidents. That is, all argument that showed Ford knew that the so-called "Upgrade Kit" was a cosmetic fix – "band-aid" – that failed to protect police personnel from gasoline leaks and fires.

Clearly, Ford's claim that the trial court did not err was not shared by the trial court.

2. Fallacy: Pre- and Post-Shield Distinctions are not Important

Plaintiffs' banned argument focused on a specific type of CVPI – cars that had leaks/fires "after the shields were put on." That is the focal point of the band-aid argument, which was designed to overcome Ford's claim that the plastic shields remedied any design flaw.

The leak and fire evidence falls into three categories:

- (1) Pre-Shield/Pre-Newton Fires and Leaks
- (2) Post-Shield/Pre-Newton Fires and Leaks
- (3) Post-Shield/Post-Newton Fires and Leaks

The trial court initially held that all pre-Newton leaks and fires (categories 1 and 2) were admissible as OSI evidence for purposes of notice to Ford of a design flaw and/or failure of the plastic shields to remedy the design flaw. In response at trial, Ford posited that the plastic shield upgrade kit changed things altogether; even if the pre-shield CVPI's were defective prior to the installation of the shields, that defect disappeared when the shields appeared. Trooper Newton's CVPI had a plastic shield upgrade kit installed; therefore, according to Ford, Trooper Newton's car had no defect resulting from the fuel storage system placement because the plastic shield cured the defect.

Again, Plaintiffs' theory of the case required the jury to consider the design/placement of the fuel storage system. Plaintiffs asserted that placing the fuel storage system behind the axle was a design defect that made the CVPI unreasonably dangerous when put to its reasonably anticipated use – that is, when it was parked on the shoulder of interstate highways where state troopers write tickets. The design was defective because Ford placed the tank in that unprotected area, where collapsing crush zones could compromise the tank's integrity and where no structural components (such

as an axle) could protect it from the full brunt of rear impacts. Moreover, Ford put the anti-spill check valve, which was designed to stop the flow of gasoline from the tank in the event that the fuel filler neck was severed, *in* the unprotected fuel tank. Thus a compromise to the structural integrity of the fuel tank also exposed the anti-spill check valve to similar compromise. The fire that killed Trooper Newton and burned Mr. Nolte occurred because the fuel filler neck was severed and the anti-spill valve in the vulnerable fuel tank was compromised. This allowed fuel to feed the fire through the severed fuel filler neck. The solution to these defects required moving the fuel storage system to a protected place, either above or in front of the axle, not a plastic shield. This is the same issue Ford faced in the Pinto design cases. Indeed, no manufacturer other than Ford now makes a passenger vehicle with a fuel tank aft of the axles – and only the Crown Victoria currently has this design flaw.

The verdict directing instructions asked the jury to consider whether “the filler tube check valve or the location of the fuel tank on the 2003 Crown Victoria Police Interceptor was then in a defective condition, unreasonably dangerous when put to a reasonably anticipated use” (design defect) and a negligence theory that “either the 2003 Crown Victoria Police Interceptor filler tube check valve was defective due to its design, or the 2003 Crown

Victoria Police Interceptor fuel tank was defective due to its location.” (LF1228-29).

The *post*-shield fires/leaks were evidence Ford knew that the upgrade kit – the band-aid – was ineffective and did not resolve the design defect. Ford’s Cupka and Ridenhour denied the existence of post-shield fires; the purpose of that testimony was to counter evidence of Ford’s knowledge of the ineffectiveness of the plastic shields. The post-shield cases were thus important for the jury to consider when it asked the first question inherent in the verdict directing instructions: “If the CVPI had a design defect, did the plastic shields resolve the design defect in this case.”

If the jury could not consider argument concerning evidence of post-shield leaks/fires that was in the case all that was left for the jury to consider was Ford’s claim that the plastic shields fixed the defects.

3. Fallacy: Plaintiffs Put the Eleven Post-Shield Leaks and Fires Evidence into the Case.

Ford argues that “there was no foundation to admit post-Newton accidents as evidence of defect.” Resp.Br.33. This argument ignores the fundamental fact that Ford put this evidence in when its counsel read the admissions of its Vice President-Safety, Sue Cishke. Plaintiffs did not object. The trial court correctly found that the evidence was never withdrawn.

Evidence that is in the case without objection is in the case – period. It may be used by either party for any purpose, including argument to the jury. Assuming that the evidence was without foundation, it remains a tenet of our law that unobjected-to evidence is properly in a case, even for purposes of submissibility. “Inadmissible evidence received without objection may properly be considered in determining the sufficiency of the evidence.” *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 863 (Mo. banc 1993).

It is only by attempting to assign the introduction of the evidence to the Plaintiffs that Ford can escape the necessary legal/evidentiary consequences of its own actions.

4. Fallacy: The Distinction between Evidence and Argument is not Important

Ford spends considerable effort in its brief discussing the *evidence* of post-shield fires/leaks that the jury did hear. What Ford ignores is the trial court’s admittedly-erroneous decision to deny Trooper Newton and Mr. Nolte the right to *argue* all post-shield fires/leaks evidence in the case.

First, closing argument is important. It is difficult to improve on Judge Holliger’s analysis of that truth in the Court of Appeals.

Closing argument properly ties the opening statement and evidence together in a meaningful cohesiveness that a party believes will confirm in the jury’s mind the plaintiff’s or

defendant's entitlement to a verdict. Good counsel on either side realize the importance of a theme. They know that a lawsuit without a theme is like a book or movie without a plot: perhaps visually interesting and entertaining but not important enough or convincing enough to require some affirmative action. Although some will debate whether a case can be won in closing argument, no experienced trial lawyer doubts that one can be lost.

This elementary and simplistic explanation of the art of advocacy and expression of juror decision-making has been known since the early days of our legal history. It underlies, I believe, some of the basic rules regarding closing arguments. "The permissible field of closing argument is a broad one, and as long as counsel confines himself to the evidence and does not go beyond the issues and urge prejudicial matters or urge a claim or defense which the evidence does not justify, he is to be given wide latitude in his comments." *Hoehn v. Hampton*, 483 S.W.2d 403, 408 (Mo.App.1972). Counsel is given wide latitude in discussing the facts and arguing inferences from the evidence. *Duncan v. Price*, 620 S.W.2d 70, 72 (Mo.App.S.D.1981). That latitude exists even though the inferences drawn may appear

erroneous or illogical. *Eickmann v. St. Louis Pub. Serv. Co.*, 323 S.W.2d 802, 810 (Mo.1959). Counsel is entitled to explain the law to the jury and not just stick with the language of the instructions. *See Heshion Motors, Inc. v. Western Int'l Hotels*, 600 S.W.2d 526, 534 (Mo.App.W.D.1980).

2008 WL 2572713 at 14.

Second, the loss of the ability to *argue* the post-shield evidence effectively negated the value of the *evidence* adduced at trial. Again, Judge Holliger speaks clearly.

[The] trial court's ruling undermined Newton's use of the subsequent fires in closing argument to undermine Ford's experts and suggest that only part of the problem of fire risk had been corrected. ...

Id. at 16.

Third, Ford took full advantage of the trial court's protection to argue that the plastic shields were a complete fix to the alleged tank-location (and anti-spill valve location) defect. As Judge Holliger wrote:

[Ford] argued that the fuel system was not defective and could not be completely safe in all circumstances, which was demonstrated by the fact that some fires occurred regardless of the extraordinary redesign and modifications that Ford made.

That was a legitimate inference that Ford was entitled to argue to the jury. But that was not the inference that Newton wanted to suggest to the jury. He wanted to argue that the other accidents showed that Ford's redesign was, as he put it, merely a "band-aid" and did not address what Newton thought was the real design defect-the location of the fuel tank. That was also a permissible inference from the subsequent accidents and fires. But Newton was not allowed to suggest that inference to the jury. Instead, he was left unarmed to counter Ford's assertion, in closing, that Ford had done everything necessary and reasonable to prevent these fires and Newton had not proved otherwise.

Id.

Ford's effort to turn the loss-of-the-right-to-argue into an evidentiary issue allows Ford to avoid arguing Plaintiffs' point that the prejudice occurred from the denial of the right to argue evidence properly before the jury.

Despite Ford's contrary view, *Stokes v. National Presto Indus., Inc.*, 168 S.W.3d 481 (Mo.App.W.D.2005) applies to this case precisely because it addresses prejudice resulting from closing argument. Here, prejudice occurred when Ford, aware that the trial court had protected it from argument about the band-aid shield, argued that it had fixed all known

leakage sources with its plastic upgrade kit. And the trial court denied Plaintiffs the right to any argument about post-shield leaks/fires.

This is why *Stokes* applies. Where a defendant uses the trial court's error to make its point in closing argument, prejudice results and a new trial is required. That is what happened in this case. When this occurs, the error is deemed prejudicial. *Id.* at 484 (if party takes advantage of error committed against the opposing party, prejudice will be more quickly found).

5. Fallacy: The Limiting Instruction Corrected the Trial Court's Error.

This fallacy is a variant of Ford's attempt to mix evidentiary questions with a limitation on argument about evidence. Prior to the testimony of Plaintiffs' expert, Jerry Wallingford, the trial court gave a limiting instruction to the jury. That instruction informed the jury that OSI evidence about which Mr. Wallingford intended to testify could only be proof of "whether or not Ford knew of the fact of these other rear end collisions involving Panther platform vehicles in which there was a fuel leak or a fuel-fed fire." (LF1221).

This limiting instruction came early in the case – well before Ford read Sue Cishke's admissions, which were not OSI evidence because they were admissions. The Cishke evidence thus came in without limitation.

Even if the limiting instruction applied to the Cishke testimony about 11 post-shield fires and leaks—and Cupka's and Ridenhour's professed

ignorance of any post-shield fires—nothing changes. The trial court denied Trooper Newton and Mr. Nolte the opportunity to *argue* about Ford’s knowledge of post-shield fires/leaks. By this act, the trial court denied Plaintiffs the right to argue not only evidence that Ford knew that the problem created by the tank location existed before the plastic shields but also evidence that the post-shield fires/leaks showed that Ford knew that the defect still existed despite the addition of the plastic shields. The trial court effectively gutted Plaintiffs’ liability theory that the shields were a mere band-aid, leaving the jury with no choice but to disregard Plaintiffs’ theory and evidence and consider only Ford’s argument unrefuted and unrebuttable claim that the plastic-shield upgrade kit addressed “every one of the leakage modes.” (TR4215)

6. Fallacy: Mr. Emison’s argument remedied the trial court’s error.

Ford informs the Court that Mr. Emison argued post-upgrade kit evidence in his rebuttal. (Resp.Br.32). This cannot be. The trial court expressly ruled prior to Plaintiffs’ rebuttal that “you cannot get into the postshield accidents.” (Tr.4224). To repeat: The critical evidentiary distinction in this case is between pre-shield and post-shield leaks and fires. All that Mr. Emison could argue under the trial court’s ruling was raw numbers. Raw numbers, standing alone, do not permit the jury to place the

evidence in the proper context – pre- or post-shield. That is what the trial court took from Plaintiffs with its ruling – the ability to place fires and leaks in a post-shield setting to counter Ford’s argument that the shields were a complete fix.

And that is exactly what Ford argued once it was assured of the trial court’s protection.

7. Fallacy: The Trial Court’s Limitation on Argument was “Modest.”

Ford argues that the trial court imposed a “modest limitation on closing argument.” (Resp.Br.31). This argument again misunderstands the nature of the defense Ford put forward and Plaintiffs’ necessary response to that defense. Again, post-shield fires and leaks were the best evidence that Ford knew that the plastic shields did not resolve the fuel-storage-system design defect in the CVPI. Two of Ford’s witnesses (Cupka and Ridenhour) testified that they had no knowledge of such leaks and fires, despite Ford’s Cishke’s contrary admissions. Thus, the argument that Plaintiffs intended to make to the jury would have directed the jury to consider the post-shield evidence in the context of Plaintiffs’ theory that Ford knew the plastic shields were a band-aid – a false and ineffective fix. The trial court disallowed that argument completely. Indeed, Plaintiffs argued prior to rebuttal that Ford had opened the door and sought permissions to argue the post-shield accidents. The trial

court disagreed and told Mr. Emison “you cannot get into the postshield accidents.” (Tr.4224).

The trial court thus disallowed again all argument that drew a distinction between pre- and post-shield leaks and fires.

This is no modest limitation -- particularly when that “modest” limitation left Ford with the ability to claim to the jury that the plastic shields fixed “every leakage mode” without fear of rebuttal.

8. Fallacy: Ford never used a “defense that the Upgrade-Kit fixed the defect.”

Ford asserts in its brief that “Plaintiffs have constructed a straw man” because Ford never utilized a “defense that the Upgrade Kit fixed the defect.” Resp.Br.37. The transcript suggests a far different conclusion.

Ford emphasized the efficacy of the upgrade kit throughout the case. (TR924, 950, 1721-22, 1890, 2797, 2819-20, 2823, 2841, 2851-52, 3264-65). For example, Ford indicated during opening argument that the upgrade kit addressed previously recognized problems with the fuel system of the CVPI:

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

(TR924).

Ford continued to emphasize the efficacy of the upgrade kit during its cross-examination of Plaintiffs' experts:

Q. And are you aware of any crash tests at 75 or higher that has been done by Ford where any of the components shielded by the upgrade kit punctured the fuel tank?

A. Not that I am aware of right now on the top of my head, no.

(TR1721-22).

And with its own experts:

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

A. No.

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

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

(TR2851-52). Against Plaintiffs' claim that Ford knew that its band-aid, plastic shield did not remedy the defect, that fires and fuel leaks still occurred after the installation of the band aids, and that Ford should have moved the fuel tank to a safer, front-of-axle position, Ford's evidence attempted to show that moving the fuel tank was not necessary because, as Ford argued in its

closing argument, “every one of those leakage modes was addressed by the upgrade kit.” (TR4215).

Here is Ford’s evidence and argument.

Q. ... Were any of the items on the car that were shielded by this developmental upgrade kit, did any of those items puncture the fuel tank?

A. No, they did not.

(TR2797).

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

A. Yes, it did.

(TR2819).

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

A. Yes, it was.

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

A. No, there were not.

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

A. Yes.

(TR2841).

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

(TR2851-52).

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

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

A. I can't tell you that there wouldn't have been a fire. What I can tell you is the leakage sources that caused the fire in those accidents have been addressed with the shield kit, with the changes that we have made to production in the '03 vehicle.

(TR3264).

Ford's lawyer specifically referenced Plaintiffs' theory that the plastic shields were a "band-aid" – an interesting argument to make if Ford's brief is

correct that there was no “band-aid defense.” Here is part of Ford’s part of closing argument:

We created this exhibit to simply deal with the question, the very simple question, the very simple question, is the upgrade kit a Band-Aid. Does the upgrade kit only work under limited circumstances?

Well, here are the limited circumstances that it works under, ladies and gentlemen. That upgrade kit and those countermeasures -- you heard Dick Cupka and Jack Ridenour explain this to you -- they were developed as a result of the joint efforts of law enforcement and Ford Motor Company that gathered information about every wreck that had occurred involving a police officer and, for that matter, a Panther. Every one.

* * *

Now, every one of the leakage modes, with the exception of the Lynn Ross incident, which nobody knows enough about to be able to say this with any certainty one way or the other, every one of those leakage modes was addressed by the upgrade kit.

This is limited circumstances?

(TR4214-15).

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

(TR4265).

This evidence and argument explains the trial court's too-late realization that, given Ford's presentation of evidence tending to establish that the upgrade kit had eliminated fuel-system-safety problems, it would have been fair to allow Plaintiffs to refute that evidence by reference to the 11 post-upgrade incidents. (LF1462). Indeed, the argument about the accidents that the trial court directed the jury to disregard showed that Ford's witnesses should not be trusted on the issue of the existence of post-upgrade kit, fuel fires and leaks.

Ford's Cupka testified that he was not aware of any of the 11 leaks involving shielded components.

Q. Ms. Cischke testified yesterday that she knew of 11 with the shields where there were fuel leaks or fires. Are you aware of those 11 accidents?

A. I don't think there is any for any shielded components.

(TR2941). The 11 accidents are, as the trial court finally realized, important to rebut Cupka's and Ridenhour's testimony. This is so for at least two reasons. If Cupka/Ridenhour did not know of the accidents, their testimony that the upgrade kit had addressed all leakage/fire issues was demonstrably false by Ford's own evidence (Cishke). If Cupka/Ridenhour did know, and were saying that these fires occurred despite the presence of the upgrade kit, Ford knew that the upgrade kit did not solve the fuel leakage/fire problem and yet did nothing. These points go primarily to liability, that is, knowledge of the continued presence of the location defect, not, as the trial court mused, only to punitive damages.

What Ford's brief (and the trial court) failed to address is the trial court's directive that the jury disregard the argument about all post-upgrade kit fires and leakages. This matters, again, because Plaintiffs contended that the upgrade kits were mere band-aids designed to placate law enforcement while leaving the true design defect, the placement of the fuel tank behind the axle, unremediated. Plaintiffs' evidence and disallowed argument would have allowed the jury to conclude that Ford's shield was virtually meaningless; that Ford knew of the failure of the plastic shields to prevent fuel leaks and fires; and that Ford had left the Panther on the road in a defective condition and left Trooper Newton exposed to the very conflagration that killed him. This is liability evidence, not punitive damages evidence.

The existence of leaks/fires, which Ford admitted still existed, served to prove Plaintiffs' point. The shield did not work to solve the real design defect—the placement of the fuel tank. The Court directed the jury to disregard the evidence that drew the necessary post-shield distinction – all of it.

C. The Prejudice to Trooper Newton and Mr. Nolte

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

D. Conclusion

Appellants’ initial brief lays out the law applicable to this Point in greater detail. That discussion need not be repeated here. It is enough to conclude, as did Judge Holliger, that the trial court’s prejudice analysis is no more than the trial court acting as a super juror reviewing its own work and superimposing its own values and views to determine what the jury might have concluded if the error did not exist.

But how can the *post hoc* super-juror [the trial court] determine that the jury jumped over all of the other issues in the case to that issue, and that, therefore, the evidence of additional fires could not have affected its deliberations? Courts frequently say that it is assumed that jurors follow the instructions. If the jury did so here, it first considered the issue of defect. And Ford strongly argued the lack of a defect. Newton was not allowed to use admitted evidence to support its theory on the first issue the jury was told to consider.

And, finally, there is the issue of fundamental fairness. It is simply not fair to allow one party to comment and use evidence in the case for its purposes and not allow the opposing party to comment on the same evidence. This case is essentially no different than the one where a party acts and succeeds to exclude evidence and then argues in closing against the other party on the basis that they offered no such evidence. Almost always, prejudice is found in those situations. *See Stokes*, 168 S.W.3d at 485. Here, Ford successfully argued a motion in limine to exclude the evidence, introduced the evidence for its own purposes, and then used it to its advantage in closing while successfully preventing the plaintiff from even mentioning it.

Ford created its own problem and then magnified it to its advantage. Newton should receive a new trial.

Newton, 2008 WL 2572713 at 16.

Reversal and remand for a new trial is required.

II.

A. Ford's Analysis Overlooks Key Facts.

Crucial facts pertaining to the Durker notes are not revealed in Ford's brief. Foremost among them, Jack Ridenour testified at trial as Ford's corporate representative. (TR3186, 3409, 3413). When Ridenour was testifying, Ford was testifying. Plaintiffs attempted to use the Durker notes to impeach Ford's testimony.

Mr. Ridenour testified as Ford, unequivocally stating that Exponent does not fudge test results and that, if Exponent did so, Ford would not use them. (TR3544). The Durker notes placed Ford's corporate representative's "Exponent-doesn't-fudge" testimony in doubt.

Ford's brief suggests that Plaintiffs' attempt to use the Durker notes was completely unconnected to Mr. Ridenour's testimony. This is not accurate. The Durker notes directly contradict Mr. Ridenour's prior testimony for Ford.

B. Ford Cannot Distinguish Plaintiffs' Cases Regarding The Standard Of Review.

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

accuracy, veracity, or credibility.” *Black v. State*, 151 S.W.3d 49, 56 (Mo. banc 2004).

Ford tries to distinguish these cases with the facile suggestion that the subject of impeachment in those cases was somehow central to the case, whereas the subject of impeachment in this case was not. This argument is not supported by the record.

Exponent crash tests were discussed at numerous points during the case. (TR1512, 1526-27, 1532, 1592-93, 1595, 1597, 1601, 1612, 1644, 1648-50, 1656-57, 1658-59, 1868-69, 3386, 3404-05). Given the extensive use of Exponent crash tests during the trial, there is no real dispute that these crash tests constituted a significant part of Ford’s evidence. The trial court said: “Exponent crash tests have been a big part of the Defendant's case.” (TR1342). If Plaintiffs had been allowed to impeach the Exponent testing properly, the jury might have given substantially less weight to this very significant part of Ford’s case.

The trial court **did not** have discretion to prevent the impeachment of Mr. Ridenour’s testimony regarding the reliability of the Exponent tests.

C. Plaintiffs Established a Foundation For Admission Of The Durker Notes.

Ford asserts that Durker’s notes could only be used to impeach Durker.

Ford's argument overlooks a critical fact: Ridenour and Durker are both agents of Ford. Ridenour testified as Ford's corporate representative. (TR3186, 3409, 3413). Durker is an employee of Ford. It is black letter law in Missouri that the statement of an agent is admissible to impeach the principal. *Lewis v. Wahl*, 842 S.W.2d 82, 86 (Mo. banc 1992) (pleading drafted by attorney as agent admissible). Other courts hold that a corporation may be impeached with any information tending to discredit the corporation. *Hickson Corp. v. Norfolk Southern Ry. Co.*, 227 F.Supp.2d 903, 906 (E.D.Tenn. 2002). *Accord E.E.O.C. v. Thorman & Wright Corp.*, 243 F.R.D. 421, 424 (D. Kan. 2007)(there is no distinction between a corporate representative and the corporation).

Durker made his notes in the course of Durker's duties as a design engineer. Ford produced the notebook, not Durker. Ridenour testified as Ford. When Ford/Ridenhour testified that Exponent would not fudge test results for Ford's benefit, Plaintiffs were entitled to impeach that testimony by presenting other statements of Ford (i.e. those made by Mr. Durker) which tended to show the exact opposite.

A corporation should not be able to avoid impeachment simply by pointing out that its prior inconsistent statements were made by a different agent than the one presently testifying.

In *Hickson Corp. v. Norfolk Southern Ry. Co.* 227 F.Supp.2d 903 (E.D. Tenn. 2002), a manufacturer brought an action under the federal rail carrier liability statute for damages resulting from a chemical spill. A corporate employee testified about Norfolk's excellent environmental record. Hickson, on cross-examination of a different corporate representative sought to impeach that witness with evidence of Norfolk's felony conviction on environmental charges. Norfolk argued the evidence could not be used because it was not a conviction of the witness. The Court stated:

Under Rule 609 of the Federal Rules of Evidence, a party may introduce evidence of a witness's prior felony conviction, subject to the requirements of Rule 403, to attack the witness's credibility. The Court has not found case law applying Rule 609 to a corporation. This dearth of precedent is not surprising, of course, given that an inanimate corporation cannot itself be a witness. Because a corporation speaks through its officers, employees, and other agents, however, it stands to reason a corporation can be a vicarious witness. The Court concludes, therefore, Rule 609 allows the use of a corporation's felony conviction to impeach the corporation's vicarious testimony.

Id. at 907 (footnotes omitted).

The Durker notes undercut Ford's testimony, and should have been allowed on cross examination.

D. Prejudice Resulted From The Trial Court's Exclusion Of The Durker Notes.

Finally, Ford argues that no prejudice resulted from the exclusion of Durker's notes because Plaintiffs were allowed to cover the same ground in their questions of Ridenour. That is simply not true. As noted previously, Ridenour expressly denied that Exponent fudges test results for Ford's benefit. Plaintiffs then attempted to impeach that testimony by presenting a prior statement that tended to refute Ridenour's assertion. However, Plaintiffs were not allowed to present that prior statement or to question Ridenour about that prior statement.

Prejudice flows from the denial of Plaintiffs' ability to impeach Ford's witness on a subject vital to the litigation. Reversal is required.

III.

Plaintiffs assert that the trial court erred in refusing to admit the Grush-Saunby Report.

A. Ford Focuses Upon Irrelevant Factual Distinctions.

During its direct examination of Mr. Ridenour, Ford's corporate representative and expert, Ford asked Mr. Ridenour to discuss a 1971 memorandum in which Ford analyzed the cost of making certain design changes to improve the safety of vehicle fuel systems. (TR 3222-40). The 1971 report showed that the installation of a sheet metal barrier would protect the fuel tank and estimated the cost of installing that barrier at \$9.95 per vehicle. (TR3507-09). On direct examination, Ridenour indicated that Ford's failure to incorporate this safety feature was not a result of cost considerations. (TR 3233-35). When pressed on this point during cross-examination, Ridenour, speaking as Ford, testified that Ford **never** factors cost over safety. (TR3510).

The Grush-Saunby Report impeaches Ridenour's testimony that Ford **never** factors cost over safety because the Report shows Ford factoring costs over safety. It is a prior inconsistent statement. The Report expressly concludes that the safety modifications (proposed design changes intended to improve fuel system safety) are not "cost-effective."

Ford devotes little or no attention to the manner in which Plaintiffs attempted to use the Grush-Saunby Report to impeach Ridenour's/Ford's statement that Ford **never** factors cost over safety.

First, the Report is a statement of a corporation and proper for impeachment where the issue is a cost-benefit analysis of safety measures. Clearly, any report in which Ford elevates cost over safety impeaches Ridenour's assertion that Ford **never** factors cost over safety.

Second, Ford emphasizes the history of the Report by arguing that the figures used in the Report to value human life were provided by NHTSA. This makes absolutely no difference to the impeachment analysis. The fact remains that Ford used the human life values in determining that it would not make a safety change in a Ford vehicle. Ridenour's "never" was just not true. The jury should have been allowed to learn that it was not true.

Finally, Ford argues that the Report dealt with a completely different issue from that discussed in the 1971 memorandum that Ridenour was discussing.

The 1971 memorandum dealt with a proposed method for improving fuel system safety by installing a sheet metal barrier that would protect the fuel tank. The Grush-Saunby Report dealt with a proposed safety standard to improve fuel system safety. Thus, both the 1971 memorandum and the Grush-Saunby Report addressed methods of improving fuel system safety.

Regardless of any differences between the 1971 memorandum and the Grush-Saunby Report, the Report still serves to impeach directly Ridenour's testimony that Ford **never** factors cost over safety.

The trial court erred in refusing to allow Plaintiffs to use the Report for purposes of impeachment.

B. Plaintiffs Established An Adequate Foundation

Ford argues that Plaintiffs failed to establish a foundation for the Grush-Saunby Report. This is essentially the same argument that Ford made with respect to the Durker notes, and it fails for the same reasons.

The issue is not whether the Grush-Saunby Report constitutes a prior statement of Ridenour. The issue is whether the Report constitutes a prior statement of Ford. Ridenour was testifying as Ford's corporate representative. Thus, Ridenour's statements were Ford's statements. More particularly, Ford testified, through Ridenour, that Ford **never** factors cost over safety.

The Grush-Saunby Report is a prior statement of Ford, prepared by Ford. For the reasons expressed in Point II, Ford can be impeached by its own documents.

The Report directly impeaches Ford's statement that it **never** factors cost over safety. The trial court erred in refusing to allow Plaintiffs to use the

Report for purposes of impeachment. The error was prejudicial as it went to the heart of Ford's rationale for adopting a band-aid approach to fuel leakage in the CVPI, rather than moving the fuel tank to a more safe location.

IV.

Plaintiffs assert that the trial erred in admitting the NHTSA evidence over Plaintiffs' objection.

Missouri's public record exception to hearsay created in *Rodriguez v. Suzuki Motor Corporation*, 996 S.W.2d 47 (Mo. banc 1999) is the "broadest public record exception in the country." Charles & Andrew Buchanan, *Public Record Hearsay – A Dramatic Expansion*, 58 J.Mo.B. 96 (2002). *Rodriguez* is a "significant departure from common law principles, the preferential treatment it provides to foreign public records, and its deviation from the public record exceptions set forth in the Federal Rules of Evidence and other jurisdictions." *Id.*

Rodriguez relied on § 490.220 RSMo. (1999) and reasoned that the Court had "no choice in the matter because, as stated, admission of the reports is required by statute." *Rodriguez*, 996 S.W.2d at 57. The Court based this holding on its assessment that the statute contained no ambiguity and that the legislature had decreed that records must come in without consideration of common law evidentiary principles.

This reasoning is not correct. The statutory directive that documents "shall be evidence" is ambiguous. This is because "evidence" is itself an ambiguous word in the law. Evidence

has been defined as "[t]hat which tends to produce conviction in

the mind as to existence of a fact." This definition says nothing about admissibility, and it implies that something that is evidence may still be found inadmissible through the application of evidentiary rules. The term "evidence" has also been defined as "[a]ny species of proof, or probative matter legally presented at the trial ... for the purpose of inducing belief" This definition implies that something does not become evidence until it is admissible.

58 J. Mo. B. at 96, 97.

In this case, the ODI report contained hearsay, expert opinions, and improper, misleading and unfounded statistical data and conclusions that should have been excluded because they would not have been otherwise admissible but for their inclusion in the NHTSA report. In particular, the NHTSA report contained irrelevant and unsubstantiated anecdotal statistics that were no more than approximations compiled from the memory of a single representative of the California Highway Patrol. Yet because these submissions had been sent to NHTSA, they were accepted as valid evidence without regard to their admissibility or trustworthiness.

Rodriguez permits all sorts of mischief. Under its holding, any person or company could influence the evidence to be permitted at

trial simply by submitting any number of letters of complaint or compilations of unsubstantiated “statistics” to a government entity for the specific purpose of having that information become a part of the official government record. Any crackpot with time on his hands and a typewriter can submit daily rantings to NHTSA (or any government entity) on any given subject and a Missouri court has no discretion to exclude these from admission into evidence. These writings will then be presented to a jury as evidence with the weight and authority of an official government record, with no ability for opposing counsel to cross-examine or otherwise test the veracity of the claims made. This was not the intent of §490.220; this is not the meaning of the word “evidence,” and this Court should so hold.

V.

Ford's argument regarding the exclusion of evidence regarding the Ford Pinto is based primarily upon a series of mischaracterizations of the facts.

First, Ford asserts that evidence regarding the Ford Pinto was not relevant or material. This assertion is directly contrary to the findings of the trial court. The trial court expressly recognized that evidence regarding the Pinto was "relevant to show that Ford had awareness of the problems with fuel tank location consistent with [Plaintiffs'] theory." (TR972-73). Similarly, the trial court noted that "the fact that Ford knew of this and the fact that Ford looked into it and studied these things, that's all -- I think that's relevant evidence for a variety of reasons." (TR977). The court further indicated that this was an appropriate line of inquiry for Plaintiffs: "So, in the generic, you putting on evidence that Ford had a behind-the-axle test and it leaked and it was a problem, I think probably that's relevant evidence the jury has a right to see, okay?" (TR978).

Ford also mischaracterizes the extent of Ridenour's involvement with the design and investigation of the Pinto. Ridenour was involved in the design of the Pinto, was a lead investigator regarding the defects in the Pinto's fuel system, and investigated more Pinto crashes than anyone else at Ford. (TR 3307-11). Thus, Ford's assertion that Ridenour only had a "tangential

connection” to the Pinto (Ford’s Brief, p. 81) is not support by Ridenour’s own testimony.

Finally, the trial court concluded that the mere name “Pinto” had negative connotations that would result in prejudice. (TR 3195-96). Inexplicably, the trial court reached this conclusion after it had already allowed discussion of the Pinto on several occasions.

It is improper to exclude otherwise relevant evidence regarding a similarly designed vehicle with similar defects simply because the name of that vehicle carries a connotation that Ford had already been willing to sacrifice human life to save money. The trial court erred in excluding the Pinto evidence on that basis. The error was prejudicial as it went to the heart of Ford’s rationale for adopting a band-aid approach to fuel leakage in the CVPI, rather than moving the fuel tank to a more safe place.

CONCLUSION

For the reasons stated, in this brief and in Plaintiffs’ opening brief, reversal is required.

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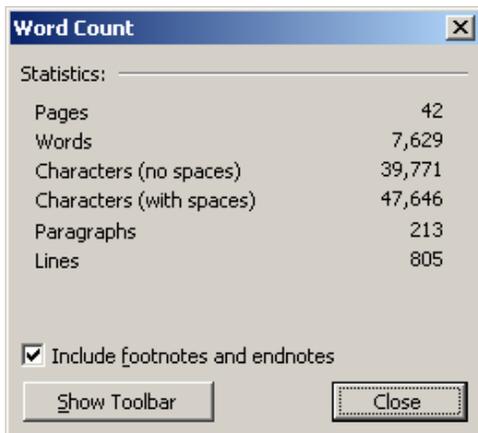
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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c) in that beginning with the Table of Contents and concluding with the last sentence before the signature block the brief contains 7,629 words. The word count was derived from Microsoft Word.

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